



KD

1815

A2

1824

CORNELL UNIVERSITY LAW LIBRARY

The Moak Collection

PURCHASED FOR

The School of Law of Cornell University

And Presented February 14, 1893

IN MEMORY OF

JUDGE DOUGLASS BOARDMAN

PAST DEAN OF THE SCHOOL.

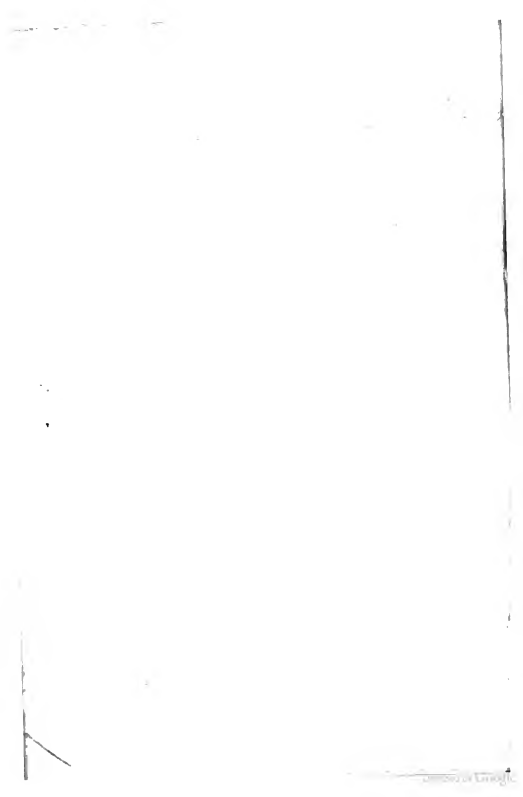
By his Wife and Daughter

A. M. BOARDMAN and ELLEN D. WILLIAMS

N. C. Moak



3 1924 064 838 158



REPORTS

OF CASES RELATING TO

MARITIME LAW;

CONTAINING ALL THE

DECISIONS OF THE COURTS OF LAW AND EQUITY

IN

The United Kingdom,

AND SELECTIONS FROM THE MORE IMPORTANT DECISIONS

IN

The Colonies, and the United States.

EDITED BY

JAMES P. ASPINALL, Barrister-at-Law.

VOL. II.,

New Series, from 1873 to 1876.

(VOL. V., U.S.)

LONDON:

HORACE COX, 10, WELLINGTON-STREET, STRAND, W.C.

1876.

M7112

LONDON:

PRINTED BY HORACE COX, WELLINGTON-STREET, STRAND, W.C.

INDEX

TO

NAMES OF THE CASES

REPORTED IN THIS VOLUME.

ABRAHAM, THE	page 34	EARL SPENCER, THE	page 523
ACHARD AND OTHERS v. KING AND OTHERS	422	EDSWORTH AND OTHERS v. THE ALLIANCE MARINE	
ADA, THE	14	INSURANCE COMPANY	125
AIMO, THE; THE AMELIA	96	EDWARDS v. THE ABERAYRON MUTUAL SHIP IN-	
ALLISON v. THE BRISTOL MARINE INSURANCE		SURANCE SOCIETY (LIMITED)	469
COMPANY	54, 312	REINACHT, THE	198
AMELIA, THE	96	EMILIAN MARIE, THE	514
AMERICAN AND THE STRIA, THE	350	ENERGIE, THE	555
AMERIQUE, THE	400	EUGENIE, THE	164
ANDERSON v. MORICE	424		
ARTHUR AVERAGE ASSOCIATION, THE, <i>Re; Ex parte</i>		FANNY M. CARVILL, THE	478, 565
CORY AND HAWKESLEY	530, 570	FEATHERSTONE v. WILKINSON AND ANOTHER	31
ASHCROFT v. THE CROW ORCHARD COLLIERY		FISHER v. THE LIVERPOOL MARINE INSURANCE	
COMPANY	397	COMPANY	44, 254
ATTORNEY-GENERAL v. TERRY	174, 217	FLOWER v. BRADLEY	489
AVA, THE	182	FRANCISCO v. MARSHY	(note) 594
		FAIR, THE	589
BALTIC, THE	237	FILMORE v. WAIT	543
BAXTER v. CHAPMAN AND OTHERS	170		
BELLEOPHON, H. M. S.	449	GEORGE v. WATTS	242
BIDDULPH AND OTHERS v. BINGHAM	225	GLENGARRY, THE	230
BLANCHIT v. POWELL'S LLANTWIT COLLIERIES		GORRIE AND ANOTHER v. SCOTT	282
COMPANY (LIMITED)	224	GREAT WESTERN INSURANCE COMPANY (app.)	
BOGAINVILLE, THE, v. THE JAMES C. STEVENSON		THE, v. FOGARTY (resp.)	262
BROWN AND OTHERS v. POWELL DUFFY'S STEAM-		GREAT WESTERN INSURANCE COMPANY OF NEW	
SHIP COMPANY	578	YORK, THE, v. CUNCLIFFE	219, 298
BROWN (app.) v. GAUDET (resp.); CARGO <i>as ARGOS</i>		GUNENTRAD v. PRICE AND OTHERS	543
BROWNING (app.) v. THE PROVINCIAL INSURANCE		GUNN v. ROBERTS	250
COMPANY OF CANADA (resp.)	35		
		HADGRAFT (app.) v. HEWITT (resp.)	573
CAIRO, THE	257	HART v. HERWITZ	63
CARGO <i>as ARGOS</i>	6	HATHERING v. LAING	170
CATHERINE CHALKERS, THE	598	HENDERSON AND ANOTHER v. THE COMPTON	
CAYON v. THE GREAT WESTERN INSURANCE COM-		D'ESCOMTE DE PARIS	98
PANY	96	HENDRICKS v. AUSTRALIAN INSURANCE COMPANY	
CHABRIER, THE	121	HENRY MORTON, THE	446
CHANCE, THE	600	HERMINE, THE	380
CITY OF BRUSSELS, THE	102	HISPERIA, THE	454
CITY OF CAMBRIDGE, THE	193, 239	HUDSON AND ANOTHER v. HILL AND ANOTHER	278
CITY OF MOBILE, THE	123		
CLOVER v. ROYDON	167	IDA, THE	551
C. M. PALMER, THE	94	IMPERIAL OTTOMAN BANK v. COWAN	37, 418
CORSEQUID MARINE INSURANCE COMPANY, THE,		IONIDES v. FENDER	266
v. BARTHAUX	536		
CORDELLA, THE FROCKERS OF THE	35	ISMA, THE BARK	153
CORLIING v. MANN	18		
CORY v. PATTON	302	JACKSON v. THE UNION MARINE INSURANCE COM-	
COWAN v. THE IMPERIAL OTTOMAN BANK	57	PANY (LIMITED)	435
C. S. BUTLER, THE (Collision, <i>Salvage</i>)	237	JAMES C. STEVENSON, THE	1
C. S. BUTLER, THE (Collision, <i>Light</i>)	408	JESSEN v. THE EAST AND WEST INDIA DOCK	
		COMPANY	505
		JOHN EVANS, THE	234
DANIELLA v. HARRIS	413	JOLLIFFE AND ANOTHER v. THE WALLASEY LOCAL	
DANNEBERG, THE	432	BOARD	146
DENNIS v. TOVELL	402		
DE WOLF v. ARCHANGEL MARITIME BANK AND		KATHLEEN, THE	367
INSURANCE COMPANY	273	KISH v. CORY	593
DIANA, THE	366	KLOHNEHAYN, THE	213
DODGSON v. PEMERBROOK	323		
DUKE OF SUTHERLAND, THE	478	LAING v. ZEDEN	396
DUNMORE, THE	509		

TABLE OF CASES.

LAMETON, <i>Ex parte</i> ; <i>Re</i> LINDSAY	page 525	PROCEEDS OF THE CORDELIA, THE	page 35
LANCAHIRE, THE	202	PROFEMING PALASSO, THE	158
LARNAX, THE	94	PROVINCIAL INSURANCE COMPANY OF CANADA, THE, v. LEBUC	338
LATHAM v. THE CHARTERED BANK OF INDIA, AUSTRALIA, AND CHINA	178	PURITAS, THE	548
LEMINSTON, THE	475	PURVIS v. FLOWER	226
LEMMAN AND OTHERS v. THE NORTHERN MAR- TIME INSURANCE COMPANY (LIMITED)	504	RACER, THE	317
LIVER ALKALI WORKS COMPANY (LIMITED), THE v. JOHNSON	332	RAITHWAITE HALL, THE	210
LONDON AND PROVINCIAL MARINE INSURANCE COMPANY v. SETMOUR	160	RANKIN AND OTHERS v. POTTER AND OTHERS	65
LOD ADVOCATE, THE, v. THE CLYDE STRAM NAVI- GATION COMPANY	502	RICHARDSON v. STANTON	288
MACKENNIE v. WHITWORTH	400	RIO LIMA, THE	34, 143
MAONET, THE	478	RIVER WEAKE COMMISSIONERS, THE, v. ADAMSON AND OTHERS	145
MAYO AND ANOTHER v. THE OCEAN MARINE INSURANCE COMPANY	361, 590	ROBINSON v. KNIGHT AND ANOTHER	19
MELBOURNE, THE	122	RODOCANACHI AND OTHERS v. ELLIOT	31, 399
MERCHANTS' MUTUAL INSURANCE COMPANY, THE v. BAKING AND OTHERS	611	ROREUCE, THE	367
MERCHANT SHIPPING COMPANY (LIMITED) v. ARMI- TAGH	51, 185	ROMA, THE	162
MERCHANTS' TRADING COMPANY, THE, v. UNI- VERSAL MARINE INSURANCE COMPANY, THE	491	ROYAL FAMILY, THE	421
MERLE, THE	402	SAFFHO, THE	4
MERRIMAC, THE	393	SCHWANN, THE	259
MILBROOK v. FITZSIMON	555	SISTERS, THE	589
MIRIAM, THE	259	SMITH v. TIDEN	307
MOORE, THE	526	SMITH AND OTHERS v. THE ST. LAWRENCE TOW BOAT COMPANY	41
MUGGER v. BALDWIN	504	SMITH v. STEELE	447
NAOMI, THE	588	STANTON v. RICHARDSON	288
NELLIE, THE	142	STEWART AND OTHERS v. THE WEST INDIA PACIFIC STEAMSHIP COMPANY	32
NOR, THE	264	STUART AND ANOTHER v. THE BRITISH AND AFRICAN STEAM NAVIGATION COMPANY	407
NORTH OF ENGLAND PURE OIL CASE COMPANY v. ARCHANGELS MARITIME BANK AND IN- SURANCE COMPANY (LIMITED)	571	TAYLOR AND OTHERS v. THE LIVERPOOL AND GREAT WESTERN STEAM COMPANY	575
NYHOLM, <i>Re</i> CHILD, <i>Ex parte</i>	165	THAMES, THE	512
OTTER, THE	206	TULAY v. TREBY	61
OWEN WALLIS, THE	206	TURKIANI, THE	603
PEARSON v. THE COMMERCIAL UNION ASSURANCE COMPANY	100	VILLAGE BELLE, THE	228
PENNSYLVANIA, THE STEAMSHIP	578	WATSON AND COMPANY v. SHANKLAND AND OTHERS	115
PETTINGEND AND OTHER v. BOTT	310	WELLS, FARGO, AND COMPANY v. THE PACIFIC INSURANCE COMPANY	111
PHILOXANE, THE	141	WELLS v. THE MAYOR, & CO. OF KINGSTON-UPON- HULL	400
PIEVE SUPERIOR, THE	162, 319	W. H. WOLF v. THE SCOW SALT	107
PREVITE AND ANOTHER v. THE ARLAIDE FIRE AND MARINE INSURANCE COMPANY	577	WILLIAM LINDSAY, THE	118
		WOOD v. WOOD AND OTHERS	309
		ZUFALL, THE	567

ERRATA.

Page 400, col. 1, line 25, after "barge" read "propelled by oars only."

Page 580, col. 2, line 14 from bottom, for "Volunteers" read "Albion."

Page 505, col. 1, last lines, for "Ingledew, Isaac, and Greening" read "Kumar and Marland."

J.L.M.
9/10/52

REPORTS

OF

All the Cases Argued and Determined by the Superior Courts

RELATING TO

MARITIME LAW.

PRIV. CO.]

THE BOUGAINVILLE v. THE JAMES C. STEVENSON.

[PRIV. CO.]

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Reported by J. P. ASPENFALL, Esq., Barrister-at-Law.

April 23 and 24.

(Present: The Right Hons. Sir JAMES W. COLVILLE,
Sir R. PHILLIMORE, Sir MONTAGUE E. SMITH,
Sir R. P. COLLIER.)

THE BOUGAINVILLE v. THE JAMES C. STEVENSON.

*Collision—Sailing ship—Steamer—Duty of—
Lights—Regulations for preventing Collisions at
Sea, Articles 15 and 16.*

When a steamer sights a sailing vessel in the night time at a distance of three miles, but, owing to the fact that the sailing vessel's lights are not visible, cannot ascertain the course of the sailing vessel, it is the duty of the steamer to slacken speed and wait to ascertain that course before adopting any decided manœuvres for the purpose of avoiding the sailing vessel. If the steamer immediately on sighting the sailing vessel adopts such a manœuvre, as by porting, and a collision ensues without fault on the part of the sailing vessel, the steamer is alone to blame.

THESE were cross appeals from an interlocutory decree or sentence of the Vice-Admiralty Court of Gibraltar, in a consolidated cause of damage brought by and on behalf of the master and the owner of the British steamship *James C. Stevenson* against the French barque *Bougainville* and her freight, for the recovery of damages in respect of losses sustained by the owner, by reason of a collision between the two vessels; and by and on behalf of the master and the owners of the barque *Bougainville*, against the steamship *James C. Stevenson* and her freight, to recover damages in respect of the same collision.

The collision occurred between 11 and 12 on the night of 29th March 1872 in the Straits of Gibraltar.

The case on the part of the *James C. Stevenson* was that she was proceeding under steam, steering about due W., with her masthead and side lights exhibited and burning brightly, and with a fresh wind blowing from the southward, when a vessel under sail, which proved to be the *Bougainville*, was seen ahead at the distance of about three miles. The *Bougainville* was apparently approaching in an opposite direction, but no light could then be seen on her. The helm of the *James C.*

Stevenson was ported in order to keep her out of the way of the *Bougainville*, and the *Bougainville* still appearing to be standing towards the *James C. Stevenson*, the helm of the *James C. Stevenson* was put hard a-port, and the green light of the *Bougainville* was then for the first time seen. The engines of the *Bougainville* were stopped, but a collision occurred, the stem of the *Bougainville* striking the *James C. Stevenson* on the port bow.

The main grounds of blame charged by the owner of the *James C. Stevenson* against the *Bougainville* were, that the lights of the latter were not so exhibited and placed as to be visible to the *James C. Stevenson*, and that she (the *Bougainville*) improperly deviated from her course under a star-board helm.

The case on behalf of the *Bougainville* was that she was passing through the Straits of Gibraltar on a voyage from Carmandel coast to Marseilles on the night of the 29th March 1872, with a crew of sixteen hands all told. At about 11.35 p.m. of the said 29th March, the wind being west and by south, and the weather squally and obscure at times, the *Bougainville* was proceeding through the Straits, steering her proper course, east by north by compass, with her regulation lights properly placed and brightly burning, when the masthead light of a steamer was reported about two points on her starboard bow, and appearing to be about three miles distant. The barque proceeded on her course, and shortly afterwards the red lights of the steamer became visible, and she came on at right angles to her original course and immediately across the bows of the barque by first porting and afterwards hard porting her helm, and a collision thereby becoming inevitable; the helm of the barque was put hard a-starboard to deaden the force of the collision, which immediately took place with tremendous force, the iron stem and part of the bow of the barque striking the port-bow of the steamer in a slanting direction, from aft to forward, about eleven feet abaft the stem.

On the part of the owners of the *Bougainville*, it was submitted that the evidence showed that her lights were, before and at the time of the collision, properly placed and brightly burning, in accordance with the maritime regulations in regard to the lights directed to be carried by sailing vessels, and that her duty was to keep her course,

[PRIV. CO.]

THE BOUGAINVILLE v. THE JAMES C. STEVENSON.

[PRIV. CO.]

which she did, until she put her helm hard-a-starboard to ease the blow of the collision, and that the duty of the steamer was to have kept clear of her, which, although she might easily have done, she failed to do.

The learned judge of the Vice-Admiralty Court held both vessels to blame; the *Bougainville*, because her lights did not give a uniform and unbroken light over an arc of the horizon of ten points from the stern to two points abaft the beam as required by Articles 3 and 5 of the Regulations for preventing Collisions at Sea, which contributed to the collision; and because she neglected to keep her course; the *James C. Stevenson*, because she did not make use of the means in her power for keeping out of the way of the *Bougainville*, which means were sufficient and would have accomplished that object, and would have been resorted to by a man of ordinary nautical experience and prudence, as he was bound on ascertaining the *Bougainville* to be a sailing ship to have slackened speed or stopped, or taken other means to keep out of the way, and the neglect to do so was a breach of Articles 15 and 16 of the Regulations.

From this decree the owners of both vessels appealed; the owners of the *James C. Stevenson* on the ground that she had by porting her helm done all that was necessary to keep out of the way of the *Bougainville* within Article 15; that she was not bound to stop and reverse, and that if she took any erroneous measure, it was owing to the want of lights on board the *Bougainville*;—the owners of the *Bougainville*, on the ground that the evidence showed that her lights were properly placed, and that she kept her course after sighting the steamer until immediately before the collision.

The facts and arguments are fully set out in the judgment of the Judicial Committee.

Milward, Q.C. and *Clarkson* for the owners of the *James C. Stevenson*.

The *Admiralty Advocate* (*Dr. Deane, Q.C.*) and *Dr. Triestrass* for the owners of the *Bougainville*.

April 24.—The judgment of the court was delivered by Sir R. PULLIMORE.—This is an appeal from the decision of the judge of the Vice-Admiralty Court at Gibraltar in a case of collision between a steamer and a sailing vessel. The collision took place in the Straits of Gibraltar, according to the best conclusion their Lordships can come to from the evidence, somewhere about 8½ miles east of Tarifa. The nature of the damage was this: The sailing vessel ran into the steamer at right angles 10 feet abaft the stem. The consequences of the collision were very serious to both vessels, both being obliged to put into Gibraltar on account of the damage they received. The learned judge of the court below found, upon the evidence, that both the vessels were to blame, and he made the usual decree. From that decree appeals have been prosecuted to the Judicial Committee of the Privy Council by both parties.

It will be convenient before stating the conclusions at which their Lordships have arrived, to notice in the first instance the case of the steamer who appeared as the first plaintiff here, and also in the court below. She was called the *James C. Stevenson*. She was a screw steamer of 1226 tons, and 250 horse-power, and was sailing from Calcutta with a general cargo for London. She passed through the Suez Canal and arrived at the entrance of the

Straits of Gibraltar on the night of the 29th March. She says, that at forty minutes past eleven on that night, being eight miles from Tarifa light, which bore W. by N., and steering W., and the wind, which was squally, being W. inclining to S., the night being clear but cloudy (it is not immaterial to observe this, and proceeding at the rate of 8½ knots an hour; while so proceeding a sail was reported right ahead, distant about three miles, apparently coming end on; but she says no lights were visible. The course which she pursued was immediately to port, and she appears from the evidence to have hard-a-ported almost directly afterwards, by which she fell, before the collision took place, seven points off from her original course. It is important to observe here that there is no dispute at all that those on board the steamer were perfectly aware that the vessel right ahead of them was a sailing ship, and as the learned judge of the court below remarked, they must have known perfectly well that she was coming directly through the Straits with the wind directly aft. It is also important to observe that the captain of the steamer entirely misapprehended the existing regulation with respect to his duty in such circumstances. He says in his evidence, "I think that it was the duty of the other vessel, although a sailing vessel and myself a steamer, to have ported her helm, because she was running free, and it is the rule of the road; and I say that, although we were meeting each other stem on. It would be quite different if she had been close hauled." It is hardly necessary to state that this opinion of the captain of the steamer is directly at variance with the existing regulation of Article 15, viz., that if two ships, one of which is a sailing ship and the other a steamship, are proceeding in such directions as to involve risk of collision, the steamship shall keep out of the way of the sailing ship. The steamer ascribes this collision to two circumstances; first, to the invisibility (if I may use such an expression) of the lights on board the sailing vessel—it not being disputed that she carried lights—their invisibility resulting from their improper position; and also to the sailing vessel having starboarded instead of keeping her course. That is the case, stated briefly, on behalf of the steamer.

The case on behalf of the sailing vessel may be also stated in a few words. She was a French iron barque of very large tonnage, and was coming from the Cape of Good Hope to Marseilles. She says that on this night, when she was due south of Europa Light, and midway between it and Centa Light, she saw the white light of a steamer, which proved to be the *James C. Stevenson*, two points on the starboard bow, and distant about three miles. Both vessels agree in putting the distance at which they were mutually discerned at about three miles. She says the wind was W.S.W., one point on the starboard quarter, and her head was E. by N. Then she gives an account of her sails. She says she had her courses, fore and maintop-sails, maintop-gallant sails, and two jibs set, the starboard clew of the mainsail being hauled up. She gives the same account of the night that the other vessel does. She says that the white light of the *James C. Stevenson* was discovered at 11:35, and that she was supposed to be steering west; that shortly afterwards the red light of the *James C. Stevenson* was observed, that her course was not discovered by those on board the sailing vessel

[Priv. Co.]

THE BOUGAINVILLE v. THE JAMES G. STEVENSON.

[Priv. Co.]

until the steamer was seen at about 300 yards distant. Then she says that the *Bougainville* had hitherto been kept on her course supposing that the steamer would keep out of her way, but upon the hull of the *James G. Stevenson* being discovered, and it being found that she was coming on at right angles towards the bows of the *Bougainville*, and it being then evident that a collision was inevitable, the helm of the *Bougainville* was put hard to starboard, but the *Bougainville* only fell off one point before the collision. Now she on her part ascribes the collision to these three circumstances, that is by her pleading and by the argument of her counsel. She says that the collision was caused by the rash and improper conduct of the steamer in not waiting to ascertain what course the sailing vessel was taking; she says that the steamer ought at all events to have reversed her engines, which would have been one mode of preventing the collision; and lastly, the ship says that if the steamer did not choose to wait, she ought in the first instance to have starboarded instead of ported.

In considering this case, it will, I think, be convenient to assume in the first instance that the lights were not visible. On that assumption what, according to the 15th Article, was the clear duty of the steamer? It was to get out of the way of the sailing vessel. What getting out of the way is must depend, of course, on the circumstances of each particular case. It may be by porting, it may be by starboard, it may be by stopping. But according to her own version of the story, the steamer was aware that the sailing vessel was coming directly through the Straits with the wind directly aft, but she says that owing to the absence of her lights she had no indication of what course the sailing vessel was pursuing. That vessel was going at the rate of 8½ or 9 knots an hour, and their joint speed must have been something like 17 or 18 knots. Being, as she says, in uncertainty as to the course the sailing vessel was steering, it was surely not the part of a prudent master immediately to take the active and decided step of porting, at the rate which she was then going, of between eight and nine knots an hour, which would carry her to the opposite coast across the bows of the ship. If she was in doubt as to the course of the vessel approaching her, as she says, stem on, or a little upon her starboard bow, and as the evidence in their Lordships' opinion seems to prove rather more than that, between one and two points on her starboard bow, surely it was the part of a prudent master to have waited until he could ascertain which course the sailing vessel was pursuing. The 16th Article seems to be precise upon this point. "Every steamship when approaching another ship so as to involve risk of collision, shall slacken her speed." There is no reason why she should conceive that the ship was going to the Moorish side of the Strait, although some suggestions were made to that effect. In their Lordships' opinion, therefore, the judge came to a perfectly sound conclusion upon this part of the case, that is in holding that upon the steamer's own statement, upon the assumption that the lights were not visible owing to their improper position, nevertheless, she sinned against the rules of navigation laid down for preventing these unfortunate collisions by not slackening her speed, or waiting, or taking any of those precautions which would

have enabled her before she took the decided step of porting to ascertain on what side the sailing vessel was going. It is not necessary, in their Lordships' opinion, therefore, to inquire whether it would have been a prudent course on her part, if she elected not to wait, to have starboarded instead of porting, by which manœuvre she cut in between the ship and the lee shore at the rate of seven knots an hour. Their Lordships think that the finding of the learned judge on this part was perfectly correct, and will advise her Majesty that it be affirmed.

There then remains the other part of the case, upon which the greater part of the argument has been addressed to their Lordships, namely, as to whether, in the circumstances of this case, it must not be held that the conduct of the sailing ship contributed to this collision? First, as to the contribution to the collision, which is said to have been made by the absence of the proper lights, that is to say, by the lights not being placed in a position in which they were visible. The law does not require any particular place at which the lights should be affixed; though no doubt it does require that they should be so placed as to be properly visible within the scope of the regulations upon that point; but no particular place is pointed out. The evidence in this case establishes these points with regard to the lights, first, that they were carried, and secondly, that they were proper lights, properly screened; and their Lordships incline to the opinion that it also is proved that they were carried in the place in which they are usually carried by French vessels. There has been considerable discussion upon the evidence as to whether the testimony of the master of the ship be credible with regard to the cutting or arching of the foresail, which, according to his evidence, to which he was not cross-examined, and according to the evidence of another witness, was expressly done for the purpose of rendering these lights visible. The vessel was a very large ship, and she had come all the way from Calcutta, and the presumption is in favour of her statement as to the lights. It may here be observed that if the allegation were correct on the part of the steamer, that the sailing ship had contravened the rule of navigation in not keeping her course, but in starboard, it is quite clear that that position is fatal to the other contention that her green light was not visible, because, if the sailing vessel had starboarded earlier than she said she did, unquestionably, by that manœuvre, she must have shown her green light, which it is proved was carried, and which it is proved was of proper quality. She must have shown her green light to the approaching steamer, and have given her that information of which she complains that she was deprived. The learned judge of the court below seems, upon the whole, to have come to the conclusion that there was a *defect probatio*, upon this particular and material point, that it was incumbent upon the sailing vessel to have proved by more conclusive evidence than she adduced, that these lights so placed in the stern of the vessel were visible by the circumstance that the foresail was cut or arched in the manner described. The learned judge seems to have come to the conclusion that there was not sufficient evidence to warrant him in thinking that this point was established, and therefore to have decided on that ground principally that the ship contributed to

PRIV. CO.]

THE ADA; THE SAPHO.

[PRIV. CO.]

this collision. Their Lordships do not think it necessary to express any opinion as to the conclusion at which they might have arrived if this particular matter had come before them as a court of first instance, whether they would or would not have been satisfied with the evidence which was produced on behalf of the sailing vessel to the effect already stated, because their Lordships are clearly of opinion, after consulting with their nautical assessors, and after a review of the whole circumstances of this case, that the sailing vessel coming through the strait with the wind, as described, was perfectly and clearly seen at a distance of three miles as stated by the steamer, but at all events between two and three miles; that upon the assumption that the lights were not visible, it was still the duty of the steamer not to take that decided course which she did take, in perfect ignorance, according to her own statement, as to which way the sailing vessel was proceeding; that it was very imprudent, rash, and careless navigation, and was the real cause of this collision; and even assuming that the lights were placed in a wrong position, and therefore were not visible, their Lordships are of opinion, upon the particular circumstances of this case, that it would not be right to come to the conclusion, that the invisibility of those lights could, in any legal sense of the term, and according to the judgments upon the question of contribution to negligence, properly be said to have contributed to this collision.

Their Lordships have not failed to consider the point which was urged on behalf of the steamer, that the starboarding of the sailing vessel might have contributed to this collision. Their Lordships are clearly of opinion upon the evidence that the starboarding was done at so late a period as to take it completely out of the category of any contribution to the collision; indeed if the starboarding had been at an earlier period it is fatal to the contention of the steamer, that she was not apprised by seeing the green light of the course which the other vessel was pursuing; because the dilemma is obvious: if the starboarding took place at an earlier period, then the green light, which is proved to have been there, must have been seen; if the starboarding took place, as we are inclined to suppose, at a later period, then there was no contribution to the collision by that manoeuvre at that late period in the history of the case.

Their Lordships will therefore humbly advise her Majesty that the decree of the judges of the Vice-Admiralty Court should be varied so as to pronounce that the steamer is alone to blame for this collision. We think that the costs must follow this decision, and that the sailing vessel will be entitled to her costs both here and in the court below.

Decree varied accordingly.

Solicitor for the owners of the *James C. Stevenson*, Thomas Cooper.

Solicitors for the owners of the *Bougainville*, Cole, Cole, and Jackson.

Friday, April 25, 1873.

(Present: The Right Honrs. Sir J. W. COLVILLE, Sir BARNES PEACOCK, Sir MONTAGUE SMITH, and Sir ROBERT COLLIER.)

THE ADA; THE SAPHO.

Collision—Crossing vessels—Taking pilot—Special circumstances—Regulations for preventing Collisions at Sea—Arts. 14, 16, and 19.

Two vessels bearing down at the same time from different directions upon a well-known pilot station to take pilots on board are to be treated as crossing vessels within the meaning of Art. 14 of the Regulations for preventing Collisions at Sea, if their courses, if continued, would intersect; and the fact of their seeking pilots at the same place is not such a special circumstance within the meaning of Art. 19 as will take them out of the operation of the rule requiring that the ship which has the other on her own starboard hand shall keep out of the way of the other.

Where a vessel is approaching a pilot station to take a pilot, and has, as regards another vessel doing the same thing, the right to keep her course, she has a right to keep sufficient headway on her to give her steerage way, so as to get on her proper course after taking a pilot, and is not bound within Art. 16 to stop and reverse. The other vessel is bound to stop and let her take her pilot, or to take some other means of avoiding her.

THIS was an appeal from a decree of the High Court of Admiralty in cross causes of collision, instituted by the owners of the steamship *Sappho* against the steamship *Ada*, and by the owners of the *Ada* against the *Sappho*. The place of collision was the mouth of the Humber; both vessels were bound for Hull, the *Ada* coming from the south-east, and the *Sappho* from the north-east, and both were approaching a pilot cutter lying at anchor to pick up a pilot. The learned judge of the High Court of Admiralty held that the vessels were to be treated as crossing vessels, under Art. 14 of the Regulations for preventing Collisions at Sea, and that the fact of approaching a well-known pilot station was not such a special circumstance as took them out of the operation of the rule, and that the *Ada* having the *Sappho* on her own starboard hand, was bound to keep out of the way, and that the speed of the *Sappho* was not improper, and pronounced the *Ada* alone to blame. The facts and judgment are set out in the report of the case below: (*ante*, vol. 1, p. 485; 27 L. T. Rep. N. S. 718.) From this decree the owners of the *Ada* appealed on the ground that the *Ada*, having a right to approach the pilot cutter to take a pilot, also had a right to expect that the *Sappho* would be so navigated as to avoid risk of collision under the special circumstances of the case.

Milward, Q.C. and W. G. F. Phillimore, for the appellants.—The master of the *Sappho*, seeing a ship there for the lawful purpose of taking on board a pilot, was bound to allow that ship to approach for that purpose, and to take steps to avoid her whilst getting a pilot. If the *Ada* was stopped and lying to for a pilot, the vessels were not crossing vessels within the meaning of Art. 14 of the Regulations for preventing Collisions at Sea. At any rate such a state of things was a special circumstance within Art. 19, which ought

[PRIV. CO.]

THE *ADA*; THE *SAPPHO*.

[PRIV. CO.]

to have obliged them not to throw all responsibility of avoiding a collision upon the *Ada*. These vessels were not on a course in the sense of Art. 14. The way a ship's head is pointed at any given moment does not constitute her course; her course is the direction in which she should be navigated to reach a given point. If this given point is known to another vessel, she should act upon that knowledge. Both vessels were bound up the river to Hull, and each must, with the knowledge of the other, take a pilot at the one place; for that purpose they must bear down upon one place and stop, and, having got their pilot, change their directions to proceed up the river. Hence, neither could be said to be on a course after stopping, until they went a-head to go up the river. The *Ada* was entitled to keep her course along the left bank of the river, and the *Sappho* in crossing over had no right to interfere with that course: (*The Velocity*, L. Rep. 3 P. C. 44; 21 L. T. Rep. 686; 3 Mar. Law. Cas. O. S. 308). If these vessels were approaching each other so as to involve risk of collision, then it was the duty of the *Sappho* to have stopped and reversed at an earlier period.

Butt, Q.C. and *Clarkson*, for the respondents, were not called upon.

The judgment of the court was delivered by Sir J. W. COLVILLE.—Their Lordships do not think it necessary to go at any length into the facts of the case, as they clearly appear upon the judgment of the court below, and the main features are not in dispute.

The first argument upon which the appellants rely in order to disturb the judgment of the High Court of Admiralty is that it is erroneous to treat these vessels as crossing vessels, as they were not, when they first sighted each other, crossing vessels so as to involve risk of collision, and consequently not within Art. 14 of the Regulations for preventing Collisions at Sea; and that even if they did become crossing vessels it was by the fault of the *Sappho*, which had by improper navigation created the state of things. Upon that view, of course, it would be the duty of their Lordships, provided they were satisfied that it was correct, to advise Her Majesty that the *Sappho* was solely to blame. The other branch of the argument was that both vessels were within the operation of Art. 16 of the regulations; that they were approaching each other so as to involve risk of collision, and that it was, therefore, the duty of each to slacken speed, and, if necessary, to stop and reverse; that the *Sappho* certainly, and perhaps the *Ada*, had failed in that duty, and both were to blame. If both failed in that duty, and the breach of that duty was the cause of the collision, then, of course, both would be in fault, and the loss would have to be divided.

In dealing with these arguments, their Lordships think it desirable to consider whether the vessels were crossing vessels within the meaning of the 14th Article, and, consequent thereon, if the assumption which seems to have been the *ratio decidendi* in the court below was correct. Their Lordships are of opinion that it was correct. It appears that both vessels, the one coming from the northward, the other from the southward, and both bound to Kingston-upon-Hull, were under the necessity of proceeding to the same point where the pilot vessel was moored. It appears to their Lordships on the evidence that when first sighted

the *Ada* had the other vessel on her starboard bow, and therefore if they were crossing vessels, it was her duty to keep out of the way of the *Sappho*. Now, their Lordships think that they were crossing vessels within the meaning of the rule, because both were of necessity directing their courses to one point. That point would be the point of intersection of the two courses if prolonged. It was not, as was put in the argument, a case in which one vessel might have proceeded up the north side and the other up the south side of the river, because there was the necessity imposed upon each of going to this one point in order to procure a pilot. It appears to their Lordships that the vessels were properly treated by the learned judge in the court below as falling within Art. 14 of the regulations, and it appears equally clear that the learned judge was right in holding that the *Ada* had failed in the duty imposed upon her by that rule, and that there were no special circumstances taking her out of the operation of the rule.

In dealing with the disputed question of speed, the learned judge relied upon the captain of the pilot vessel, who was on board his own pilot vessel. As regards the speed of the two vessels, it appears to their Lordships that he was in the best position to judge—more particularly with regard to the *Sappho's* speed. Standing on the deck of his own vessel at anchor, and evidently having his attention directed to the movements of the two vessels, he could best judge of their speed, and their Lordships therefore adopt without hesitation his statement that the speed of the *Sappho* was $1\frac{1}{2}$ knots through the water, and therefore about three knots per hour over the ground. It also appears to their Lordships to be made out by that witness that the *Ada* was not motionless (as represented by some of the witnesses) at the place where she stopped expecting a pilot, but she had decided headway on her, and was approaching both the *Sappho* and the pilot cutter. The rate of speed attributed to her was nearly as great as that of the *Sappho*, namely, $1\frac{1}{2}$ knots through the water, but she was coming across the tide.

Now, it appears to their Lordships that upon this state of facts two questions arise: first, was the *Sappho* justified in getting so far past the pilot cutter as she certainly did, as shown by the place where the collision occurred; and, secondly, was the *Ada* right in advancing so near to the pilot cutter, or in fact in going ahead at all under the circumstances? As regards the first question, their Lordships are of opinion, and their opinion is confirmed by that of their nautical assessors, that if there had been no question at all of another ship, which is the fair way to treat the matter, it would have been the ordinary and proper course of navigation to keep such headway as she is represented to have had in order to enable her in getting a pilot on board to turn and follow the proper course of the river up to Hull; that is, having come as far over as the place where the pilot cutter is represented to have been moored, to turn up towards the Spurn Light, so as to get into the proper course of navigation; and that in fact both vessels, situated as they were, would have had to follow the same course up the river from that point. Their Lordships, therefore, cannot say that the allegation is made out that the *Sappho* improperly threw herself into the way of the other

Priv. Co.]

BROWN (app.) v. GAUDET (resp.); CARGO *ex* ARGOS.

[Priv. Co.]

vessel, and in fact created the risk of collision which otherwise would not have existed. On the other hand, if the vessels were crossing vessels, as their Lordships think they were, and, as their Lordships also think, and the event has shown, vessels crossing so as to involve risk of collision, it seems to their Lordships that it was the duty of the *Ada* to have become absolutely motionless at a far earlier period than that at which she is said by some of the witnesses to have stopped, and this when it did, or ought to have, become clear that the *Sappho* was coming inside the pilot vessel, and therefore would be the first to take a pilot, to have had the means of reversing her engines, and keeping out of the way. If she could not have done that, and their Lordships can see no reason why she could not, then she ought to have been navigated differently, and have been kept out of the way by some other means. No doubt both vessels at the last moment, and when too late, did reverse their engines, but that does not show, in their Lordships' opinion, any contributory negligence on the part of the *Sappho*, if she was pursuing, as their Lordships think she was, her ordinary course, keeping no more headway on her than was necessary to give her steerage way enough to put her upon her proper course of navigation.

Under the circumstances of the case their Lordships must humbly advise Her Majesty to affirm the judgment under appeal, and dismiss the appeal with costs.

Appeal dismissed.

Proctors for the appellants, *Dyke and Stokes.*

Proctors for the respondent, *Fritchard and Sons*, for *J. and T. W. Hearfield*, Hull.

May 2, 3, and 30, 1873.

(Present: The Right Hon. Sir J. W. COLVILLE, Sir BARNES PEACOCK, Sir MONTAGUE SMITH, and Sir R. F. COLLIER.)

BROWN (app.) v. GAUDET (resp.); CARGO *ex* ARGOS (a).

Carriage of goods—Bill of lading—Port—Usual place of delivery—Impossibility of performance—Landing goods—"Goods to be taken out"—Duty

(a) The decision in this case, and the legislation upon which it is founded, carry out a principle of maritime law which seems to be in full force in almost every country except our own, viz., that whilst the ship is bound to the cargo for the performance of the contract, the cargo is equally bound to the ship. Before the recent Acts giving maritime jurisdiction to the County Courts the only means a master or shipowner had of enforcing a lien upon goods was to retain possession of them until security given to answer his claim. Now he may proceed in rem against the goods themselves, and so enforce his lien. This assimilates the practice in this country to that of the United States; (See *Parsons on Shipping*, vol. 1, p. 174, and notes.) The extraordinary condition of English law in the question of liens for freight and expenses has already been noticed in a note to the case of *Moss-Le Blanche v. Wilson* (ante vol. i., p. 605). The County Court is the only court in this country with jurisdiction to enforce such a lien by a proceeding *in rem*. Where the new Judicature Act will, by uniting all jurisdiction in one court, revive any former powers which were exercised by the High Court of Admiralty, but prohibited by the common law courts, is a question which will, no doubt, be raised in the time. A proceeding *in rem* being merely a form of procedure, it is quite possible that the High Court might by its rules give the remedies which can now only be obtained through the County Court.—*Ed.*

of shipowner and merchant—Master's authority—Demurrage—Expenses—Back freight.

The duty of a shipowner to deliver goods at the usual place of delivery of a port, to which he has contracted to carry under a bill of lading stipulating only that the goods shall be delivered at the port without any particular part of the port being named, is an implied duty only, and does not amount to an engagement to go to the usual place in all events and under all circumstances. The shipowner's express contract is to deliver in the port, and if it be impossible to deliver at the usual place of delivery by reason of the prohibition of the port authorities, or other accidental cause, the contract is not dissolved, but may be performed by the master being ready to give delivery at some other convenient part of the port, and keeping the cargo in that place for a reasonable time ready for delivery, and the shipowner will thereupon be entitled to his freight.

A bill of lading by which a shipowner contracts to deliver at a port, "the goods to be taken out within 24 hours after arrival or pay demurrage," does not absolutely require that the shipowner should be ready, not merely to deliver, but also to land the goods in the port, or that the merchant should be able, on receiving them, to land them, but it casts upon the merchant the duty of taking the goods out of, or, at all events, from alongside, the ship; hence, if it should be impossible to land the goods, by reason of a prohibition of the port authorities, the shipowner may still perform his part of the contract if he be ready to deliver the goods to the merchant in the port without landing them.

The master of a ship being, in many cases of accident and emergency, the agent from necessity of the owners of cargo where he cannot obtain instructions from them, has not only the power, but a duty cast upon him, to act in such cases for the safety of the cargo in such manner as may be best under the circumstances in which it may be placed, and is entitled as a correlative right to charge the owner of the cargo with the expenses properly incurred in so doing. The obligation on the part of the master to act for the merchant does not cease after a reasonable time for the latter to take delivery has elapsed, and hence after such time, if it be impossible to land and warehouse the goods, or to leave them at their port of destination, the master may, in the absence of all advice, carry or forward them to such place, even back to the port of shipment, as is most convenient to the owner, and charge him with the expense of so doing.

When goods carried under a bill of lading, by which the shipowner is to deliver at the port of destination, and the merchant is to take them out within 24 hours or pay demurrage, cannot be landed at, but may be delivered within, that port, the shipowner cannot recover from the merchant demurrage and expenses claimed in respect of attempts to land the goods at other ports, before he is ready to give delivery at the port of destination; but he may recover expenses incurred, after he is ready to give delivery at that port, in hiring a vessel to store the goods, if thereby the merchant is relieved from the demurrage payable in respect of the detention of the ship.

This was an appeal from a decree of the High Court of Admiralty, affirming on appeal a decree of the City of London Court (Admiralty jurisdic-

PRIV. CO.]

BROWN (app.) v. GAUDET (resp.); CARGO *as* ARGOS.

[PRIV. CO.]

tion). The suit was instituted in the City of London Court by the following *precept* :—

We, Cattans, Jehu, and Cattans, Attorneys, hereby institute a suit for freight, demurrage, and expenses on behalf of Jules Gaudet, of No. 73, Lower East Southfield, owner of the steamship or vessel *Argos*, against 147 barrels of petroleum late shipped on board the steamship *Argos* by W. Horner, but now lying at Plaistow Wharf, Plaistow, in the county of Essex, owner or owners unknown in the sum of 200*l.*; and we consent, &c.
Dated 23th of Dec., 1870.

To this suit an appearance was entered on behalf of Walter Horner Brown, the owner of the petroleum, and bail was given in the sum of £150. The cause was heard in the City of London Court upon the following

STATEMENT OF AGREED FACTS.

The plaintiff, who trades under the style of Gaudet Frères, was, in the month of November, 1870, the owner of the British steamer *Argos*, and of other steamers which were frequent traders between London and Havre, and other ports in the North of France.

The defendant, Walter Horner Brown, is a merchant in Billiter Square, dealing in petroleum, oils, chemicals, and other articles, trading as Walter H. Brown and Co., and on the 23th November he received an order from Messrs. Tuffieré and Prud'hou, of Rouen, for two hundred barrels of petroleum, to be delivered free on board, in London, and to be sent to Havre as soon as possible.

In consequence of this the defendant, on the same day, sent his clerk to the plaintiff's London brokers (Messrs. Rowell and Racine), to inquire the freight of petroleum from London to Havre, and the probable date of sailing of the next steamer, and was informed the freight would be 1*5s.* to 20*s.* per ton, and the steamer would sail about the end of the week. The defendant thereupon arranged to send 147 barrels of petroleum by such steamer, and the same was shipped on board the *Argos*, on the 5th December, and the captain gave the defendant the following bill of lading :—

Shipped in good order, and well conditioned, by W. Horner, in and upon the good steamship called the *Argos*, whereof is master for the present voyage, "Richardson," and now riding at anchor in the river, and bound for Havre, 147 barrels of petroleum.

The goods to be taken out within 24 hours after arrival, or pay 10*l.* 10*s.* a day demurrage..... 42*l.* 10*s.* 0*d.* 9th. Being marked and numbered as in the margin, and are to be delivered in the like good order, and well-conditioned, at the aforesaid port of Havre, the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, machinery, boilers, steam and steam navigation, of whatever nature or kind per cent. on cover, excepted, unto order or to their assigns, on paying freight for the said goods at the rate of 20*s.* and 15 per cent. prime per ton gross, with prime and average accustomed. In witness whereof the master or purser of the said ship hath affirmed to two bills of lading all of this tenor and date, the one of which bills being accomplished the others to stand void.
Dated in London, 30th November, 1870.

Weight and contents unknown. Not accountable for leakage.

W. J. RICHARDSON.

The said bill of lading was by direction of the

defendant made out in the name of W. Horner, his two first names.

Upon the 6th December the defendant applied to the plaintiff's brokers for the name of the ship's broker at Havre, and was informed it was M. H. Gendéstal, Rue d'Orléans, Havre. Defendants thereupon wrote him the following letter, which was duly received by Gendéstal, but of which the plaintiff had no notice :—

11, Billiter Square, 6th Dec., 1870.

Monsieur H. Gendéstal, 73, Rue d'Orléans, Havre.
We beg to inform you that we have shipped upon the steamship *Argos*,

Washington, } 147 barrels of spirit of petroleum,
1/147 } 21,392 kilogrammes,
to order. These spirits are to be sent to Messrs. Tuffieré and Prud'hou, at Rouen, and you must not deliver them unless they present the regular bill of lading endorsed by us.

The freight and other expenses are to be charged on the goods.

Accept, Monsieur, our salutations.

W. H. BROWN & Co.

The *Argos* sailed with the petroleum and other goods, being a general cargo, at midnight on the 6th December, arrived at Havre 10.30 p.m. on the 7th, and, being unable to land the cargo there, the captain proceeded to Honfleur; and being unable to land it there, he took the ship to Trouville, and was informed there he might land it there if he obtained a certificate from the engineer of bridges and ways resident at Honfleur; and the captain thereupon went to Honfleur, and obtained the following certificate :—

Honfleur, le 8 Décembre, 1870.

L'Ingénieur Ordinaire de l'Arrondissement du Nord Est.

A Monsieur, — L'Ingénieur Sousigné a envoyé le steamer *Argos* à Trouville à cause du danger tout particulier en ce moment qu'offre la présence du pétrole sur les quais à côté du matériel de guerre en chargement pour le Havre. Le Sousigné a écrit à ce sujet M. Dubosc une lettre qui lui parviendra demain matin et qu'indique les précautions à prendre sous le bénéfice de ces précautions et en installant de suite un garde-feu à bord pour empêcher.

M. Dubosc peut faire entrer le steamer *Argos* en bassin ce soir à la marée.

E. ARNOUX, L'Ingénieur Ordinaire.

Arrondissement du Nord Est,

Ports et Chenaux, Département du Calvados.

The captain, under this authority, took the ship into the basin at Trouville Deauville, where he remained during the 9th, and was on the 10th compelled to go out of the basin; and the President of the Municipal Commission of Trouville Deauville, endorsed on the engineer's authority the following certificate :—

Nous Président de la Commission Municipale de Deauville certifions que nous avons été obligés malgré l'assurance du Monsieur l'Ingénieur d'Honfleur de faire sortir du bassin de Deauville le navire Anglais *Argos* chargé de pétrole, la population s'opposant à un débarquement du dit navire et menaçant de se laisser entraîner à des excès.
(Sd.)

HÉBERT DÉROQUET,

Le Président de la Commission Municipale,

Le Membre Délégué.

Deauville, 10 Décembre, 1870.

Upon that the captain went to Honfleur, and the following protest was noted before the British Consul there, and the statements therein are to be taken as true :—

Vice-Consulat Britannique à Honfleur.

By this public instrument of Protest he it known and manifest unto all whom it doth or may concern, that on the 10th Dec. 1870, before me, British Vice-Consul for the port and district of Honfleur, voluntarily

[Priv. Co.]

BROWN (app.) v. GAUDET (resp.); CARGO *ex* ARGOS.

[Priv. Co.]

came and personally appeared William John Richardson, master of the British steamship or vessel called the *Argos*, of London, official No. 69,880, of the burden of 160 tons, or thereabouts, then lying in the port of Trouville-sur-Mer, in the secular district of Honfleur, laden with petroleum, who duly noted and entered his protest with me, the said Vice-Consul, against all losses and charges he incurred for not being allowed to unload his cargo in the port of destination and two other ports, by the local authorities of these ports, and did declare, de pose, and say, That he sailed from London on the 6th Dec., present month, at midnight, with a cargo of petroleum, in destination for Havre, where he arrived on the 7th, at 10.30 p.m., having the red flag up on account of having petroleum on board, and that early in the morning of the 8th Dec. the authorities of the port of Havre compelled him to take the ship out of the harbour, as they would not allow him to remain there, having petroleum on board, and in consequence of which he started immediately, at 10.50 a.m., for Honfleur, where he arrived at 11.30 a.m., and having swung the vessel, and was about to make her fast in a position where the pilot told him, he received an order from the harbour-master to leave immediately the port, and therefore he did leave, at noon, for the next nearest port, which was Trouville-sur-Mer, and where he arrived at 1.30 p.m. And the said apporor did further declare, that on arriving at Trouville he found a difficulty for the unloading of the petroleum from the port or harbour-master, or principal of the port, who informed him that he would allow him to unload the petroleum if he could obtain a permission from the Ingenieur des Ports et Chenaux, residing at Honfleur; and in order to hasten the despatch he immediately employed a cab, and started himself with the broker, M. Hébert, to Honfleur, and obtained the required permission, and after which he returned to Trouville, and put the ship in dock next day (Friday, the 9th), waiting further instructions. And further, that to-day (Saturday, the 10th), he met with some objection from the part of the president of the Municipality Administrative Commission of Deauville Trouville, for the landing of the casks in question; and after having made further steps in the case before other authorities he had been ordered to leave the port of Trouville as soon as possible, without landing any of the casks of petroleum, and in consequence of which he went to Honfleur at 3 p.m., in order to deposit, note, and enter his protest declaration and protest at this Vice-Consulate with all reserve, to furnish further particulars if required. And therefore the said William John Richardson, master, did declare to protest, and by these presents he does solemnly protest against all and every person or persons whom it doth, shall, or may concern, against all loss of time and charges incurred by the above-mentioned appeals of landing his cargo he met in those three different ports, and doth declare that all damages for delay or detention, and all losses and charges, are and ought to be borne by the merchants and freighters interested, and reserves for himself and his owner all rights against them. And I the said Vice-Consul, at the request of said William John Richardson, master of the said steamship *Argos*, did and do hereby solemnly protest against the same, in the manner and form aforesaid.

Thus done and protested in the City of Honfleur, at the British Vice-Consulate.

On the 9th Dec. M. Général wrote to the defendant as follows:—

Havre, 9th Dec., 1870.

Messrs. Walter H. Brown and Co.,

11, Billiter-square, London.

Your letter of the 6th I have received to-day only.

For some time the entry into the port of Havre has been refused to ships carrying petroleum. I have attempted in vain to discharge the 147 barrels at Honfleur, and been compelled to send the *Argos* to Trouville, where I hope to be able to disembark it. Koenen has been occupied by the Germans, and I have not yet heard from Messrs. Tuffiere and Frodhen. If a judicial sequestration could be obtained at Trouville, he (the officer appointed by the court), would take care of the goods, and he would only deliver against presentation of a regular endorsed bill of lading, and after payment of the freight, and all other expenses.

I cannot truly comprehend how the buyers at Rouen should have directed this petroleum to go to Havre, since

it has been forbidden in the newspapers to discharge such goods here, and that for more than two months.

Accept, gentlemen, my sincere salutations.

H. GÉNÉRAL.

The plaintiff and defendant were throughout personally quite unaware that there was any difficulty in landing petroleum at Havre.

The *Argos* having other cargo in her, Mr. Duprey, on the part of Général, hired a lighter, called the *Augustine Amélie*, in order that the petroleum might be transhipped into her in Havre outer harbour, or the roads, while the *Argos* went into dock to unload her other cargo; and the following agreement was entered into:—

Havre, le 12 Dec., 1870.

Entre le Capitaine Ponette de sloop Français *Augustine Amélie* d'une part.

Et M. Général, agent du steamer Anglais *Argos*, d'autre part, a été convenu et réglé ce qui suit.

Le Capitaine Ponette s'engage à recevoir et garder à son bord jusqu'à Samedi 17 courant 147 fûts essence de pétrole les dits fûts à transborder dans l'avant port ou au rade du Havre à bord du steamer Anglais *Argos*.

Il est bien entendu que le Capitaine Ponette gardera son navire à disposition, de manière à ce que le transbordement s'opère sans aucun retard et dès la sortie du port du dit steamer *Argos*, moyennant quoi il lui sera à titre de fret la somme de deux cent cinquante francs.

PONETTE.

Fait double au Havre, 12 Dec., 1870.

On Monday, 12th Dec., the *Argos* arrived in Havre Roads, when the captain found permission had already been obtained to enter the outer harbour, and having entered the outer harbour, he transhipped the petroleum into the lighter.

Immediately on the arrival of the *Argos* in Havre outer harbour the transshipment of the petroleum into the lighter was commenced, and was finished at 4.30 p.m. on the same day, and at midnight the *Argos* entered the dock, and was moored alongside the quay, whilst the remainder of her cargo was discharged, and a fresh cargo shipped for London; and on the 16th, a fresh cargo having been loaded, the *Argos* came out of dock, and having re-shipped the petroleum, as she was obliged to do by the port authorities at Havre, sailed again for London, where she arrived at 9 a.m. on the 18th Dec.

During the whole of this time no bill of lading was presented to the captain or officers of the *Argos*, nor was any request made for the delivery of the goods. In the ordinary course of business petroleum would be delivered on the quay at Havre, on presentation of the bill of lading. In this case it would not have been possible for the captain to have landed on the quay, even if the bill of lading had been presented. M. Général was well aware at the respective times that the *Argos* was in dock and moored alongside the quay, and of the various movements of the ship, and of the petroleum having been put on board the lighter.

By reason of the hereinbefore-mentioned circumstances the plaintiff was put to the following expenses:—

At Havre	Fra. 72.85	
" Honfleur	85.75	
" Trouville	118.35	
Hire of sloop	310	} £24 16 10
Labour transhipping petroleum		
Captain and seamen's travelling	24.5	
expenses		
Broker's expenses, &c.		5 0 0

[Priv. Co.]

BROWN (app.) v. GAUDET (resp.); CARGO OF ARGOS.

[Priv. Co.]

And he also claims the following amount of freight:—

Freight to Havre	£24 4 5
Freight back to London	24 4 5

And he also claims five days' demurrage for the detention of the *Argos* whilst engaged in travelling from port to port, which, at £10 10s. per day, as per bill of lading, amounts to £52 10s., and she also consumed on her extra journey 5 tons of coal, which, at 18s. per ton, amounts to £4 10s.

On the 16th December Messrs. Rowell and Racine, the brokers in London for the *Argos*, wrote Messrs. W. H. Brown and Co. the following letter:—

90, Lower Thames-street, London,
Messrs. W. H. Brown and Co. 16th December, 1870.
Dear Sirs,—Some few days ago we heard that the 147 barrels of petroleum that you shipped per *Argos*, for Havre, had been landed at Trooville. We now hear that this is a mistake, the authorities there having at the last moment refused to allow it to be landed. The Captain therefore took it back to Havre, where he had to charter a sailing vessel to take charge of it, while he took his ship into port to load (not being permitted to go in with it on board). We expect the *Argos* back shortly with the 147 barrels on board, and give you notice of the facts at once, so that you may make any arrangement you consider necessary.

The expenses incurred will, we fear, be enormous, and amount (with the freight) to about £130 or £135.

(Signed) ROWELL AND RACINE.
but to which they had no reply. And in accordance with that letter Messrs. Rowell and Racine gave notice to Messrs. Brown and Co. of the arrival of the *Argos* with the said petroleum on board by the following memorandum:—

MEMORANDUM.

(Private.)
Rowell and Racine, } W. HORNER,
90, Lower Thames-street, E.C., } Messrs. W. H. Brown
19th December, 1870. } and Co., Billiter-square.
The *Argos*, Captain Richardson, from Havre, has arrived, having on board the undermentioned cargo belonging to you.

Washington, 1/147 147 barrels petroleum.
In reply, Messrs. W. H. Brown and Co. sent the following letter:—

From Walter H. Brown and Co. } To
11, Billiter-square, London, E.C., } Messrs. Rowell
19th December, 1870. } and Racine.

Seeing that you have failed to fulfil your engagement to deliver 147 barrels petroleum at Havre, according to bills of lading for same in our possession, we herewith enclose you invoice for this lot, amounting to £240 10s. 2d., and shall feel obliged by a cheque for the amount at your earliest convenience.

We are in error of this article at the present time, and although the market has dropped, we shall be happy to treat with you for the purchase of the 147 barrels you have, as you inform us, brought back to London, per *Argos*; of course, at landing gauge.

WALTER H. BROWN AND CO.

And enclosed in their letter was the following invoice:—

Messrs. Rowell and Racine, } 11, Billiter-square, To Walter H. Brown and Co. } London, 19th December, 1870.
Washington, 1/147 147 barrels petroleum spirit.
Net gallons, 5382, at 11d. per gallon £240 13 6
Discount, 2½ per cent. 6 3 4
£240 10 2

And Messrs. Rowell and Racine, in reply to that letter, sent the following letter:—

90, Lower Thames-street, London, E.C.,
Messrs. W. H. Brown and Co. Dec. 20, 1870.
Gentlemen,—We have your favour of yesterday, and in reply beg to say that, as you are well aware that it was through no act of the ship's that the goods were not

landed at Havre, we can hardly imagine that your claim is intended seriously.

Nevertheless, as you seem inclined to dispute our claim, we beg to give you notice that, unless it is settled before three o'clock (3 o'clock) this afternoon, we shall place the matter in the hands of our solicitor, and instruct him to proceed at once to recover the full amount of our account as rendered, and further, the costs of lighters of the goods from the ship to the wharf.—We are, Gentlemen, your obedient servants,

ROWELL AND RACINE.

Messrs. W. H. Brown and Co. not having paid by the time mentioned, the goods were taken to Plaistow Wharf, and there lodged to the plaintiff's order; and the attorneys for the plaintiff instituted a suit in rem under the Admiralty Jurisdiction of this court against the said 147 barrels of petroleum. An appearance was entered to that suit by the defendants' attorneys, and shortly afterwards they, on behalf of W. H. Brown and Co., applied to the plaintiffs' attorneys to release the goods and deliver them to the said W. H. Brown and Co.; whereupon the defendants' attorneys put in bail to answer damages and costs in this suit, and a delivery order was accordingly given, and the said goods were duly delivered to W. H. Brown and Co.; and in order to obtain the delivery of their said goods they had to pay the wharf charges and expenses consequent upon the said goods being landed at Plaistow Wharf.

The cause was heard on the above statement of facts in the City of London Court (before Mr. Commissioner Kerr) on Jan. 4, 1872, and judgment was given on Jan. 15, 1872, for the plaintiff for the sum of 135l. 5s. 8d. with costs. From this decree the defendants appealed to the High Court of Admiralty. The appeal came on for hearing on May 7, 1872, and Sir R. Phillimore reserved judgment. Subsequently the Court of Common Pleas having decided (*Simpson v. Blues L. Rep. 7 C. P. 290; 26 L. T. Rep. N. S. 697; ante, vol. 1, p. 326*) that County Courts had no jurisdiction over such questions beyond that possessed by the High Court of Admiralty, and this being a question over which the latter court has no original jurisdiction, Sir R. Phillimore before giving judgment on the merits, ordered the question of jurisdiction to be argued; this question was argued, and the learned judge held, in deference to the opinion of the Common Pleas, that the County Court had no jurisdiction to entertain the cause, and dismissed the suit without costs: (*see ante, vol. 1, p. 360; 27 L. T. Rep. N. S. 64*). The plaintiffs thereupon appealed to the Privy Council, and the decision of the learned judge was there reversed and the jurisdiction pronounced for, and the cause was remitted to the Court of Admiralty that the appeal might be decided on its merits (*see ante, vol. 1, p. 519; 28 L. T. Rep. N. S. 77*). The arguments before the High Court of Admiralty on the merits were as follow:—

May 7th, 1872.—The *Admiralty Advocate* (Dr. Deane, Q.C.) and *Murphy* for the appellant (the defendant below).—The rule as to the right to freight is laid down in *Maclean on Shipping*, p. 334. It is there said, "Freight is not due until it is earned; and as the carrier's contract is in its nature entire, nothing short of complete performance satisfies the common law, unless the freighter himself interferes to prevent it. No freight, then, is due, *prima facie*, unless the whole is earned. By the consent of the freighter, however, the shipowner—not insisting on completing his con-

PRIV. CO.]

BROWN (spp.) v. GAUDET (resp.); CARGO *ex* ANGOS.

[PRIV. CO.]

tract, imperfect performance may be a good title, under a new contract, to remuneration, in the nature of freight *pro rata itineris peracti*. If there is no performance whatever, there may yet be a valid claim for damages, although there be no title to freight. . . . Freight being the price of safe carriage and delivery of the subject of bailment at the destined port, performance of the contract is a condition precedent to any right of the carrier to recover the reward." As an authority for this last proposition *Osgood v. Groning* (2 Camp. 468) is cited. Here the contract is to deliver at the port of Havre. The delivery was not prevented by any act of the defendants, and the claim is made without any benefit occurring to him. This was a special contract to deliver, and it remains unperformed on the part of the plaintiff; and he, therefore, cannot have an action to recover compensation for what he has done, until the whole is completed: (*Cutter v. Powell*, 2 Smith L.C. 6th edit. p. 16.) It was a positive contract, not in itself unlawful, and the plaintiff was bound to perform it, or to pay damages for not doing it, although in consequence of an unforeseen accident, namely, the refusal of the French authorities to allow the landing of the petroleum, the performance of his contract became impossible: (*Taylor v. Caldwell*, 3 B. & S. 826; 32 L. J. 164, Q. B.; 8 L. T. Rep. N. S. 356.) The plaintiff has at least no right against the defendant on this authority. Where a man contracts to do work for a specific sum, to be paid on completion of the whole, he is not entitled to recover anything until the whole work is completed, unless it be shown that the performance of his contract was prevented by the default of the other contracting party: (*Appleby v. Myers* L. Rep. 2 C. P. (Ex. Ch.) 651; 16 L. T. Rep. N. S. 669.) In that case, which was an action for work done, which was destroyed by fire, Blackburn, J. said, "We think that where, as in the present case, the premises are destroyed without fault on either side, it is a misfortune equally affecting both parties; excusing both from further performance of the contract, but giving a cause of action to neither. . . . The case is like the case of a shipowner who has been excused from the performance of his contract to carry goods to their destination, because his ship has been disabled by one of the excepted perils, but who is not therefore entitled to any payment on account of the part performance of the voyage, unless there is something to justify the conclusion that there has been a fresh contract to pay *pro rata*." Here the complete performance was not prevented by an excepted peril, and therefore, *a fortiori*, the plaintiff cannot claim freight. It is a rule that, if a shipowner, entering into a contract, and so creating a duty upon himself, wishes to excuse performance in certain cases, he must provide for those cases in his contract: (*Spence v. Chadwick*, 10 Q.B. 517, 530, citing *Paradise v. Jane*, Aleyn's Rep. 26.) To have any claim to freight at all, the master is bound to deliver at least in part: (*Christie v. Rose*, 1 Taunt. 300.) In *The Teutonia* (L. Rep. 3 Adm. & Ecc.; 24 L. T. Rep. N. S. 521; ante, vol. 1, p. 32) various French authorities are quoted in the judgment to show that, where an interdiction of trade is imposed, the outward freight only is due, but not the homeward freight (Valin, Ordonnance de la Marine, lib. iii. tit. 3, art. xv.; *Traité des Assurances et des Contrats à la Grosso d'Emerigon*, P.

8, Bonlay-Paty, tom. i., cap. xii., sect. xxxi.; *Cours de Droit Commercial Maritime*, tit. viii., sect. 10, tom 2, p. 424, edition 1834.) This is no doubt the Continental law, but by English law no freight is due without delivery, and no claim for freight *pro rata* can arise except on an implied contract. There are no circumstances here from which a contract can be implied to pay *pro rata* freight. [Sir R. Phillimore.—If this be a court of equity, may I not presume freight to be due independently of the express contract, if the master could not reasonably deliver?] There must be a voluntary acceptance (*Vlierboom v. Chapman*, 13 M. & W. 230), and this court has held in accordance with that ruling: (*The Solomons*, L. Rep. 1 Adm. & Ecc. 293; 15 L. T. Rep. N. S. 393; 2 Mar. Law Cas. O. S. 436.) There was no acceptance here. This is a written contract, and this court should, therefore, apply the principles of common law. A party seeking payment must show that he has done all that he is bound to do. Unless the performance of a contract has become illegal by the law of the country of the ship, the contract must be performed, or there must have been an actual change of relations between the country of the ship and the place of destination: (*Esposito v. Bowden*, 4 E. & B. 963; 7 E. & B. 763; 24 L. J. 210, Q. B.; 27 L. J. 17, Q. B.; *Atkinson v. Ritchie*, 10 East, 530.) A foreign law operating to make performance illegal or impossible at the port of delivery will not excuse non-performance: (*Barker v. Hodgson*, 3 M. & Sel. 267; *Blyth v. Page*, cited in *Touleng v. Hubbard*, 3 B. & P. 291-295, note; *Sjovold v. Luconico*, 16 East, 201.) Even the act of a British superintendent of trade in a Chinese port is no excuse unless it appears that he was duly authorised to act: (*Evans v. Hutton*, 6 Jur. 1042.) The plaintiff was a regular trader to the port of Havre, and had a regular agent there. It was within the plaintiff's knowledge that this was petroleum; and if there was difficulty in landing petroleum the plaintiff should have known this, and have refused to take the goods. The ship never got with these goods on board to the quay at Havre, which is found by the case to be the ordinary place of delivery, and therefore the plaintiff was never ready to deliver. The defendant made no contract to receive until the plaintiff was ready to deliver. The two acts were to be done together, and therefore no action lies without performance or an offer to perform on the part of the plaintiff: (*Portage v. Cole*, 1 Williams' Saunders' Rep. 556.) There was no obligation on the part of the defendant to produce the bill of lading until the plaintiff was ready to deliver. The letter of December 6th, 1870, to *Général*, did not constitute the latter the defendant's agent, and his acts do not bind the defendant. The master was bound to have waited till the removal of the disability of the goods, and then to have landed them: (*Hadley v. Clark*, 8 T. R. 259.)

Milward, Q.C., and *Day, Q.C.*, for the plaintiff (respondent).—The letter above referred to has the effect of authorising *Général* to represent the owner of the goods, and requests him to take charge of them. The goods were to be taken out within twenty-four hours after arrival, and the defendant wished *Général* to do this in order to save them the demurrage for which they would otherwise have been liable. This shows that it was the defendant's duty to remove the goods. There is no stipulation in the Bill of Lading as to

PRIV. CO.]

BROWN (app.) v. GAUDREY (resp.); CARGO *as* ARGOS.

[PRIV. CO.]

any particular quay or dock, and all that the plaintiff was bound to do was to go to the port of Havre, and that he has done. We contend that delivery has been made; but even if we have failed in anything, it was through the fault of the cargo. Where delivery is prevented by the incapacity of the cargo alone, the shipowner is entitled to his freight: (*The Fortuna*, Edwards' Adm. Rep. 56; *The Friends*, lb. 246.) In the latter case the ship had got to the mouth of the harbour of the port of destination, and was prevented from proceeding by a blockading force, and Lord Stowell said: "This court sits no more than courts of common law do to make contracts; but as a court exercising an equitable jurisdiction it considers itself bound to provide as well as it can for that relation of interests which has unexpectedly taken place under a state of facts, out of the contemplation of the contracting parties in the course of the transaction. . . . Now if the incapacity of completing the voyage could be exclusively attributed to one of the parties, it would be proper that the loss should fall there; but the fact is that the calamity is common to both;" and the freight was divided. There is no law which made the delivery illegal. There was a popular disturbance caused by the petroleum. This was not the incapacity of the ship, but of the cargo. We say, however, that there was an actual delivery, for we transhipped the goods into a lighter in the harbour, and so really discharged the cargo. The defendants should have presented the bills of lading and taken the goods from the lighter, but as they did not, or were not allowed, we had to bring them back. A reasonable time for delivery is all the defendant can demand, and if he detain the ship beyond such a time she is liable in damages (*Ford v. Cotemorth*, 9 B. & S. 559; 10 B. & S. 991); and the defendant is not excused from not unloading by the Act of the French authorities: (*Adams v. Royal Mail Steam Packet Company*, 5 C. B.; N. S. 492; *Keaton v. Pearson*, 7 H. & N. 386.) Here it is expressly stipulated that the cargo shall be taken out within twenty-four hours by the defendant, and he is bound to concur with the plaintiff and do all that was necessary to effect delivery and acceptance of the cargo: (*Ford v. Cotemorth* (*ubi sup.*) *Spence v. Chodnick* (*ubi sup.*) proceeded on the ground that a mere foreign revenue law could not be noticed in this country; the defendant is here bound to be ready to take delivery, in spite of a local law. *Christie v. Row* (*sup.*) shows that freight may be earned when delivery is presented, and even that we are entitled to our return freight. We completely performed our contract. By the bill of lading we were to deliver in the port of Havre, and we did so. The place of discharge depended on the harbour authorities, and a complete performance took place on discharge into the lighter under their orders. The goods were then at the defendants' disposal on payment of charges. The defendants were bound to take out the goods.

Murphy in reply.—In the cases of *The Fortuna* (*sup.*) and *The Friends* (*sup.*) there was an implied contract raised by the fact of the owner going into the court to claim his cargo, but in this case I submit the court will not exercise any equitable jurisdiction. The Court of Chancery proceeds, with respect to the payment of freights, upon precisely the same grounds as the court of

common law (*Brown v. Turner*, L. Rep. 3 Ch. App. 597; 18 L. T. Rep. N. S. 624; 3 Mar. Law Cas. O. S. 94); and no freight is due until delivery is complete. "Taken out" in the bill of lading refers to the goods being taken away within twenty-four hours, and the margin of the bill shows that the plaintiff was to land them. The quay was the ordinary place of delivery, and delivery must take place according to the practice and custom of the port, and the defendant was entitled to a reasonable time to take the goods: (*Galliffe v. Bourne*, 4 Bing. N. C. 314, 329, 331.) The plaintiff sailed away before twenty-four hours had elapsed after arrival. The plaintiffs were at no time ready and willing to deliver whilst at Havre, and no claim exists till they were so ready: (*Duthie v. Hilton*, L. Rep. 4 C. P. 138; 19 L. T. Rep. N. S. 285; 3 Mar. Law Cas. O. S. 166).

March 11, 1873.—Sir R. Phillimore.—This is a cause of appeal from the City of London court, arising out of an agreement made for the use or hire of the ship *Argos*, under the 32 & 33 Vict. c. 51, s. 2. I regret to say that I derive no assistance from the judgment of the Court below, which is in these words: "As I understand you are going to appeal in this case, all I shall say is, that I give judgment for the plaintiff. The amount I believe is agreed at 1354 *ss.* 8d." It appears to me that the reason here assumed for not stating the grounds of a judgment involving important questions of law is based upon a very mistaken view of the duty of a judge of the court of first instance, and deprives the appellate court of the assistance which it has a right to expect. All the material facts of this case are admitted. They are as follows: [The learned Judge then stated the facts down to and inclusive of the bill of lading, as in the statement given above, and proceeded.] A person of the name of Gónestál appears to have been the shipbroker of Havre. He was selected by the defendant as his agent at Havre by the following letter [His Lordship then read the letter of Dec. 6th, 1870, from the appellant to Gónestál, stated the rest of the facts as given above, and continued.] The plaintiff claims, for freight out, demurrage, freight back, and expenses, the sum of 1354 *ss.* 8d., for which he has recovered judgment in the court below. The defendant contends in substance that the plaintiff never performed his contract of carrying the petroleum to the usual place of delivery at Havre, which he asserts to be the quay; that, as the plaintiff was never ready to give delivery at the agreed place, the defendant was not obliged to take the goods; and that, at all events, though neither plaintiff nor defendant were held to blame for the non-delivery, the contract was unexecuted, and no right of action could accrue to either party. The bill of lading contains the two stipulations: (1) That the goods are to be taken out within twenty-four hours after arrival or pay demurrage; and (2) that they are to be delivered at the port of Havre. Under this contract it was the duty of the defendants to take out the goods, and of the plaintiff to bring the goods to the port of Havre, where they could be taken out. Indeed, it is one of the admissions of the case that the captain could not have landed them on the quay. I think that when the ship on her first arrival at Havre went, under the direction of Gónestál, to Honfleur and to Trouville, she had performed the duty of bringing

PRIV. CO.]

BROWN (app.) v. GAUDET (resp.); CARGO ex ARGOS.

[PRIV. CO.]

the goods to the port, and was exonerated from the necessity of waiting a longer time than she did. And, in any case, I think that upon the second occasion, when she actually did deliver the goods on board the lighter, there was an entire execution of this contract, and the shipowner became entitled to his outward freight and his demurrage up to that time. But if this opinion be erroneous, and there was not an entire execution of the contract, I should still be of opinion that the shipowner was entitled to his freight, because, to borrow the reasoning of Lord Stowell in *The Fortuna* (Edwards's Adm. Rep. 57), there was such an execution as he could effect consistently with the incapacity under which the cargo laboured. The shipowner had done his utmost to consummate the contract; it did not lie with him that the contract was not performed; it was stopped by the incapacity of the cargo. It remains to consider that part of the claim which relates to the return freight and certain incidental expenses. In the first place, I am of opinion that Gédéral must be considered as acting on behalf of the owners of the cargo; he was present and aware that the petroleum was reshipped. In the second place it must be remembered that the authorities at Havre had power to compel the master to take the cargo on board. In these circumstances what was the duty of the master of the ship? He was obliged to take the goods out of the territorial waters of France. Would he have acted properly if he had then thrown them overboard? I should have said, on principles of common sense and justice, he could not take this course; and I feel myself strengthened by the opinion of Sir James Mansfield—no inconsiderable authority, and himself expressing the opinion of the Court of Common Pleas in the case of *Christy v. Rose*, (1 Taunt. 314): "Where a ship is chartered upon one voyage, onwards only, with no reference to her return and no contemplation of a disappointment happening, no decision which I have been able to find determines what shall be done in case the voyage is defeated; the books throw no light on the subject. The natural justice of the matter seems obvious—that a master should do that which a wise and prudent man would think most conducive to the benefit of all concerned. But it appears to be wholly voluntary; I do not know that he is bound to do it; and yet if it were a cargo of cloth or other valuable merchandise, it would be of great hardship that he might be at liberty to cast it overboard. It is singular that such a question should at this day remain undecided." And though this judgment was delivered in 1808, I have been unable to find a further exposition of this subject. If, however, he had not this duty of necessary agent to the cargo thus reshipped after delivery, and it was competent to him to have thrown them overboard, he is *a fortiori* entitled, on restoring them to the owner, to a lien upon them for the expenses of their preservation; and the proceeding *in rem* in a court having admiralty jurisdiction is the mode which he has adopted for enforcing that lien. I think, therefore, that the plaintiff is entitled to recover the return freight and the incidental expenses. I wish to observe that I have consulted the cases for reference to which I am indebted to the industry of counsel, though I have not thought it necessary to advert to more than those I have mentioned. I think I should also say a word as to the delay in the ad-

judication of this case. It is due to the following cause: After the argument, and while I was considering my judgment, the Court of Common Pleas prohibited a County Court from exercising jurisdiction in a case of this description. I was unable to agree with the judgment of the Common Pleas; but, for reasons which I have before stated, I thought myself bound to obey it, and, as my jurisdiction in these matters is purely appellate, to dismiss the suit for want of jurisdiction; but I gave leave to appeal to the Privy Council, suggesting that, if they took the same view as I did, they might think themselves warranted in coming to a different decision from that of the Common Pleas. This they have done, and have remitted the cause to the jurisdiction of this court. I affirm the decree of the court below and dismiss the appeal with costs.

From this decree the defendant in the City of London Court (the appellant in the Admiralty Court) appealed to her Majesty in Council on the following grounds, as stated in his case on appeal: That the ship was never ready to give delivery of the cargo at the agreed place, i.e., on the quay; that the obligation on him to take delivery did not arise until the respondent was ready to give it; that he broke no contract, as is admitted in the agreed statement of facts, acted with perfect good faith, and in ignorance of the prohibition against landing petroleum; that, upon the other hand, the respondent, who is a regular trader to Havre, must be taken by his agent, Gédéral, to have knowledge of the regulations of the port; and for these reasons the appellant submitted: First, that he was and is entitled to judgment, with costs, upon the merits; secondly, the respondent entered into a contract with the appellant to deliver and land the petroleum at the usual place of unloading at Havre; thirdly, that until the respondent had landed the petroleum at the usual place of landing at Havre, which is the quay there, no person could possibly present any bill of lading to the captain or master and receive or demand the goods; fourthly, that the appellant never expressly or impliedly sanctioned the hiring of any sloop to receive his goods; fifthly, it was by no act or default of the appellant that the respondent did not deliver the goods, or that the ship was detained for five days in seeking to deliver goods which the respondent might have known from his own agent could not be delivered.

The respondent's case on appeal submitted that the decrees of the courts below should be upheld for the following reasons:—

1. The respondent is entitled to recover the freight mentioned in the bill of lading:
 - (a.) Because the freight was earned when the goods were carried into the port of Havre and discharged there.
 - (b.) Because M. Gédéral was the agent of the appellant, and the goods were delivered according to his directions.
 - (c.) Because the ship carried the goods into the port of Havre, and the respondent was ready, so far as he was concerned, to deliver the same. It was the duty of the appellant, or his agent, to present the bill of lading, and to provide for and take delivery of the goods, and he is liable for the consequences of not having done so, and the appellant, having contracted to

PRIV. CO.]

BROWN (app.) v. GAUDET (resp.); CARGO OF ARGOS.

[PRIV. CO.]

take the goods at Havre, is not relieved from his contract by the interference of the authorities of the place.

- (d). Because there was no illegality in the contract, as petroleum is lawful merchandise, and the difficulties created by the local people were difficulties which it was for the appellant to remove or provide for.
- (e). Because there was such an execution of the contract on the part of the respondent as he could effect consistently with the incapacity under which the cargo laboured.
- (f). Because, even if the goods were not actually delivered to the appellant at Havre, the respondent was under the circumstances excused from delivering them there; and further, the appellant by his conduct waived his right to demand delivery at Havre.
- (g). Because the respondent was ready and willing to deliver the goods, and the appellant was not ready and willing to accept them, or to make provision for receiving them, or to produce the bill of lading, or to pay the freight.

2. If the respondent is not entitled to recover the freight mentioned in the bill of lading, he is entitled to sue on a *quantum meruit*, or for freight *pro rata itineris*.

3. The respondent is entitled to recover the expenses claimed, because the expenses were forced upon the master of the ship by the act of the appellant, and were properly incurred by the master for the benefit of the appellant, and with the sanction of M. G  n  stal.

4. The respondent is entitled to recover the amount claimed as homeward freight, because the carriage of the goods home was the only thing that could be done under the circumstances for the safety and preservation of the goods, and was directed and sanctioned by M. G  n  stal, and was ratified by the act of the appellant in claiming the goods home.

5. The appellant is liable to pay the demurrage claimed according to the express terms of the bill of lading, and for detaining the ship, independently of the terms of the bill of lading.

May 2 and 3, 1873.—The *Admiralty Advocate* (Dr. Deane, Q.C.) and *Murphy* for the appellant.—Here the contract was to deliver at Havre and it has remained unperformed, though through no default on the part of the respondent; yet he cannot, as there was no act on the part of appellant preventing the completion of the contract, recover freight under the contract. The act of third parties, and even of a foreign government, whereby a contract is rendered impossible of performance, cannot be set up as an excuse for non-performance unless there is an express stipulation in the contract providing for the contingency. Hence, as the respondent would be liable to the appellant for breach of the contract, he cannot recover for that which he has never performed.

Paradine v. Jane, Ayles's Rep. 26;

Hadley v. Clarke, 5 East, 265;

Taylor v. Caldwell, 3 B. & S. 826; 32 L.J. 164, Q.B.;

Appleby v. Myers, L. Rep. 2 C.P. (Ex. Ch.) 631; 16 L.

T. Rep. N.S. 609;

Barker v. Hodgson, 3 M. & S. 267;

Parsons on Shipping, vol. 1 pp. 328, 329;

Spence v. Chadwick, 10 Q.B. 517, 530;

Medeiros v. Hill, 8 Bing. 231.

The judgment in the court below proceeds greatly upon the prize cases there cited, but there is a great distinction between the admiralty prize and instance jurisdiction, because in the former the court exercises an equitable power of providing for a state of circumstances which must necessarily have been out of the contemplation of the parties, whereas in the latter the court should follow the same rules in the construction of a contract as other courts of law.

The Fortuna, Edwards' Adm. Rep. 56;

The Friends, Ib. 246.

The finding that G  n  stal was agent of the appellant is erroneous; the authority given to him was merely to hold the goods in safety, and not to deliver except to the holders, of the bills of lading. The respondent, never having been in a position to complete his original contract, cannot recover return freight. [Sir MONTAGUE SMITH.—Suppose it had become impossible to land these goods by misfortune, would not the master have become the agent by necessity for the owner of the cargo? If he had employed another ship to carry them back to England, would not the appellant have been compelled to pay the freight?] That question was put in *Christie v. Rose* (1 Taunt. 300), and yet there it was held that the master could only recover against the consignor as for actual delivery. [Sir MONTAGUE SMITH.—From the judgment in that case it would seem that the plaintiff recovered not on the old contract, but on an implied contract to deliver. Here it might be said that there was, on the arising of the difficulty as to deliver at Havre, a new and implied contract on the part of the master to be ready to deliver at some other place than the quay.] In *Christie v. Rose* it was said that a master was bound under the circumstances to do that which a prudent man would have done with his own goods, and that he did so, and yet could not on his contract recover return freight.

There was no completion of this contract on the part of the shipowner, because the master was never ready and willing to deliver at the usual place of discharge, viz., the quay at Havre. A shipowner has no right to claim demurrage until his ship arrives, not merely in the port, but at the usual place of discharge, as the lay days do not commence till then, and he is not until then ready to discharge (*Brereton v. Chapman*, 7 Bing. 559). The arrival at the quay was a condition precedent to the payment of freight. The quay was the agreed place, and the time for taking the goods out, viz., within twenty-four hours after arrival, never began to run, as the ship never got there with the goods on board. The holder of the bill of lading would not be bound to present it until the ship was at the quay with the goods. There was no intention of the parties in this case to contract for a substantial performance of the contract, as apart from an absolute performance; hence it cannot be said that any implied contract arose from the exceptional circumstances. In the cases where freight *pro rata itineris peracti* has been recovered, there has always been some act of the parties which has given rise to an implied contract. There was no such act here, either in Havre or in London. In *The Testonia* (L. Rep. 3 Adm. & Ecc. 394; 24 L.T. Rep. N.S. 521; ante vol. 1, p. 32; and on appeal, L. Rep. 4 P.C. 171; 26 L.T. Rep. N.S. 48; ante vol. 1, p. 214) there was clearly an implied contract arising out

Priv. Co.]

BROWN (app.) v. GAUDRY (resp.); CARGO *as* ARGOS.

[Priv. Co.]

of the demand made by the consignees for the delivery of the goods in a port within the charter-party; there, moreover, the inability to complete was occasioned by the voyage becoming illegal by the law of the country to which the ship belonged. [The rest of the argument was the same as that in the court below.]

Milneard, Q.C. and *Gainsford Bruce* for the respondent.—Assuming that the master was ready to deliver in the port of Havre, then, if the owner of the goods was prevented by the order of the authorities from taking delivery, that was the breach of the owner of the goods, and not of the shipowners. The stipulations of the bill of lading as to taking the goods out only imply that the owner is entitled to leave them twenty-four hours after arrival without paying demurrage; the duty of the shipowner was fulfilled in being ready to discharge in the port of Havre. There was nothing to prevent the master discharging the cargo over the side of the ship, which was the only obligation imposed upon him, and this in fact was done. The shipowner entered into a contract to carry on the terms that the owner of cargo would perform all that he undertakes to do by his contract; the shipowner is to deliver, and the owner of cargo to take out; the latter should come to the ship's side and take his cargo. There was no contract in law on the part of the shipowner to do more than deliver over the side. On arrival in port the master was entitled to expect some one on the part of the consignees to demand the goods and pay the freight, whereas no assistance was given by them to enable him to complete his contract.

Then as to the place of delivery. The contract, as contained in the bill of lading, is that the goods are to be delivered at the "port" of Havre. If it is contended that they must be delivered at the usual place of landing within that port, then that is introducing an implied stipulation into the contract; and if it is implied, then *Paradine v. Jane* (Aylem, 26) does not apply. In *Taylor v. Caldwell* (*ubi sup.*) Blackburn, J. says: "There seems no doubt that where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it, or pay damages for not doing it, although, in consequence of unforeseen accidents, the performance of his contract has become unexpectedly hitherto or even impossible."

But this rule is only applicable when the contract is positive and absolute, and not subject to any condition either express or implied. The contract here is to deliver at the port, not at any particular part of the port. The place is only implied. It is not an express term which the shipowner has taken upon himself, but is an implied undertaking, subject to the condition that such delivery shall be possible. There was nothing to prevent delivery to the consignees in any other part of the port of Havre. In all the cases cited by the appellants there was an express contract to do a particular thing, which the parties failed to perform. These goods were discharged into a lighter, and were there at the absolute disposal of the consignee, provided that he sent them elsewhere, and did not attempt to land them in the port of Havre. On the other hand, the appellant had entered into an express contract to take the goods out within twenty-four hours after arrival, and in the performance of this contract he has failed, and hence is liable even if performance was impossible: (*Ford v. Coteneorth*, 9 B. & S. 559; 10 B. & S.

991; L. Rep. 4 Q.B. 127; L. Rep. 5 Q.B. 544.) In *Lakin v. Odey* (15 C. B. N.S. 646; 10 L. T. Rep. N.S. 268; 2 Mar. Law Cas. O.S. 6.) Willes, J., says: "The true test of the right to freight is, the question whether the service in respect of which the freight was contracted to be paid has been substantially performed; and, according to the law of England, as a rule freight is earned by the carriage and arrival of the goods ready to be delivered to the merchant." That was the case here. The usual place of delivery must be taken to be the usual place at the time of the arrival of the goods; and, as this place was under the control of the port authorities, on the naming by them of a place of discharge within the port that place must be taken to be the usual place for the time being. There was a substantial performance of the contract, and that was sufficient: (*The Teutonia, ubi sup.*) In *Wangh v. Morris (ante)*, vol. 1, p. 573; L. Rep. 8 Q.B. 202; 28 L. T. Rep. N.S. 265; it was held that a contract to carry and deliver goods, not in itself illegal, but the performance of which has become impossible, because to deliver at the place named had become illegal, was properly performed by delivery in another manner within the charter not illegal; hence, where performance was in this case possible by delivering elsewhere than at the quay, the contract must be considered as performed. (*Sis M. Smith*: Is it not common sense that when it is impossible to deliver at the usual place, as both parties are bound to use reasonable diligence in the completion of the contract, the next best place in the harbour under the special circumstances of the case is the place where delivery should take place?)

Again, this delivery took place under the directions of G  n  stal, who, as we submit, was the appellant's agent for that purpose. The letter to him appointed him agent because the words as to the payment of expenses, &c., had the effect of authorising him to pay freight for the goods, and to recover it over against the consignees. As the consignee resided at Rouen, it was necessary for the appellant to appoint some one to receive the goods at Havre until the presentation of the bill of lading, and this was provided for by the appointment of G  n  stal. Although the letter did not arrive until after the first departure of the ship from Havre, yet after the return he was fully authorised to act as agent, and in accepting on board the lighter he accepted delivery there. Moreover, there was an implied obligation on the part of the appellant to supply goods which were capable of being carried and delivered, and he was bound to have known of the incapacity of the cargo; his ignorance cannot be used as an excuse to relieve him from the payment of the freight due for the carriage of the goods. *The Fortuna* and *The Friend* (*ubi sup.*) do not proceed merely on the ground of the right to freight arising out of the exceptional circumstances of hostile capture, but Lord Stowell distinctly considers the question whether a shipowner would have any right to freight independently of capture. If the agent was prevented from taking complete delivery in consequence of the incapacity of the cargo, that cannot affect the respondent's right to freight.

But even assuming that G  n  stal was not appointed agent for the appellant, then there remains the question of the duty of a master or ship's agent in a case of emergency arising affecting the cargo.

[Priv. Co.]

BROWN (app.) v. GAUDET (resp.); CARGO OF ARGOS.

[Priv. Co.]

There can be no doubt that a master is bound to use all due diligence to preserve his cargo from injury. (*Notara v. Henderson, ante*, vol. 1, p. 278; L. Rep. 5 Q. B. 346; Id. 7 Q. B. 225; 22 L. T. Rep. N. S. 577; 26 Id. 447; 3 Mar. Law Cas. O. S. 419.) Having got the goods to the port of Havre, the master was not bound to bring them back to London, and might, if he had been able, have landed and warehoused them. He could not land them in this case; was he to have thrown them overboard? If he had landed them he would have been entitled to charge the owners of the goods with the expenses of keeping them; and surely it is reasonable that, having done the best thing for the goods under circumstances, viz., brought them back to England, the master is entitled to charge the expense of so doing—that is, to charge the return freight. He is the agent of the owner of the goods to that extent. The expenses incurred at Havre and the other ports arose directly out of the conduct of the owner of the goods in forwarding such a cargo, and hence he should pay them. (*Hill v. Idle*, 4 Camp. 327.) (The rest of the argument was the same as that in the court below.)

The Admiralty Advocate in reply.—The respondent was never ready and willing to deliver, nor was he ever in a position to do so. The ship could not enter the port of Havre in the proper sense with these goods on board, because she had to tranship them before she was entered at the custom house. If the respondent had wished that any part of the port should be taken as the place of delivery, he should have expressed it in his contract. (*Marquis of Bute v. Thompson*, 13 M. & W. 487.) In *The Teutonia* (*ubi sup.*) a fresh contract was created by the demand for delivery at another port than that named. [SIR MONTAGUE SMITH.—The resemblance between the two cases is that here the question is whether the delivery at one part of the port is sufficient when delivery at another part has become impossible; that in *The Teutonia* it was held that delivery at one of several ports named in the charter was a sufficient performance of the contract where the port named became impossible.] There is no claim for expenses or back freight, as there is no contract, express or implied, on which the respondent can found the claim, he not having completed his original agreement. [SIR MONTAGUE SMITH: Suppose the contract had been dissolved without the fault of either party, what ought the master to have done with the goods? Should he keep them or throw them overboard?] He should bring them back at the shipowner's risk and expense. It is a risk he undertakes when he ships the goods, unless he expressly excepts the risk in his contract. [SIR MONTAGUE SMITH: If he were proceeding on a voyage, could he not send them back in another ship?] Certainly, but at his own expense, unless the contingency was provided for.

Cur. adv. vult.

May 30, 1873.—The judgment of the court was delivered by SIR MONTAGUE SMITH.—This was a cause originally brought in the City of London Court by the respondent, the owner of the steamship *Argos*, for freight, demurrage, and expenses in respect of 147 barrels of petroleum, shipped by the appellant to be carried from London to Havre. Judgment was given for the plaintiff in the City of London Court for the full amount claimed, 13*l.* 5*s.* 3*d.*, and affirmed on appeal by the judge of the

Admiralty Court, with leave to appeal to her Majesty in Council. A statement of agreed facts forms part of the record, and the following general facts may be collected from it. [His Lordship then shortly stated the facts as given in the statement, and, after pointing out that the letter from the appellants to G  n  ral of Dec. 6, 1870, did not reach Havre till Dec. 9, continued.]

It was contended for the plaintiff that by this letter the defendant constituted G  n  ral his agent to deal generally with the goods, and that what was done with them at Havre was by his authority as such agent. But, in their lordships' view, such an agency was not created; in fact, the *Argos* was despatched to Honfleur before G  n  ral had received the letter.

The first question is, whether the freight was earned. The bill of lading which forms the contract describes the ship as bound "for Havre," and the special and material terms are the following, viz.: "the goods to be taken out within twenty-four hours after arrival, or pay 10*l.* 10*s.* a day demurrage. . . . and are to be delivered in good order, &c., at the aforesaid port of Havre . . . on paying freight." The master, as a rule, is only bound to deliver cargo upon production of the bill of lading; and it is clear that freight may be earned before actual delivery, if the goods have been brought to the port of arrival ready to be delivered according to the bill of lading. The rule was stated in the judgment of the Court of Common Pleas delivered by Willes, J., in *Dakin v. Oatley* (15 C. B., N. S., 666) as follows:—"The true test of the right to freight is the question whether the service in respect of which the freight was contracted to be paid has been substantially performed; and according to the law of England, as a rule, freight is earned by the carriage and arrival of the goods, ready to be delivered to the merchant." Arrival, of course, means "at the destined port," as the next passage of the judgment explains. There is no doubt that, in this case, the goods were carried to the destined port, and the question is, whether, when they had been brought to the port the master was ready to deliver them there, if the merchant had been ready to perform his part of the contract by taking them from the ship. The express contract of the shipowner is to deliver at the port of Havre; that of the merchant to "take out" the goods there within twenty-four hours after arrival, or pay demurrage. No part of the port being expressly mentioned for discharging, there can be no doubt that under usual circumstances the ship ought to have been brought to the place in the port where cargo, such as she carried, is ordinarily discharged. It is stated that "in the ordinary course of business petroleum would be delivered on the quay at Havre, on presentation of the bill of lading." Their lordships however think that, although this may be the ordinary course, and that in the usual state of things in the port, the quay would have been the proper place for the ship to have gone to be discharged, yet that this being an implied duty only, it does not amount to an engagement to go there in all events and under all circumstances. It may be that if the shipowner had expressly agreed to go to the quay, he must have been held to a strict performance of what he had contracted to do; but his express contract is only to deliver in the port of Havre, and what is a compliance with that obligation must depend on and vary with the

Priv. Co.]

BROWN (app.) v. GAUDET (resp.); CARGO *ex* ARGOS.

[Priv. Co.]

existing state of things in the port. The following observations on this subject occur in the judgment of Tindal, C. J., in the case of *Gatliffe v. Bourne*, (4 Bing. N.C. 329): "But we know of no general rule of law which governs the delivery of goods under a bill of lading, where such delivery is not expressly in accordance with the terms of the bill of lading, except that it must be a delivery according to the practice and custom usually observed in the port or place of delivery. An issue raised upon an allegation of such a mode of delivery would accommodate itself to the facts of each particular case, and would let in every species of excuse from the strict and literal compliance with the precise terms of the bill of lading, which must necessarily be allowed to prevail with reference to the means and accommodation for landing goods at different places, the time of the arrival and departure of the vessel, the state of the tide and wind, interruptions from accidental causes, and all the other circumstances which belong to each particular port or place of delivery." The petroleum was not allowed to be discharged at or near the quay, apparently because munitions of war were lying about. But the same impossibility of getting the ship up to it might have arisen if the quay had been under repair, or the approach to it had been prevented by a wreck. It could not, be said that, had such accidents happened, the shipowner would not have performed his contract by being ready to discharge in some other convenient part of the port. It is true that on the first arrival of the *Argos* at Havre she was not permitted to stay anywhere in the port more than a few hours; but on her return, after her ineffectual efforts at other ports, she not only obtained permission to stay in the outer harbour, but to discharge the petroleum there. This outer harbour is within the port, and is, as their Lordships understand, an artificially protected place where goods may be conveniently and safely discharged. The petroleum remained there for at least four days, during which the delivery of it could have been given, being, as their lordships think, a reasonable time for that purpose; and although the authorities would not allow it to be landed at Havre, the defendant might undoubtedly have received it, if he had chosen, in the harbour, and given it any other destination he pleased.

But it was further contended for the defendant, that, in order to perform his contract, the master must not only have been ready to deliver in the port, but to land the goods at Havre, or that, at the least, the defendant, on receiving them, must himself have been able to land them there; and that, as this could not be done, the contract became incapable of performance, and dissolved. Their Lordships are not of this opinion. They think the effect of the stipulation in the bill of lading, "The goods to be taken out within twenty-four hours after arrival, or pay ten guineas a day demurrage," was to cast upon the defendant the obligation of taking the goods out, or of st all events from, the ship, that is, from alongside. The engagement of the defendant to pay demurrage after twenty-four hours clearly implies that the parties contemplated that the ship might be detained by his default to take out the goods, and that it was not intended the master should land or take the risk of landing them. The prohibition to land the petroleum, therefore, did not prevent the plaintiff from fulfilling his part of the con-

tract. The note in the margin of the bill of lading relating to a landing charge is probably a printed form, and may mean that goods, if landed, are subject to such a charge; but this general notice cannot control the special terms in the body of the bill. In a recent case (*Wagh v. Morris*, ante, vol. 1, p. 573; L. Rep. 8 Q. B. 202), a cargo of hay was brought from Trouville to London, under charter and bill of lading which made the hay deliverable at the port of London. There was a stipulation to the effect that the cargo should be brought and taken from the ship alongside. The shipper directed the master to proceed to a particular wharf in Deptford Creek, and the parties contemplated landing the hay there. It turned out that by an order in council, under the Cattle Diseases Act, of which they were ignorant, it was made illegal to land in England hay brought from France. After a long delay the shipper received the hay into another ship alongside; and the action was brought against him for demurrage whilst the ship was detained. The defence set up was the illegality of the contract; but Mr. Justice Blackburn in delivering judgment made some observations which bear on the objection relied on in this case, that the contract of the shipowner was not performed because the petroleum could not be landed at Havre. The learned judge says: "When it turned out that the defendants had named a place for the performance of the contract where the performance was impossible because illegal, that did not put an end to the contract, if the performance in any other way was legal and practicable. In the present case the performance, by receiving the cargo alongside in the river without landing at all, was both legal and practicable." Again, "It is a mistake to say the plaintiff intended that the hay should be landed. He no doubt contemplated that it would be, for, except under very unusual circumstances, hay is not brought into the Thames for any other object; but all that the shipowner bargained for, and all that he can properly be said to have intended, was, that on the arrival of the ship in London, his freight should be paid, and the hay taken out of his ship." The learned judge also says that *The Teutonia*, lately decided by this committee (ante, vol. 1, p. 214; L. Rep. 4 P. C. 172), would have been precisely in point if the order in force had come into operation after the contract instead of before. In *Wagh v. Morris* the plaintiff recovered for the detention of his ship, although it was not possible to land the hay anywhere in the port of London. The contract of the shipper in that case does not, in their Lordships' view, substantially differ from the defendant's in the present. It was remarked by Mr. Justice Blackburn that the hay might, under some circumstances, have been profitably re-shipped, and it might have so happened in this case with the petroleum. It can scarcely be contended that the master would have been justified, when he found the petroleum could not be landed, in at once leaving the port without waiting a reasonable time to give to the defendant an opportunity of receiving it there. He might, even if the prohibition had not existed, have desired to send the goods to Rouen or elsewhere by water, instead of landing them. Their Lordships, therefore, think that the means of performing the contract were not exhausted, nor the contract dissolved, when it

Priv. Co.]

BROWN (app.) v. GAUDRY (resp.); CARGO OF ARGOS.

[Priv. Co.]

was found the ship could not be discharged at the quay and the cargo landed; and that they ought to hold that, the master being ready and able to give delivery in the harbour, and having kept the goods a reasonable time there for the purpose, the freight has been earned. It is admitted that both parties, when they made the contract, were ignorant of the prohibition against landing petroleum, and therefore no question of intentional infraction of the law of France arises.

It was contended for the plaintiff that, as the inability to land arose from the incapacity of the goods and not of the ship, the judgment of Sir William Scott in *The Fortuna* (Edwards 26) was an authority for declaring the freight to be recoverable, even if the contract of the ship had been to land the goods, or to deliver them on land. But as, in their Lordships' view, that is not the contract, it is unnecessary for them to consider whether the judgment for the plaintiff could properly rest upon this ground. The counsel for the defendant relied on some of the reasons given by the judges in *Ford and others v. Cotesworth and others* (L. Rep. 4 Q.B. 127; 5 Id. 544). The action in that case was for detaining the ship, and the judges were considering whether reasonable diligence had been used by the merchant in unloading the goods. The right to freight did not arise, and the attention of the judges was directed only to the question whether, under the peculiar circumstances of the case, unreasonable delay in discharging the ship had been established.

The next question to be considered is, whether the plaintiff is entitled to compensation in the shape of homeward freight for bringing the petroleum back to England. It seems to be a reasonable inference from the facts, that after the four days during which the petroleum had been lying in the harbour had expired, the authorities would not have allowed it to remain there. It was still in the master's possession, and the question is, whether he should have destroyed or saved it. If he was justified in trying to save it, their Lordships think he did the best for the interest of the defendant in bringing it back to England. Whether he was so justified is the question to be considered. As pointed out by the judge of the Admiralty Court, the same kind of question arose in *Christy v. Ross* (2 Tannt. 300). In that case Sir James Mansfield says: "Where a ship is chartered upon one voyage outwards only, with no reference to her return, and no contemplation of a disappointment happening, no decision which I have been able to find determines what shall be done in case the voyage is defeated; the books throw no light on the subject. The natural justice of the matter seems obvious—that a master should do that which a prudent man would think most conducive to the benefit of all concerned. But it appears to be wholly voluntary; I do not know that he is bound to do it; and yet, if it were a cargo of cloth or other valuable merchandise, it would be a great hardship that he might be at liberty to cast it overboard. It is singular that such a question should at this day remain undecided." The precise point does not seem to have been subsequently decided; but several cases have since arisen in which the nature and scope of the duty of the master, as agent of the merchant, have been examined and defined. (Amongst others, *Tyson v. Dent*, 8 Moore P. C. C. 419; *Notara v.*

Henderson, ante, vol. 1, p. 278; L. Rep. 7 Q. B. 225; *Australasian Navigation Company v. Morse*, ante, vol. 1, p. 407; L. Rep. 4 P. C. 232.) It results from them that not merely is a power given, but a duty is cast on the master in many cases of accident and emergency, to act for the safety of the cargo in such manner as may be best under the circumstances in which it may be placed, and that, as a correlative right, he is entitled to charge its owner with the expenses properly incurred in so doing. Most of the decisions have related to cases where the accident happened before the completion of the voyage, but their Lordships think it ought not to be laid down that all obligation on the part of the master to act for the merchant ceases after a reasonable time for the latter to take delivery of the cargo has expired. It is well established that if the ship has waited a reasonable time to deliver goods from her side, the master may land and warehouse them at the charge of the merchant; and it cannot be doubted that it would be his duty to do so rather than to throw them overboard. In a case like the present, where the goods could neither be landed nor remain where they were, it seems to be a legitimate extension of the implied agency of the master to hold that, in the absence of all advice, he had authority to carry or send them on to such other place as in his judgment, prudently exercised, appeared to be most convenient for their owner; and if so, it will follow from established principles that the expenses properly incurred may be charged to him. Their Lordships have no doubt that bringing the goods back to England was in fact the best and cheapest way of making them available to the defendant, and that they were brought back at less charge in the *Argos* than if they had been sent in another ship. If the goods had been of a nature which ought to have led the master to know that on their arrival they would not have been worth the expenses incurred in bringing them back, a different question would arise. But in the present case their value, of which the defendant has taken the benefit by asking for and obtaining the goods, far exceeded the cost. The authority of the master, being founded on necessity, would not have arisen if he could have obtained instructions from the defendant or his assignees. But under the circumstances this was not possible; indeed, this point was not relied on at the bar.

Their Lordships, for the above reasons, are of opinion that the plaintiff has made out a case for compensation for bringing back the goods to England.

But they think the plaintiff is not entitled to recover the amount claimed for demurrage and expenses in attempting to enter the ports of Honfleur and Trouville. These efforts may have been made by him in the interest of the cargo as well as the ship; but they were made before the ship was ready to deliver at all in the port of Havre, and the expenses of this deviation and of the return to Havre, after permission had been obtained to discharge there, must be treated as expenses of the voyage, and not as incurred for the benefit of the defendant. The charges for the hire of the vessel and of storing the petroleum in her at Havre, after permission had been obtained for its discharge there, stand on different ground. If the ship had then waited in the outer harbour with the petroleum on board, the defendant would have been liable to pay demurrage at 10*l.* 10*s.* a day. It was ob-

C. P.

CORKLING v. MASSEY.

[C. P.]

viously, therefore, to his advantage under the circumstances for the master to hire the vessel, and thus relieve him from the heavy demurrage payable for the detention of the ship. The whole expense of this operation appears to be about 15*l*. only.

In the result their Lordships think the plaintiff is entitled to recover the outward freight, and the charge made for the carriage back to England, together 48*l*. 8*s*., and also the 15*l*. for the above expenses at Havre, in all 63*l*. 8*s*.

When their Lordships remitted the cause, after deciding the question of jurisdiction, they were told it had been fully heard by the judge of the Admiralty Court, and they presumed that the judgment he was prepared to give would be acquiesced in. The defendant, however, notwithstanding the small amount in dispute, applied for leave to appeal, which was granted only on the ground that questions of law of general importance were involved in the decision. Having failed on these questions, he ought, although the decree will be reduced in amount, to pay the costs of his appeal.

Their Lordships will humbly advise Her Majesty that the judgment given for the plaintiff ought to be affirmed, except only that the amount thereof should be reduced to 63*l*. 8*s*. The respondent will have the costs of this appeal.

Appeal dismissed.

Solicitors for the appellant, *Heather and Son*.
Solicitors for the respondent, *Cattaras, John, and Cattaras*.

COURT OF COMMON PLEAS.

Reported by H. F. FOULKE and JOHN ROSE, Esqrs.,
Barristers-at-Law.

Saturday, May 3, 1873.

CORKLING v. MASSEY.

Charter-party—Meaning of words, “expected to be at a port”—*Warranty*—*Breach of*.

By a charter-party it was mutually agreed between the plaintiff and defendant that a ship expected to be at Alexandria about 15th Dec. should proceed to Alexandria, or as near thereto as she could safely get, and there load a cargo.

Held, that the words expected to be at Alexandria about 15th Dec. were a matter of contract for the breach whereof an action is maintainable, also that they mean that the ship is in such a place that she may reasonably expect to be at Alexandria at the time named.

THE declaration stated that an agreement or charter-party was made by and between the plaintiff and defendant bearing date the 14th Nov. 1871, and that in the said charter-party it was agreed between Messrs. Massey and Sawyer, of the good British steamship or vessel called the *Ceres*, expected to be at Alexandria about the 15th Dec. 1871, and R. Corkling, of Manchester, merchant, that the said ship being tight, staunch, and strong, classed A1, and every way fitted for the voyage, should with all convenient speed sail and proceed to Alexandria, Egypt, or so near thereto as she may safely get, and there load a full and complete cargo of cotton, seed, &c. setting out all the conditions of the charter-party; and averred that the said Robert Corkling, in the said charter-party mentioned was the plaintiff, and the said Massey therein mentioned was the defendant, and that all things happened, and all times

elapsed, necessary to entitle the plaintiff to have the said agreement performed by the defendant, and to maintain this action for the breaches thereinafter alleged, yet the said ship was not then expected to be at Alexandria about the said 15th Dec. 1871, but it was then in such part of the world, and under such engagements that the said ship could not perform her said engagements and arrive at Alexandria about the said day.

Plea 3.—And for a third plea the defendant says that before and at the time of the making of the alleged agreement, the said vessel *Ceres* in the said charter-party mentioned, was on a passage to Revel and Helsingfors, and thence to load from Cronstadt or Riga for a port on the east coast of England or a port on the continent, and thence to proceed to Alexandria with a cargo from a coal port, of all which the plaintiff had notice, and the said above named defendant says, that the alleged charter-party was made subject to the condition that the said vessel should with all convenient speed fulfil her said engagements and then sail and proceed to Alexandria, and the said above named defendant says that the said vessel did with all convenient speed fulfil his said engagement, and sail and proceed to Alexandria.

The defendant demurred to so much of the declaration as alleged as a breach, that the said ship was in such part of the world, and under such engagements, that the said ship could not perform her said engagements and arrive at Alexandria about the said day or days.

Replication and joinder in demurrer and demurrer to the defendant's third plea.

Joinder in demurrer.

Day, Q.C. (with whom was *Petheram*) for the plaintiff.—It is part of the contract that the ship shall be at Alexandria on or about the day named, and it amounts to a warranty that she was so situated that she might be there, and under such engagements that she might be reasonably expected to arrive there at the date mentioned. What the words “on or about” mean, is shown in the case of *Ebbs v. Burness* (1 Mar. Law Cas. O. S. 178, 329; 8 L. T. Rep. N. S. 207; 3 B. & S. 751); there by a charter-party dated the 19th Oct. it was agreed that the ship now being in the port of Amsterdam, should sail to Newport for cargo. On 15th Oct. the ship was at a place sixty miles from Amsterdam, and could have reached the docks in twelve hours with ordinary weather, but owing to boisterous weather, she did not reach the docks until the 23rd inst. It was held that the words in the charter-party, “now in the port of Amsterdam,” implied a warranty, and that as the ship was not in the port of Amsterdam at the time the charter-party was made, the charterer was justified in saying there had been a failure of performance of an essential condition, and in refusing to load the ship on her arrival at Newport. Secondly, the plea is bad, for the charter-party being in writing, cannot be varied or added to by any parol condition. *Young v. Auldin* (L. Rep. 4 C. P. 553; 20 L. T. Rep. N. S. 336) is against me, but that case is disapproved of, and Brett, J. invites the court to overrule it in *Abrey v. Cruz* (L. Rep. 5 C. P. 46). (KEATING, J.—We certainly sitting here should not overrule a decision of our own court.)

Butt, Q.C. and R. E. Webster for the defendant.—There is no condition precedent that the vessel should be at Alexandria. It is a mere statement in the charter-party, that the vessel

C. P.]

ROBINSON v. KNIGHT AND ANOTHER.

[C. P.]

is expected to be there about the 15th Dec. A statement of the tonnage of a ship in a charter-party is more matter of description, and does not amount to a warranty; (*Barker v. Windle*, 6 El. & Bl. 675; see also *Harris v. Mandle*, 3 T. R. 307). And so here the statement is too vague to amount to a warranty, and distinguishable from *Behn v. Burgess* (*ubi sup.*). It is necessary for the plaintiff to aver according to the true construction of the charter-party, that the defendant knew that the situation of the ship was such that she could not be expected to arrive. The third plea does not attempt to vary the words of the charter-party, but shows that the whole charter-party was subject to a condition that the vessel should fulfil her engagements, which she had at that time unfinished. [KEATING, J.—On that point we have made up our minds.]

Day, Q.C. in reply.

KEATING, J.—With reference to the demurrer to the third plea, we have already expressed our opinion; it is decided by the opinion expressed by this court in the case of *Young v. Austin* (20 L. T. Rep., N. S. 346; L. Rep. 4 C. P. 553), and which case we entirely approve of. The remaining point for us to consider is with reference to the breach in the declaration. It alleges that the ship was not then expected to be at Alexandria about the 15th Dec. 1871, but was then in such part of the world, and under such engagements, that the ship could not perform her said engagements and arrive at Alexandria about the day. It depends whether the words "expected to be at Alexandria" are words of description, or are in the nature of a contract. I am of opinion they are in the nature of a warranty, and that the breach is therefore well assigned. No doubt the words are somewhat vague and uncertain, but I come to the conclusion they are part of the contract, and intended to be so. It is of the utmost importance to the charterer that he should know when to expect the ship to be at Alexandria, and such a statement one would expect to find in every charter-party. I therefore consider that the words "expected to be at Alexandria about the 15th Dec. 1871," mean she is in such a position that she may reasonably be expected to be there, else there would be no binding contract between the shipowner and the charterer, and the charterer would be at the owner's mercy. Here we do no violence to hold as we do. The proper construction is, that it is in the nature of a warranty, for breach of which there is a cause of action, and the breach is well assigned.

HONYMAN, J.—As to the third plea, I agree with my brother Keating, we are bound by the decision in *Young v. Austin* (*ubi sup.*). On the other question I consider the words used in alleging the breach as a matter of contract; they afford the only indication in the charter-party whereabouts the vessel is, and the only thing that affords the charterer any information when he will be likely to be able to ship his cargo. The words are not in the nature of description. In *Gorrie v. Perrin* (2 C. B., N. S., 681), the words expected to arrive per a certain ship were held to be a warranty that the goods were then on their way. In *Oliver v. Fielden* (4 Ex. 135), by the charter-party it was agreed a new ship was about to be launched and ready to receive cargo in May, should load on board a cargo of timber, and it was there held that the readiness to receive a cargo in May was a

condition precedent to the plaintiff's right to recover for not loading a full cargo. I do not think that the words can be made out to be matter of description; there must therefore be judgment on the demurrer to the plea for the defendant, and on the demurrer to the declaration for the plaintiff.

Attorneys for plaintiff, Walter and Hanson.

Attorneys for defendant, Pritchard and Son.

Saturday, May 31, 1873.

ROBINSON v. KNIGHT AND ANOTHER.

Charter-party—Lump freight—Loss of part of cargo by excepted perils—Deduction from freight.

By charter-party it was agreed that the ship should load a cargo of lathwood and a deck load, and "proceed to London and deliver the same, being paid freight as follows, viz. a lump sum of 315*l.* . . . the freight to be paid in cash, half on the arrival, the remainder on unloading and right delivery of cargo." The ship took her cargo accordingly, but on the homeward voyage the deck load was washed overboard and lost, by the excepted perils of the sea, without default of the shipowner. The rest of the cargo was rightly delivered:

Held, that the charterer was not entitled to deduct from the lump freight a sum proportioned to the amount of cargo which had been so lost, but that the whole freight was earned by the shipowner.

The Norway (Bro. & L. 404), followed.

Action in the Lord Mayor's Court to recover a sum of 16*l.* 19*s.* 9*d.* for freight under a charter-party.

By charter-party of 3rd Oct. 1870, it was agreed between the owner of the ship Nile and the defendants, merchants of London, that the vessel should go to Riga thence to load at two places named a full and complete cargo of lath wood, the ship to be provided with a deckload, and "that the ship so loaded shall proceed to London and deliver the same, being paid freight as follows, viz. a lump sum of 315*l.*, the cargo to be taken from the side of the ship, freight to be paid in cash, half on the arrival, the remainder on unloading and right delivery of cargo, less four months' discount."

The charter contained the usual clause, excepting losses by perils of the sea, &c.

The ship went to Riga, then loaded a full cargo with a deck load, and returned; but on the homeward voyage the deck load was, without default of the shipowner, washed overboard and lost by the perils of the sea.

The rest of the cargo having been delivered, the plaintiff claimed his lump freight, but the defendant sought to deduct therefrom a sum of 16*l.* 19*s.* 9*d.* in respect of the deck load lost, whereupon the plaintiff sued to recover the 16*l.* 19*s.* 9*d.*

The cause was tried by the Common Serjeant without a jury, when the defendants denied their liability to pay freight for the part of the cargo lost. Verdict for the 16*l.* 19*s.* 9*d.* Leave to move to enter a nonsuit.

A rule having been obtained accordingly upon the authorities following, viz.—

Wright v. Cooper, 1 Brownlow, 21;

Abbott on Shipping, 11th edit. 394;

Smith's Mercantile Law, 7th edit. 325;

Dakin v. Oxley, 15 C. B., N. S., 646; and

The Norway, 3 Mar. Law Cas. O. S. 17, 168, 254; 12

L. T. Rep. N. S. 37; Bro. & Lush. 377.

C. P.]

ROBINSON v. KNIGHT AND ANOTHER.

[C. P.]

Grantham showed cause.—There was in effect a demise of the ship. The defendants have had the use of the whole vessel, and the plaintiff is entitled to the sum agreed upon for freight without deduction in respect of the part of the cargo which was lost, through no default on his part but, by the excepted perils. *The Norway* (2 Mar. Law Cas. O. S. 17, 168, 254; 12 L. T. Rep. N. S. 57; Br. & L. 377) was cited on moving the rule. There it was held that in all cases of short delivery under a bill of lading, a deduction may be made from the freight of such proportion as would have been payable if the goods had been delivered, and this, even though the freight be lump freight, but must, if necessary, be the subject of a separate action. But here the cargo was lost by excepted perils, which was not so in the *Norway*, and which distinguishes this case from that. [BRETT, J.—Dr. Lushington in that case says (2 Mar. Law Cas. O. S. 172), "The freight is lump freight, and it is urged on behalf of the defendant that lump freight should be apportioned, that the deduction would be difficult if not impossible to calculate, and consequently that the only remedy open to the shipper is that of an action for damages. On the other hand, Mr. Lush argued for the plaintiffs, that if there was any difference between lump freight and freight per tale, it was, that in the case of lump freight, if any part of the cargo shipped was not brought to the port of destination, the shipowner in an action for freight could not recover any freight at all, because he would not have observed his own part of the contract, and in favour of this proposition he cited the old case of *Bright v. Cooper* (1 Brown, 21). There seems to have been no recent decision on the point, and on consulting the various text-books on the subject, I find that they all speak doubtfully as to what would be decided if a case like the present was to arise, and the court must therefore fall back upon considerations of equity."] In *Dakin v. Ouley* (2 Mar. Law Cas. O. S. 6; 10 L. T. Rep. N. S. 268; 15 C. B. N. S., 268; 15 C. B. N. S., 646) it was held that it is no answer to an action by a shipowner against the charterer to recover freight, that, by the fault of the master and crew, and their negligent and unskillful navigation of the vessel, the cargo was damaged so as, upon the arrival at the port of discharge, to be then and there of less value than the freight, and that the charterer abandoned it to the shipowner. [BRETT, J.—There the whole cargo of coal arrived in specie, though damaged. But I find the *Norway* went to the Privy Council, and the loss of part of the cargo having been occasioned by perils of the seas, the court held that, under the bills of lading and charter-party, the master's lien on the residue for freight extended to the entire lump freight without deduction (2 Mar. Law Cas. O. S. 254; Bro. & Lush. 404). Now, there is a decision directly in your favour. It is. [BRETT, J.—But the charter was in somewhat different terms, for the sum of 11,250*l.* was to be paid as freight "for the use and hire of the ship." A little stronger phrase than is to be found here, perhaps, but both cases are governed by the same principle. The payment here is in effect to be for the use and hire of the vessel. [BRETT, J.—It is clear from the judgment of Dr. Lushington that he put the case entirely on the ground of the jettison having been caused by the neglect of the master; and in the Privy Coun-

cil the Court say (p. 257), "It is right to add that we do not mean to express an opinion that, even if the jettison and sale had been attributable to the negligence of the master, there ought to have been a deduction. Perhaps in this case the proper remedy of the shipper would have been by a cross action."]

Cock in support of the rule.—In the *Norway* (sup.) there was a clear demise of the vessel, and Knight Bruce, L.J. (in the course of the argument, see B. & L. 406) pointed out that the shipper had had the full value of the use of the ship. Here, however, are no such precise words. The contract for lump freight was merely made with reference to the nature of the cargo, the quantity of which could not be so easily ascertained by piece as when bales, &c. are shipped. Logs of wood would doubtless vary in size a good deal; and, therefore, it would be more convenient to estimate them in bulk and say, "For the shipment of wood delivered, you shall pay freight 315*l.* And for so much as is not delivered a proportionate deduction may be made."

KEATINGE, J.—I think the rule must be discharged. This is a question which arises on the right of the shipowner to recover the whole of a sum described as lump freight, without any deduction in consequence of the loss of the deck cargo contemplated by the charter-party, which loss occurred through no default on the part of the shipowner. Now the charter was entered into on the 3rd Oct. 1872, and by it the ship was to go to Riga, and there to load, at two places named, a full and complete cargo of lath wood, the ship to be provided with a deck load. Then it provides "that the ship, so loaded, shall proceed to London and deliver the same, being paid freight as follows, viz. a lump sum of 315*l.*, the cargo to be taken from the side of the ship; freight to be paid in cash, half on the arrival, the remainder on unloading and right delivery of cargo, less four months' discount." The ship took in a full cargo, and took the deck load contemplated by the charter. But that deck load was lost by perils of the sea and without any default by the shipowner. The question is whether the shipowner is entitled to recover the full amount of 315*l.*, or whether there should be a proportionate deduction in respect of the freight payable on the deck load which was so lost without the default of the shipowner. Some things are quite clear in this case. There seems to be no doubt that, under this charter, if the charterers had loaded less than a full cargo, the shipowner would have been entitled to a payment of the whole lump freight. Can any real distinction in principle be established between a deficiency in the cargo caused by cargo not having been originally put on board, or a deficiency caused by peril of the sea without default of the shipowner? It seems to me that there can be no such distinction in principle. The only case relied on in moving this rule seems to be that of the *Norway* decided in the Admiralty Court by Dr. Lushington, and afterwards taken to the Privy Council. We have before us the decision of the Court on the appeal. There, on a charter-party not altogether identical with this, but, on the other hand, not distinguishable in principle, the Judicial Committee of the Privy Council held the shipowner entitled to the lump freight without any deduction in consequence of losses occurring without anything that could be charged as negli-

C. P.]

RODOCANACHI AND OTHERS v. ELLIOTT AND OTHERS.

[C. P.]

gence in the shipowner. The terms there were, in every respect, very similar to those now in question; and it is to be observed that a portion of the lump sum was to be paid in advance, and the remainder on the true and sufficient delivery of cargo at the port of discharge, similar words to those in the present charter, yet, nevertheless, they held that the whole lump sum was recoverable, although part of the cargo was lost. In the *Norway*, as was pointed out by my Brother Brett, during this argument, Sir E. Vaughan Williams says, that although the charter expressed the sum to be paid as freight, yet it was for the "use and hire of the ship," and this lump sum was to cover both the out and inward voyage. Now, I do not think that that makes any substantial distinction between the two cases, because it was not the less one entire sum to be paid for one entire service. What was the service for which it was to be paid? Was it the bringing and delivery of all cargo which might be on board, or bringing cargo which might be put on board, and was not, but without default of the shipowner? Sir E. V. Williams said, "It was objected on behalf of the respondent that by the charter-party the remainder of the lump sum is made payable only on 'true and final delivery of the cargo at the said port of discharge.' But this does not necessarily mean that the whole cargo originally shipped must be delivered. It may well have been intended merely to fix the time for payment to be the time of the delivery of such cargo as the ship brings with her to the port of discharge" (2 Mar. Law Cas. O. S., p. 257). It seems to me that the same construction can be put on this charter-party. I think the better opinion is clearly that where a portion of the cargo has been lost without any default on the part of the shipowner, he is entitled to be paid his lump freight, even although there has been a partial loss.

BRETT, J.—It is quite true that the terms of this charter are not exactly the same as those apparently were in the *Norway*. But in the present case I think that the freight is a stipulated payment of a gross sum for the use of the whole ship for the whole voyage. Under these circumstances the rule is that in the first place the gross sum will be payable, although the merchant has not fully laden the ship, for the owner has put his ship at the disposition of the freighter to load with a full and complete cargo, if the freighter so please, but if he do not so please, and the voyage be completed the shipowner will be entitled to the lump sum. He has under his contract given the use of the ship for the purpose of carrying a cargo to the extent the freighter chooses to put on board. Therefore, it seems to me, the charters in this case, and in that of the *Norway*, are the same. In the *Norway*, it may be observed the freight was called in both courts a "lump freight," and was so treated. I do not think that either under that charter, or under this, there was what is called a "demise" of the ship, the vessel remaining in both cases in the possession of the shipowner. But it is one gross sum for the use of the entire ship, instead of a sum to be paid for each part of the cargo carried. Then the fact that the freight is to be paid half on arrival and the other half on unloading and right delivery of cargo, as in the *Norway*, was relied on to show that it would be payable on the delivering of the cargo. What cargo? Such as the freighter

chooses to put on board. Now, in this case, it is admitted that the disputed part of the cargo was lost by perils of the sea, within the excepted perils—therefore, not only lost without default of the shipowner but, positively a loss within the exception. In the case of *Norway* before the Privy Council, the court doubted whether even if the cargo was lost by the shipowner he would not be entitled to full freight, leaving the freighter to bring an action against him. But here the loss was without any default. Then, if this be in fact the same case as the *Norway*, that is a distinct authority for saying that the innocent loss of a portion of the cargo does not entitle the freighter to deduct any part of the lump sum. Although a decision of the Privy Council is not in one sense binding on us, I think that court has put the true interpretation on the contract, and that the freighter bound himself to pay the full sum of 315*l.* for whatever things were brought to England. (a)

Rule discharged.

Attorneys for plaintiff, Webb and Pearson.
Attorneys for defendants, Pearson and Lee.

May 29 and June 2, 1873.

RODOCANACHI AND OTHERS v. ELLIOTT AND OTHERS.

Marine policy—Terrene risk—Goods shut up in besieged town—"Restraint of princes"—Notice of abandonment—Total loss.

Plaintiffs effected an insurance with the defendants by a Lloyd's policy in the ordinary form, "lost or not lost, at and from Japan ^{and} Shanghai to Marseilles ^{and} Leghorn ^{and} London, via Marseilles ^{and} Southampton, and whilst remaining there for transit" on silks against the usual perils—"arrests, restraints, and detainment of princes," &c., and it was agreed that the silks should be shipped by any of three designated lines of steamers, one of which was the *Messageries Impériales*. That company, as was well known to underwriters, always sent such goods overland through France, i.e., by the Lyons Railway from Marseilles to Paris, and thence by the Northern Railway to Boulogne, and thence to London. The silks were shipped at Shanghai for London on board a steamer of the *Messageries Impériales*, and reached Marseilles on the 27th Aug. 1870. There was then, and from the 15th July previously had been war between France and Germany. The silks were despatched by the Lyons Railway and arrived in Paris on or before the 13th Sept. The German armies, which were at that time advancing upon and gradually surrounding Paris, on the 19th completely invested it, held military possession of all the roads leading out of Paris, and prevented communication between it and all other places, by reason whereof it was impossible to remove the silk from Paris. This state of siege continued, and on the 29th Sept., while the silks were detained in Paris, the plaintiffs gave notice of abandonment to the underwriters:

Held, that the policy covered the terrene risk of the transit through France, that the goods were lost by the perils insured against, viz., restraint of princes; that notice of abandonment was given in season.

(a) This case has since been followed by the Court of Queen's Bench in *Merchant Shipping Company v. Armistage* (L. Rep. W. N., June 14, 1873).

C. P.]

RODOCANACHI AND OTHERS v. ELLIOTT AND OTHERS.

[C. P.]

able time; and that, therefore, the plaintiffs were entitled to recover the sum insured from the underwriters as for a total loss.

ACTION to recover 400*l.* on two policies of insurance—and the following Case was stated without pleadings.

1. The plaintiffs effected insurances on silks by two policies in the ordinary form of Lloyd's policies. By one dated 24th March 1870, which was for 15,000*l.*, they caused themselves in the words of the policy to be insured as follows, that is to say:

Lost or not lost at and from Japan ^{and} Shanghai to Marseilles ^{and} Leghorn ^{and} London, ^{via} Marseilles ^{and} Southampton and whilst remaining there for transit, with leave to call at any ports or places in or out of the way for all purposes.

2. The subject matter to be insured is in the policy described as follows:

The said ship and goods and merchandises, &c., for so much as concerns the assured by agreement between the assured and assurers in the policy, are and shall be valued at 15,000*l.*, being on silks, to be hereafter valued and declared.

3. The risks insured against are described in the policy as follows:

Tonching the adventures and perils which the assureds are contented to bear and do take upon us in this voyage, they are of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and counter mart, surprisals, takings at sea, arrests, restraints, and detentions of all kings, princes, and people of what nation, condition, and quality soever, heratry of the master and mariners, and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandises or ships, &c., or any part thereof.

4. In the margin of this policy is a memorandum in the following words:

It is hereby agreed that the silks insured by this policy shall be shipped by Peninsular and Oriental Company, Messageries Imperiales steamers ^{and} the steamers of the Mercantile Trading Company of Liverpool only. And it is further agreed that on shipments by the last-mentioned company's steamers, 20*o.* additional shall be charged.

5. In the above policy, dated the 8th April 1870, which was for 1000*l.*, the voyage and the subject matter insured against are described in terms nearly the same as in the first mentioned policy.

6. The defendants underwrote each policy for 200*l.* (Copies of both policies were in the Appendix to this case, and might be referred to as part of this case.)

7. Sixty-four bales of silk, the subject of this action, were shipped at Shanghai on board the Messageries Imperiales steamer *Phase*, and consigned to the plaintiffs under a bill of lading dated 7th July 1870. (A copy whereof was in the Appendix.)

8. The silks were duly declared on the before-mentioned policies and valued at 11,220*l.*, and 3625*l.*, part of the said sum of 11,220*l.*, was declared on the first policy, and 7593*l.*, the residue of the said sum of 11,220*l.*, was declared on the second policy. These declarations were endorsed on the policies respectively. (Copies of these declarations were in the Appendix.)

9. At the time of the said declarations, and thence until the giving of the notice of abandonment hereinafter mentioned, the plaintiffs were interested in the silks to the amount of the said sum of 11,220*l.*

10. The silks were carried in the said steamer *Phase* from Shanghai to Hong Kong. They were there transhipped to the steamer *Peiho* of the same company, the Messageries Imperiales, and they were carried on board the said steamer *Peiho* through the Suez Canal direct to Marseilles. This is the ordinary course of business of the Messageries Imperiales in carrying the goods from Shanghai to Marseilles. Goods from Shanghai for Marseilles are carried by that company from Shanghai to Hong Kong by a branch line of steamers, and the steamers for Marseilles start from Hong Kong. The silks arrived at Marseilles on board the said steamer *Peiho* on the 27th Aug. 1870.

11. The Messageries Imperiales carry goods at through rates from Shanghai to London. Freight upon the silks was paid to the Messageries Imperiales from Shanghai to London.

12. (As amended at suggestion of the Court.) Before and at the time of the insurances, the steamers of the Messageries Imperiales ran from the East to Marseilles and no further. Of those of the Peninsular and Oriental Company, one line ran to Marseilles and no further; another ran direct to Southampton. Those of the Mercantile Trading Company ran direct to Liverpool. Goods were never in the ordinary course of business carried from China, Japan, or India to London *via* Marseilles, except by the Messageries Imperiales, and that company always sent such goods overland through France, that is to say, by the Lyons Railway from Marseilles to Paris, and thence by the Northern Railway to Boulogne, and thence to London. Silk is usually, but not invariably, sent by *petite vitesse*. It was well known among underwriters that goods sent from China, Japan, or India to London *via* Marseilles were always sent overland through France.

13. At the time when the silks reached Marseilles there was, and from the 15th July previously had been war between France and Germany.

14. On the 15th July 1870 a decree of the French Government was issued in accordance with the laws of France, whereby both the Lyons Railway Company and the Northern Railway Company were bound immediately to place at the disposal of the French Minister of War all their means of transport; and whereby the said companies were also empowered to suppress passenger or goods trains as far as might be necessary to carry out the before mentioned order. (A translation of so much of the decree as was material was in the Appendix.)

15. Notice of the before mentioned decree was on the 16th July 1870 sent to every station on each of the said railways respectively. A copy of this decree was posted up in every station of the said Lyons Railway.

16. After the date of the before mentioned decree each of the said railway companies continued to receive goods for carriage and to carry them in the ordinary course, except as hereinafter mentioned, until such carriage was interrupted at the times and in the manner hereinafter mentioned.

17. Goods sent from Marseilles to Paris, and carried by the Northern Railway from Paris to Boulogne for London, continued to leave Paris regularly till the 6th Sept. and to arrive in London regularly till the 7th Sept. 1870. On the 10th

C. P.]

RODOCANACHI AND OTHERS v. ELLIOTT AND OTHERS.

[C. P.]

Sept. 1870 carriage by the said railway from Paris to Boulogne became, and thence until after the giving of the notice of abandonment hereinafter mentioned, and until after the commencement of this action, continued to be impossible and ceased altogether in consequence of the German armies having taken possession of parts of the said railway, and intercepted all communications by such railway between Paris and Boulogne. During the month preceding the said 10th Sept. 1870, the time occupied in the journey between Marseilles and London varied greatly. The time ordinarily occupied in that journey is eight days for goods sent by *petite vitesse*.

18. On the 29th Aug. 1870 the plaintiffs received in London a letter from their agent at Shanghai, informing them of the shipment of the silk. This letter came from Shanghai to Marseilles by post in the same steamer with the silks.

19. On the same 29th Aug. 1870 the plaintiffs wrote to their agents, Messrs. Rodocanachi, of Marseilles, a letter containing the following terms:—

We have received advice from Shanghai of the sixty-five bales of silk R. S. C. 1855 consigned to us by the *Phlox* steamer and overland, that is to say, by the mail which has just arrived, and we find in the advice the following clause:—"To be warehoused at Marseilles at the company's expense during one month, and to await orders from the consignee." Be good enough, therefore, to give orders to the agent that the silks may be forwarded to London.

On the same day the plaintiffs wrote to their said agents at Marseilles another letter containing the following terms:

The first 65 bales from Shanghai are coming by the French steamer, and the freight is paid to London. We do not doubt that you have given orders to send them here. They are insured, including war risk.

These letters would in the ordinary course of post reach Marseilles on the 31st Aug. 1870.

20. On the 31st Aug. 1870 Messrs. Rodocanachi, of Marseilles, sent the director of the Maritime Service of the Messageries Impériales a letter, of which the following is the translation:

Marseilles, 31st Aug. 1870.

The Director of the Maritime Service of the Messageries Impériales.—In town. We receive the orders of Messrs. Rodocanachi, Sons, and Co. to despatch to London the 65 bales of silk, "R. S. C." arrived from China by the French steamer, *Phlox*, which you hold in warehouse to their orders. We forward you their order at once, begging you to have the goodness to execute it to-day, if possible. We have, &c.

(Signed)

F. & K. RODOCANACHI.

21. On the same 31st Aug. 1870 Messrs. Rodocanachi, of Marseilles, wrote to the plaintiffs in London a letter, from which the following is an extract:

We are glad to hear that you have insured the 65 bales of silk, including war risk, and we have ordered them to be forwarded to London, as you will see by the enclosed copy of our letter to the Messageries Impériales.

22. The silks were delivered to the Lyons Railway Company on the 2nd Sept. 1870, and a receipt for them was given by that company. [A copy of this receipt, and of the endorsement thereon was in the Appendix.]

23. The silks were despatched from Marseilles on the 3rd Sept. 1870 by *petite vitesse*.

24. The silks arrived at Bercy on or before the 13th Sept. 1870. Bercy is the railway station in

Paris, at which goods sent by the Lyons railway arrive.

25. At the time of the arrival of the silks at Marseilles, and thence, until and after the arrival of the silks at Bercy, the German armies had invaded and occupied a large part of France, and were advancing upon and gradually surrounding Paris, which state of things continued until the 19th Sept. 1870, on which day the German armies completely invested Paris. From the last-mentioned day until the giving of the said notice of abandonment, and thence until the commencement of this action, they completely surrounded and besieged Paris, and held military possession of all the roads leading out of Paris, and prevented communication between Paris and all other places, by reason whereof it was during all this time aforesaid impossible to remove the silk from Paris.

26. On the 29th Sept. 1870, while the silks were detained in Paris as above-mentioned, Messrs. Rodocanachi, of Marseilles, received from the Messageries Impériales a letter informing them of the detention of the silk at Bercy. (A translation was in the Appendix.)

27. On the 7th Oct. 1870 the plaintiffs gave notice of abandoning the silks to the defendant and the other underwriters. (A copy of the notice was in the Appendix.)

28. After the commencement of this action the silks were forwarded to London, and they arrived in London in an undamaged state on the 20th March 1871.

29. A correspondence, commencing on the 17th March and ending on the 9th May 1871, took place between Messrs. Markby and Tarry, the plaintiff's attorneys and solicitors, and Waltons and Bubb, the defendant's attorneys. (A copy of this correspondence was in the Appendix.) The notice referred to in the letter of the 17th March 1871, from Messrs. Markby and Tarry to Messrs. Waltons and Bubb, was a notice of the arrival of the silks in London received by the plaintiffs from the Messageries Impériales. The plaintiffs, taking upon themselves to act for the benefit of the underwriters, dealt with the silks in the manner hereinafter mentioned.

30. On the 2nd Sept. 1870 the plaintiffs had by a written contract bearing date that day sold the silks to arrive, on the terms that the prompt should be four months from making, and that in the event of the silks not arriving the contract was to be null and void. (A copy was in the Appendix.)

31. When the silks arrived in London the prices of silks were about the same as at the time when the contract of the 2nd Sept. 1870 was made.

32. The purchasers elected to take and did receive the silks after their arrival in London under the last mentioned contract and paid the plaintiffs the net price of 9362. 12s. 6d., in accordance with the terms of the contract.

33. The court might draw inferences of fact.

34. A claim was made on behalf of the plaintiffs before the arbitrator, by whom this case was stated, to recover as for a partial loss of the silks, first in respect of an alleged loss of weight in the silks by a natural process of drying, during and in consequence of their detention in Paris, and secondly, in respect of loss of interest upon the purchase money to be received for the silks during the period of such detention.

C. P.]

RODOCANACHI AND OTHERS v. ELLIOTT AND OTHERS.

[C. P.]

The questions for the court were: First, whether the silks were covered by the policies at the time of the alleged loss; secondly, whether the plaintiffs were entitled to recover for a total loss of the silks; thirdly, whether the plaintiffs were entitled in point of law to recover as for a partial loss, in respect of the matters mentioned in par. 34, or either of them.

If the court should be of opinion in favour of the plaintiffs on the first question, and that there had been a total loss, judgment was to be entered for the plaintiffs for an amount to be ascertained as the court shall direct, with the costs of suit.

If the court should be of opinion in favour of the plaintiffs on the first question, and that the plaintiffs were entitled in point of law to recover as for a partial loss, in respect of the matters referred to in the third question, or either of them, the case should be referred back to the arbitrator, by whom this case was stated, to find what sum (if any) was recoverable in respect of such matter or matters, and in such case judgment should be entered for the plaintiffs for the amount (if any) which should be found to be so recoverable with the costs of suit. And if nothing should be found to be so recoverable, judgment should be entered for the defendant for his costs.

If the court should be of opinion in favour of the defendant upon the first question, or upon the second and third questions, judgment should be entered for the defendant for his costs.

Field, Q.C. (with him *Thesiger*) for the plaintiffs.—First, the risk was covered by the policy. The voyage actually made, viz. to London *via* Marseilles, was within the policy, and the words in the description of the voyage, "whilst remaining there for transit," apply to any of the voyages stipulated for which involve land transit, as the voyage in question undoubtedly did to the knowledge of the underwriters (par. 12). Part of the journey was clearly *terrene*.

Secondly, the loss was caused by one of the perils insured against, viz. an arrest, restraint, or detainment of princes. There are no English cases precisely in point, but the American case of *Oliveira v. The Union Insurance Company* (3 Wheat. 183; 4 Curtis, 193) is nearly so, where it was held that a vessel within a port blockaded after the commencement of her voyage, and prevented from proceeding on it, sustains a loss by a peril within this clause of the policy insuring against the arrest, restraint, and detention of kings, &c. for which the insurers are liable. [BRETT, J.—But a blockade is for the very purpose of preventing ships going out of the port.] Just as the investment of Paris, in the present case, was to prevent the exit of men and goods. [BRETT, J.—Does no English case decide that blockade is an arrest?] None; but there is one in which it was held that the fear of arrest preventing the master of a vessel from entering a port did not amount to a total loss.

Hodkinson v. Robinson, 3 Bos. & P. 289;

Lubbock v. Rowcroft, 5 Esp. 30;

Barker v. Blake, 9 East. 283.

Those three cases are the only English authorities bearing on the question. In *Oliveira v. The Union Insurance Company* (sup.), Marshall, C.J. delivering the judgment of the Supreme Court of the United States says, "The question, whether a blockade is a peril insured against is one on which the court has entertained great doubts. In

considering it, the import of the several words used in the clause has been examined. It certainly is not 'an arrest,' nor is it a 'detainment.' Each of these terms implies possession of the thing by the power which arrests or detains; and in the case of a blockade the vessel remains in the possession of the master. But the court does not understand the clause as requiring a concurrence of the three terms, in order to constitute the peril described. They are to be taken severally; and if a blockade be a 'restraint,' the insured are protected against it, although it be neither an 'arrest' nor 'detainment.'" (p. 194.) (He also read other passages of this judgment, which are cited by Bovill, C.J. *infra*.) That is a case precisely analogous to the present one. [BRETT, J.—The ship there was within a blockaded port, but I believe the American courts have gone still further and held that a blockade preventing entrance into the port is restraint.] In *Saltus v. The United Insurance Company* (15 Johns. N. Y. Sup. Ct. Rep. 523), an American brig bound for St. Petersburg during our war with her country put into Wingo Sound, near Gothenburg, as a place of safety; but it was impossible for her to pursue her voyage without the certainty of capture. The Baltic was thronged with British cruisers; several were stationed in Wingo Sound, one or more of which were always in sight from Gothenburg, and the vessel must have attempted to pass them to get to sea. The voyage was in consequence abandoned. Thompson, C.J. delivering judgment said, "The loss in this case may, I think, fairly fall within the risk of restraint of princes or of men-of-war. It is not necessary to constitute a loss by the peril, that actual physical force should be applied to the subject insured;" (p. 528). Exclusion may not be restraint; but here was restraint. The American authorities seem to show that the fact of the master abandoning the voyage merely *quia timet*, is not enough to be a total loss; but in the present case there was actual inability to move. *Geipel v. Smith* (ante, vol. 1, p. 268; L. Rep. 7 Q. B. 404; 26 L. T. Rep. N. S. 361) was an action on a charter-party against English shipowners for refusing to let the ship take goods to Hamburg according to their agreement; they pleaded the blockade of the port by the fleets of France, and that an attempt to run the blockade would contravene a British proclamation of neutrality, and it was held that they were justified in throwing up the contract as the further performance was prevented by an excepted cause, viz. the blockade, which was a "restraint of princes." [BRETT, J.—But the clause there was in a charter-party, to which case the doctrine of *causa proxima* does not apply.] It is difficult to understand the distinction between *causa proxima* with reference to a charter, and with reference to a policy, although a distinction certainly exists. If not a restraint this was an arrest: (*Bird v. Jones*, 7 Q.B. 742.) There the plaintiff attempting to pass in a particular direction, was obstructed by defendant, who prevented him from going in any direction but one, not being that in which he had endeavoured to pass; and it was held to be no imprisonment, for as Coleridge, J. said, "A prison may have its boundary large or narrow, visible and tangible, or, though real, still in the conception only; it may itself be movable or fixed; but a boundary it must have." . . . The restraint must be within a circumscribed space, and here it

C. P.]

RODOCANACHI AND OTHERS v. ELLIOTT AND OTHERS.

[C. P.]

was so. [BRETT, J.—What difference is there between this case and capture?] Very little. [BRETT, J.—Considerable, for the German armies never took your goods but let them lie in Paris, saying, only "if they come out we will capture them." Nevertheless, the American cases are strongly in your favour, as the reasoning in them seems to be that an arrest means taking possession, therefore restraint must mean something other than taking possession.] Thirdly, there was at the time of the notice of abandonment such a state of things as to give rise to a reasonable probability that the assured would be deprived of the ownership of the goods for an indefinite period, and therefore he was justified in abandoning.

Ross v. Salvador, 3 Bing. N. C. 166.

Day, Q.C. (J. C. Mathew with him), for the defendants.—First, the policy only covered the goods while they were water borne. *Prima facie*, a marine policy only applies to risks which may be incurred while the objects insured are afloat, and does not cover terrene risk. Moreover, there is in the present policy a clear intention to cover marine risk only. "The general rule, in fact, is clear, that the underwriter in a sea policy insures only against sea risks; the risk on goods, therefore, ends directly they are put on *terra firma*, unless they are placed there only for a temporary purpose, or under such circumstances as to be protected by the usage of trade." Aronold on Insurance (4th edit.), p. 369, citing *Harrison v. Ellis* (7 E. & B. 465), where although there was a memorandum on the policy giving liberty to load, reload, &c. goods on the coast of Africa, it was held that the policy embraced only maritime risks; and Lord Campbell, C.J., asked during argument, "Can the marine policy be extended to goods on shore without something on the face of the policy so to extend it?" and said in his judgment, "I can see here no words that can be reasonably extended to cover goods on land;" (p. 480.) So in S. C.; 26 L. J. 239, Q.B., *Crompton*, J. says, "I am of the same opinion. I am at a loss to find any words in this policy which would apply to a case of loss on shore. No such intention of the parties is expressed in the policy;" (p. 243.) No doubt two cases exist showing that terrene risk might be included in a marine policy (*Pelly v. Royal Exchange Insurance Company*, 1 Borr. 341; and *Brough v. Whitmore*, 4 T. R. 206), but of the first of them, Campbell, C.J., in *Harrison v. Ellis* (sup.), says, it "is clearly distinguishable. . . . It was an insurance on specific goods which were the furniture of the ship, whether they were in the ship or on land." [BRETT, J.—Would not the same principle apply to cargo? If part of the land is made part of the voyage by the usage, the loss on the island is equivalent to loss on the sea.] In *Australian Assurance Company v. Saunders*, an unreported case decided by this court by Willes and Keating, JJ. on the 26th May 1872, a question somewhat like the present arose. (He referred to the shorthand notes of the judgment.) The point, however, was whether two policies covered the same time. [BRETT, J.—And I understand that the decision was that the policies were not of the same kind, and therefore it did not cover this point. Moreover there was no usage, so the case turned on the terms of the charter.]

Secondly, the policy begins by describing the voyage. The journey is laid out by the opening sen-

tences. Taking Japan and London as the termini, the insurance is between those ports. The earlier words are merely to describe the course without extending the policy to terrene risk. Then "while remaining there for transit," the goods are insured at the places named where they stay for transit, not in transit. If the goods were insured overland those words would be unnecessary, for the goods would then be covered while going to the station and waiting at the intermediate stations; and if it was intended to cover them in transit, why was not that expressed? [BRETT, J.—These words are always inserted to cover the risk of the carrying of the goods from the great ship by small craft to shore.] Yes, they are absolutely necessary to cover the risks at the intermediate ports. If the silks came by a Peninsular and Oriental Company's vessel, they would have to be transhipped, not so if they were brought by one of the other companies. They would be landborne by the Peninsular and Oriental Company through the Desert, and would not be insured during that period. But, as the premia are the same, why should the risks be so varied as the plaintiffs seek to make them? Secondly, as to whether this was a loss by the perils insured against, there has been no loss at all. The goods reached Paris in charge of a carrier appointed by the plaintiffs. Paris was then a town to which persons went at their peril. It was uncertain when they could proceed. The silks were always at the disposal of the plaintiff, who might have disposed of them in Paris. There was no requisition of these goods or threat of seizure by the Germans. They remained in Paris simply because the carriers could not enter. The goods were, figuratively speaking, no more than windboard. [BRETT, J.—By the law of nations the goods of merchants are not touched by captors investing a town, they are only confiscated if an attempt is made to bring them out.] A mere retardation of the voyage is not a good cause of abandonment.

Anderson v. Wallis, 2 M. & S. 249;

Hunt v. The Royal Exchange Assurance, 5 M. & S. 47.

Thirdly, as to the restraint of prices. There is an evident distinction between *Geipel v. Smith* (sup.) and this case; for where a contract is entered into subject to an exception of restraint of prices, the parties are excused from performance when even fear of restraint operates as restraint; but a wide difference exists between a charter and a policy in this respect, for in a marine policy the proximate and not the remote risks are insured against. For example, in *Taylor v. Dunbar* (L. Rep. 4 C. P. 204) meat delayed on a voyage by tempestuous weather became putrid and was thrown overboard—held not a loss by perils of the sea, or within the words "all other perils and misfortunes," &c., in the policy. "Restraint of prices," has never been extended to a case of blockade: (see *Barker v. Blake*, 9 East, 283, per Lord Ellenborough, p. 293.) There the restraint of prices was when the ship was actually seized. Blockade is not equivalent to restraint of prices: (*Foster v. Christie*, 11 East, 205.) There a British ship, insured from Hull to St. Petersburg, having sailed under convoy to the Sound, was afterwards stopped in her course by a king's ship in the Baltic, from an apprehension of hostilities, for eleven days, and then proceeded to a point of rendezvous for convoy, when she waited seven days longer, and then sailed under convoy till the king's officer received

C. P.]

RODOCANACHI AND OTHERS v. ELLIOTT AND OTHERS.

[C. P.]

intelligence that a hostile embargo was laid on British ships at St. Petersburg, when he ordered the fleet back to the place of rendezvous, from whence the ship returned to Hull. Held, that this loss of the voyage was not attributable to the arrest or detainment of kings, &c. but immediately to the fear of the hostile embargo in the port of destination, and therefore not within the policy, though if the ship had not been detained in the first instance by the king's officer, she would have arrived in time at St. Petersburg to have delivered her cargo before the embargo. And see the judgment of Lord Ellenborough thereon (p. 200).

[BRETT, J.—The immediate cause of retardation of the voyage was the king's officer of the ship's own country—clearly not a restraint of princes. Those cases are where there was a blockade of the port into which the ship was going, but here you want a case of blockade of the port in which the goods are. (BOVILL, C.J.—If there had been an embargo here, would that be a restraint of princes?) Certainly; and there is little or no difference between restraint and arrest. (BRETT, J.—Capture is taking possession with intent to change the property; arrest is taking with intent ultimately to restore to the owner; restraint, a prevention of the goods going.) No case in England distinguishes between exclusion and inclusion.

[BRETT, J.—What is the difference between embargo and blockade of a port?] Blockade of a port with neutral goods inside is the same case as where a hostile power for the sake of naval operations refuses to allow the goods to pass out, but there is no war on the goods, nor anything done to them so long as they rest quiet. (BRETT, J.—Embargo still leaves the goods with the owner; it is no claim to seize and sell.) It is a step to seizure. (BRETT, J.—Not so; but a mere prohibition.) In Wheaton's International Law, 842, we read that "a neutral ship can only carry out the goods brought in," which tends to show that there is no analogy between this case and one of naval blockade. Here, the Prussians surrounding Paris, the carriers do not go out for fear, —a remote and not proximate cause of loss. In *Hadkinson v. Robinson* (3 Bos. & P. 392) Lord Alvanley, C.J. says, "Detention of the cargo on board the ship at a neutral port, in consequence of the danger of entering the port of destination, cannot create a loss within the meaning of the policy, because it does not arise from a peril insured against."

[BRETT, J.—You may assume it to be settled, by a number of cases, that exclusion from a port is not restraint according to English law.] The peril is only collateral, and in this respect there is no difference in principle between an exclusive and inclusive blockade (GROVE, J.—Save the material distinction, that in the latter case the goods are restrained, and in the former they are not so. One is a restraint, the other an injunction.) [BRETT, J.—What is your distinction between a blockaded port and a besieged town?] There is a well recognised law of nations applicable to the port, and none, apparently, to a town besieged.

Field, Q.C. replied.

BOVILL, C.J.—I have never entertained the least doubt but that the object of the insurance in this case was to cover the goods from the time of departure from Japan ^{and} Shanghai until they should have arrived at the terminus of the jour-

ney, viz., at London, and that the general intention was that all risks should be covered, both during the transit on land as well as during the transit by water, and on board ship. The question is whether that intention is or is not expressed by the terms in which the policy is framed. That must depend, of course, on the language of the instrument itself. But in discussing the question as to the meaning of the policy we must not forget what was the whole course of business; and, therefore, to what particular mode of transit the terms of the policy must be considered to apply. The course of business is stated in par. 12 as amended. [His Lordship read that paragraph.] It has been admitted, and properly so, by the learned counsel for the defendants in argument (although there is no statement in the case to that effect) that silks for London coming *via* Southampton, would pass from Southampton to London, overland, in the ordinary course of business. That, also, must be assumed to have been known to the underwriters here. Now, what are the terms of this policy? The statement of the insurance is this: the plaintiffs caused themselves to be insured, "Lost or not lost, at and from Japan ^{and} or Shanghai to Marseilles ^{and} Leghorn ^{and} London ^{and} *via* Marseilles ^{and} Southampton, and whilst remaining there for transit with leave to call at any ports or places in or out of the way for all purposes." According to the understood usage in mercantile business, the words "^{and} London *via* Marseilles," necessarily include a passage from Marseilles, overland, through France, and the meaning to be placed upon these words must be the same as if it had been expressly stated on the face of the policy "^{and} London, *via* Marseilles, by railway through France and then to Boulogne and London," clearly including a journey overland. Then come the words, "^{and} Southampton;" and it is equally admitted that they would mean the voyage or journey to Southampton, and thence overland to London. The description, therefore, of the nature of the voyage or journey insured, clearly describes a journey both by land or water; and I should say, under these circumstances, the fair interpretation of the policy is that the goods were intended to be covered by a policy insuring them against loss by the risks mentioned, during the whole transit, whether by land or water. Mr. Day contended that the addition of these words, "and whilst remaining there for transit," shows it was not intended to cover goods while in their transit on land, but, while stopping, or remaining at rest, during the sea passage. I do not think these words have any such effect. The general terms of the policy would cover the goods in course of transit, and those words, if necessary at all, would apply to cases where they were detained for some time while in course of transit, either by land or water. There is another part of the policy which also shows it was contemplated by both parties that a portion of the voyage would be by land, viz., the description of the vessel, "by steamer or steamers *per* overland or *via* Suez Canal," which seems to contemplate the possibility of the goods coming altogether by water through the Suez Canal, or a portion coming

[C. P.]

RODOCANACHI AND OTHERS v. ELLIOTT AND OTHERS.

[C. P.]

overland. Now, "steamer overland" cannot mean by steamer coming overland, and the policy seems intended to cover the transit whether by land or water. The adventure is to begin on goods from being loaded on board ship, but is to continue "until the goods or merchandise shall be arrived at as above." At where? Why, in this case, at London, by a route, partly by water, partly by land, according to the usage and understanding of merchants. Policies of the kind in question are, I believe, not uncommon in cases which have come under my notice. I have known cases where the insurance has been effected covering goods from the west coast of America, coming overland through America, and then in vessels; and here the insurance has covered stopping, &c., not only on the journey to Southampton but to London, and I can see no possible reason why an insurance should not be effected, covering the whole transit. My opinion is that the intention was to cover the transit of the goods until their arrival in London, whether they were upon land or water, and therefore that the risks of transit through France are covered by this policy.

The question then arises whether, by reason of what occurred after the arrival of the goods in Paris, there has been a loss within the terms of the policy which insures the plaintiff from loss "by arrests, restraints, and detainment of all kings, princes, and people of what nation, condition, and quality whatsoever . . . and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandises, or ships, &c. or any part thereof." These latter words of course must mean matters *ejusdem generis* as the preceding. The goods having arrived at Marseilles were sent in the usual course by the Lyons Railway for Paris, and reached there on or before the 13th Sept. 1870, and what happened thereafter is set out in the case. [His Lordship read para. 25, 26, and 27.] The question is whether there was a loss of these goods within the meaning of the policy; and it has been contended that there was not a partial, but a total loss which entitled the assured to abandon; and that notice of abandonment having been given, they are entitled to recover. No doubt those goods existed in specie and were insured. It is equally clear according to our law, that mere delay and interruption of delivery in the ordinary course of things do not give the assured a claim against the underwriters, but it is different if caused by perils insured against. Now has there been a taking or detention of these goods by any of the matters covered by the policy?

It is said there was a restraint or detention by the German army surrounding Paris, which city was in a state of siege and all exit therefrom was impossible. Mere delay will not suffice. There must be a loss by the perils insured against. Has that loss been made out? First, what is the nature of a siege such as that which existed at the time in question preventing all goods from passing out of Paris. It has been argued that it is not like a blockade, but in the American courts the judges have treated a blockade as in the nature of a siege, and a siege is *a fortiori* an interruption of transit in the passage of goods. Blockade and siege are placed very much on the same footing by Grotius and Whentou, nor can I find any distinction between them; and

for cases of this kind I see no difference between an embargo and blockade in so far as each is a restraint of prices. Now is blockade a restraint of prices? Various authorities have been cited wherein the question arose how far a blockade is a restraint of prices causing loss within a policy of insurance; but those cases were where the goods or ships were prevented entering the blockaded port, and it was contended there was loss by restraint of prices; but the answer is, that the immediate loss was the laudable desire of the assured not to incur the risk of attempting to enter the blockaded port, and therefore was no restraint of prices, because the insured objects never were within the port. Then suppose they were within the blockaded port; would there be a restraint of prices? *Geipel v. Smith (sup.)* is a clear and distinct authority on that point. True, the question there arose on a charter-party, the shipowner having abandoned the voyage in consequence of the blockade, and it became essential to consider whether the blockade was a restraint of prices or not. The Lord Chief Justice of England in giving judgment says: "First, is a blockade a restraint of prices? I think it is. It is an act of a sovereign state or prince; and it is a restraint, provided the blockade is effective; and in the eye of the law a blockade is effective if the enemies' ships are in such numbers and position as to render the running of the blockade a matter of danger, although some vessels may succeed in getting through. In such a case the obstacle arises from an act of state of one of the belligerent sovereigns, and consequently constitutes a restraint of prices. The case, therefore, is brought within the exception in the charter-party" (p. 410.) And Blackburn, J. says: "I am unable to see why this was not a restraint of prices; it was clearly a restraint by the then Emperor of France preventing the cargo from being carried on to Hamburg;" (p. 412.) The question then arose as to the defendant being justified in breaking the charter; but throughout the case it is assumed that, if the vessel had been within the blockade, that would have been a restraint of prices, and the case decided, not on any distinction as to the nature of a charter-party, but on general principles, that that was a restraint of prices. Another authority cited for the defendant was *Foster v. Christian (sup.)*, and there, indeed, it was held that the not continuing the voyage for fear of an embargo was not a loss within the meaning of the policy; but the whole argument assumes that if the vessel had been made or subject to embargo, that would have been a restraint of prices.

Mr. Day further contended there was a difference in the meaning of the words "restraint of prices" as employed in a charter-party, and as used in a policy. I am not aware of any such distinction, nor have any cases been cited to show it. There may be a difference in a contract as to restraint of prices justifying the breaking off of the agreement, as in *Geipel v. Smith (sup.)*, and the cases where a party is liable on a policy as an underwriter. But that does not make any difference in considering what is a restraint of prices. Moreover there is an important case in the American courts decided in 1815, viz., *Oliveira v. The Union Insurance Company (sup.)*, which has, I believe, been acted upon as law from that time to the present. One passage of peculiar bearing as to blockade or embargo being a restraint is

[C. P.]

RODOCANACHI AND OTHERS v. ELLIOTT AND OTHERS.

[C. P.]

at p. 189 of 3 Wheaton's Reports (4 Curtis, 193), where Marshall, C.J. says: "What then according to common understanding is the meaning of the term 'restraint?' Does it imply that the limitation, restriction, or confinement, must be imposed by those who are in possession of the person or thing which is limited, restricted, or confined; or is the term satisfied by a restriction created by the application of external force? If, for example, a town be besieged, and the inhabitants confined within its walls by the besieging army, if in attempting to come out they are forced back, would it be inaccurate to say that they are restrained within those limits; the court believes it would not; and if it would not, then with equal propriety may it be said, when a port is blockaded, that the vessels within are confined or restrained from coming out. The blockading force is not in possession of the vessels enclosed in the harbour, but it acts upon and restrains them. It is a *vis major*, acting directly and effectually to them, which prevents them from coming out of port. This appears to the court to be, in correct language, 'a restraint' by the power imposing the blockade; and when a vessel, attempting to come out, is boarded and turned back, this restraining force is practically applied to such vessel." Those observations seem to me very applicable to this case, and I entirely concur in them, and think they ought to be applied to the present case. There is an external force of a sufficient power applied to the whole of Paris and, *inter alia*, to those goods which are absolutely prevented by force from going to their destination.

Under these circumstances was the assured entitled to abandon or not? The case seems to me to be, not a case of capture where the property is intended to be appropriated and taken possession of, and there is no hope of recovery by speedy process but, a restraint in the nature of an embargo; and it is impossible to distinguish it from an embargo on the goods in port, or something in the nature of an arrest and detention of a competent authority, and restraint of princes. Then what is the right of the assured? The point was raised in *Goss v. Withers* (2 Burr. 683), when the vessel was under capture for eight days only; but in the course of delivering judgment, Lord Mansfield, C.J. took occasion to refer also to cases of restraint or embargo, saying, at p. 696, "I cannot find a single book, ancient or modern, which does not say, 'that in case of the ship being taken, the insured may demand as for a total loss, and abandon.' And what proves the general proposition most strongly, is, that by the general law he may abandon in the case merely of an arrest, or an embargo, by a prince not an enemy. Positive regulations in different countries have fixed a precise time before the insured should be at liberty to abandon in that case. The fixing a precise time proves the general principle." We have no fixed time in our law; but I think there must be a reasonable time within which the insured must exercise the power or privilege of abandoning, subject to that he has in case of restraint of princes the right to abandon to the underwriters; if he does so in proper time the underwriters are liable. Here no question is raised as to notice of abandonment having been too early or too late; and I do not think any such question could arise, because a reasonable time was

allowed to elapse to see if the goods were permanently detained or whether it was a mere temporary detention. The detention having taken place was, I think, a restraint by a power within the meaning of the policy, and therefore our judgment must be for the plaintiff.

KEATING, J.—I am of the same opinion. If this case rested altogether and exclusively on the terms of the policy I should have desired more time to consider whether it was not a policy intended exclusively to cover marine risks and not *terrene* risks. But coupling it with the findings of the special case, I come to the conclusion, without difficulty, that it was the intention of the parties that this policy should cover *terrene* risks. It is expressly provided that the goods are to be shipped by any one of three modes of transit, and two out of those three modes necessarily involve a *terrene* risk. They contemplated by the policy to send the goods as they were sent, viz., to Marseilles, then through France, and thence by the Straits of Dover to London. Therefore I think that, having regard to the facts found, the meaning of the policy was clearly to include the risk by land, because the case expressly finds that it was known to both parties that such was the usual and ordinary mode of transit. Consequently, I cannot doubt that that was the voyage from Shanghai to London which was in contemplation.

Then, if the land risk be within the policy, was there such a loss as justified an abandonment? Now, I quite agree with my Lord with respect to the analogy between the siege of a town and blockade of a port. There are not a great many English cases, fortunately, which gave rise to the question as to the position of English goods blockaded in a port. But there are many cases relating to goods which could not get into a blockaded port. I think, however, it stands to reason that the position of goods within the blockaded port would be precisely analogous to an embargo. True, in cases of embargo, it is the sovereign power of the place which directly intervenes, whereas with respect to blockade it is an adverse foreign power preventing the escape of the vessel; but that seems to me a distinction without a difference. There is equally a restraint imposed on the party by the sovereign power; and I think that the case as stated is a particularly strong one, for it is found that during the period referred to it was impossible that the goods could leave Paris. What rendered it impossible? Why the presence of the German army. That surely is restraint of a sovereign prince within the meaning of the policy. I have not from the beginning of the case had the slightest doubt on this policy that there was a restraint of princes. If so, was there a loss within the terms of the policy? It is equally clear that if goods are inclosed beyond the control of the assured they are lost to him for an indefinite time, and then, no doubt, he had a right to abandon; and as he did abandon, he is entitled to recover as for a total loss from the underwriters.

BRETTE, J.—I am of opinion that this policy covered the land transit from Marseilles to Boulogne; and, indeed, if a loss occurred during the land transit it was within the policy just as if during the passage by sea. I think that by the terms of the policy the land transit is made part of the voyage insured. Every individual policy

C. P.]

RODOCANACHI AND OTHERS v. ELLIOTT AND OTHERS.

[C. P.]

is to be construed as any other contract between the parties. Most policies are in ordinary form, and with respect to such there have been many decisions. If the policy is in unusual form the rules applied to ordinary policies must be applied as far as they can be, and beyond this the court must attempt to put a construction upon them according to the meaning of the parties. All policies are framed in somewhat the same manner; the first thing done is to describe the voyage insured, afterwards the duration of the risk is described and made applicable to that voyage already described in the policy. Now, in the case before us one of the voyages (which is sufficient for our consideration) is described as from Shanghai to Marseilles and London *via* Marseilles. By itself we cannot tell what that voyage is. Whatever the voyage described in a policy may be, one must look at the known and usual mode of going from one place to another, and here we find that it is well known to underwriters that the journey to London *via* Marseilles is invariably by land transit through France, and then from Boulogne to London by ship. That being so, the land transit by ordinary railway through France is made part of the voyage insured; but it is said here there are other parts of the policy showing it is not part of it. Mr. Day relied on the phrase "and whilst remaining there for transit;" but I apprehend and believe the ordinary voyage described is the running voyage, with the ordinary stoppages on such running voyage; and whereas there was to be a further delay or landing of the goods during the voyage, there must be a further description to apply to the time during which the goods were not in course of conveyance. Now, here the voyage necessarily involves several transshipments of goods, and landings during the voyage at different places; and hat for those words, "and whilst remaining there for transit," the period of time during which the goods were not actually in transit would not have been covered. And it is very usual in a policy, to cover such period of time during which the goods were not actually in transit, and would not have been covered. And it is very usual in a policy to cover such period of time as is required for landing the goods. The phrase "including all risk of craft and from steamers," was also relied on by the counsel for the defendants. Now, it is peculiar to this policy that several steamers are to be employed, and not as more usual one steamer only; and obviously the goods are to be covered whilst in each steamer; and construing the policy as nearly as possible as we should construe an ordinary one, it would not attach until the goods were in the first steamer, and if it had not been for the last-mentioned phrase I should not have thought the goods covered while in craft going to and from the steamers; and I should think any careful Assured would put in these words to include the times during which the goods were carried to and from the first and to and from the last steamer. It seems to me these words do not interfere with the description of the transit voyage which included the journey from Marseilles to Boulogne. The cases of *Pelly v. The Royal Insurance Company (sup.)* and *Brough v. Whitmore (sup.)* are authorities to show that when either, by a known or agreed usage, or by the terms of the policy, land is made part of the voyage, the risk covered applies to that part as well as to the other. Therefore, on these author-

ities and on the construction of the policy, I think this passage through France was part of the voyage insured. If so, then the description of the duration of risk in the afterpart of the policy must be made applicable to the voyage. And the intention is that the policy shall apply from the beginning to the end of the voyage. Quite true, one must, in some sense, apply the words in an unusual way, as Mr. Day contended; and when Mr. Field relied on them in support of his argument, he went too far and was not promptly by the observation of my brother Grove.

If this part of the transit was covered, the next question is whether there was a loss during that transit by the perils insured against. I think there was a loss here occurring by restraint of princes. It was argued that there was, because the restraint was like to that put on goods in all ships which are within a blockaded port, and that under these circumstances the goods or ships have been held to be within the words, "restraint of princes," and therefore that these goods within a besieged town must be held to be within the words "restraint of princes." True, the American authorities, except as to the description given by Marshall, C.J. in *Oliveira v. The Union Marine Insurance Company (sup.)* would not assist us much, because in America they admit to a great extent that retardation of the voyage is a loss which may be considered, and that if a person is prevented from going into a blockaded port that is a loss by restraint of princes. It has, however, been clearly decided in this country that it is not so, and our law differs from that of America in that respect. Such cases as have been decided in England have proceeded, not on the ground that a blockade is a restraint of princes but, on the ground that if the master, by his own conduct, stops the ship going into the blockaded port, that is the *causa proxima*; or if an order of an officer of our Queen stops the vessel the act of the officer is *causa proxima*, and not the blockade itself. But there is no case on a policy which has decided that when ships or goods are within the blockaded port then the loss is a loss within the phrase "restraint of princes." It is quite clear the goods are not captured, because capture within the terms of the policy means where the goods are seized by a hostile power with intent to change the property in them. Such a case cannot either be an arrest, because the word "arrest" requires an actual taking of the goods; and in the case of blockade or embargo there is no such taking possession, for the goods are left in the possession of the master of the ship for the owner. But there are other words in the policy, and the words "restraint of princes" are the important ones and we must apply to this policy the ordinary rule, that where different words are used in a mercantile instrument one must give sense to each. Here the phrase seems to apply to the case where goods are not taken, but restrained from being carried to their destination by a sovereign power. That that applies to an embargo seems beyond doubt—that it applies to a blockade seems also beyond doubt, because in both cases there is an order by a sovereign power that the goods shall remain where they are, and if an attempt is made to remove them they shall be confiscated. That seems to me as much a restraint as can be when we look to Marshall's, C.J., observations in *Oliveira v. The Union Marine Insurance Company*

(*sup.*) which give a strong authority for the interpretation of the words "restraint of princes" in an ordinary policy. I thought at one time there might be a distinction between the case of a besieged town and that of an embargo where goods are within the port, on the ground that if any one attempts to remove the goods they are confiscated, whereas it is not shown that in international law with respect to goods in a besieged town they would be subject to confiscation if removed. But although they are not to be confiscated by international law, yet it seems to me if any one attempted to carry them out they would be lost by the besieging army stopping the goods, and to suppose they would, having stopped them, hold them, to men whose they are, does not appear likely in the ordinary course of business. They would be lost to the owner. Therefore, practically, the goods are just as much restrained in a besieged town as they are in a blockaded town. Moreover, we have the two authorities justifying us in our decision, viz., the passage from Wheaton at p. 819, which obviously applies to the two cases on the same leaf, and also that of Marshall, C.J. I think these goods were restrained. Then the question is what is the amount of restraining force which, when exercised, will justify an abandonment. I am of opinion that, as when goods are in a besieged town, no one can say how long that restraint will last, there is so great a loss that the owner is entitled to give notice of abandonment immediately, or within a reasonable time after he has news of such restraint as puts his goods into such a degree of loss. Here notice of abandonment was given in proper time, and consequently there was constructive total loss by the perils insured against which became a total loss by notice of abandonment.

GROVE, J.—I am of the same opinion. It has been contended that the strongest words in favour of the plaintiff, "or London *vid* Marseilles" might be fulfilled because the goods might come to London *vid* Marseilles by sea. But, according to the ordinary construction of the policy it would involve a certain portion of land transit. Then Mr. Day further contended (and that seems to be the most forcible argument) that throughout this policy are words connected with maritime matters and a maritime mode of transit, as "all risks of craft," and then that which I pointed out to Mr. Field in answer to a part of his argument, viz., that when the termination of the voyage is dealt with, the words used are, "and upon the goods and merchandises until there discharged or safely landed," which certainly seems *prima facie* applicable to landing from a ship, and not delivering from a railway carriage or van. Probably, the reason is that this passage is copied from some old form of marine policy; and, instead of the policy being entirely remodelled to suit the present mode of transport, the old form of expression has been maintained. It was further argued that the phrase "whilst remaining there for transit," meant to apply to remaining on land. But it seems to me that this was intended to protect the goods *en route et morando*. Then the policy is "from Shanghai or Japan to London *vid* Marseilles." Now it is found in par. 12 that goods coming from Shanghai to Japan and to London *vid* Marseilles do come a considerable portion of the way by land; and if this policy was not intended to be more than a marine

policy, why should it have gone further than Marseilles, for, except the short ship passage from Dover to Calais, the marine risk would have been ended. Why, if those who prepared this policy, which must be taken *fortius contra proferentes*, meant to limit it to the marine risk, they should not have said so, I cannot understand. Therefore, I think that, as far as the risk is concerned, it was intended to cover the whole voyage from Japan or Shanghai to London.

Next, as to the question whether there was restraint of princes. Now there are English cases on insurance in which it has been held that where there is a blockade at the port of destination, the goods being outside thereof, or where the captain of a vessel is only prevented by possibility or probability of risk he will run in arriving at the port of destination, this kind of hindrance does not come within the word restraint, it would be more in the nature of an injunction than restraint. So on land, a person might be kept out of a place by a cordon of troops surrounding it, when he would simply be told, "You must not go there, or if you do you will be captured." But when we consider the converse case of a person inclosed by stone walls or shut up by locked doors, if that be not restraint I know not to what the word "restraint" would apply. For I cannot apply it only to mere physical restraint, such as that of a man held by the hand, or with a chain around his body. A man in prison is as much restrained as if enchained. It is further said that a blockade of a port is different from a blockade of an inland town. The authorities of Wheaton and Grotius are distinct on this point.

Now, there are two kinds of blockade specified in treaties on international law, viz., an effective blockade and a nominal or what is called a paper blockade—the latter being a mere declaration that the place is to be deemed actually blockaded. The most effective blockade of a port is when sufficient ships are there to prevent egress and ingress, yet still that is not absolutely perfect and certain for the blockade may be "ran." But in this instance the case absolutely finds not only that the siege and investiture of Paris was effected, but also that it was certain. The German armies "completely surrounded and besieged Paris, and held military possession of all the roads leading out of Paris, and prevented communication between Paris and all other places, by reason whereof it was during all the time aforesaid impossible to remove the silks from Paris;" (par. 25). There is a direct and absolute finding that the goods could not be removed from Paris. Therefore, this seems to me even *a fortiori* case of blockade. The only remaining question is whether there was a loss which justified the notice of abandonment. The total and absolute loss in specie of the goods could hardly be contemplated by the parties stipulating as to the particular peril insured against, viz., restraint of princes, because when under restraint the goods can scarcely be, in one sense, said to be lost. Therefore "restraint" involves the idea of the goods not being lost in the more common acceptance of the term. So restraint must mean something other than loss of goods. Then what restraint could be, presumptively, of greater duration than that caused by the late siege of Paris in a war which had then been waged a consider-

[Ex.]

FEATHERSTON V. WILKINSON AND ANOTHER.

[Ex.]

able time, and when the risk of bombardment appeared also possible?

Judgment for the plaintiff.

Attorneys for the plaintiffs, Markby and Terry.
Attorneys for the defendants, Walton and Bubb.

COURT OF EXCHEQUER.

Reported by T. W. SALTERS and H. LEIGH, Esqrs.,
Barristers-at-Law.

Friday, Jan. 25, 1873.

FEATHERSTON V. WILKINSON AND ANOTHER.

Charter-party—Damages in consequence of neglect of shipowner—Hiring of other vessels, and increased cost of cargo—Evidence—Onus of proof.

By a charter-party between the plaintiff and the defendants the latter agreed that they would have a ship ready at a certain time to receive a certain quantity of coals to be shipped for a certain foreign port. The defendants having failed in the performance of this contract, the plaintiff was obliged to charter other vessels at a higher rate, and to pay a greater price for his coals, which had risen during the delay occasioned by the defendants' default. It did not appear whether or not the plaintiff was enabled to dispose of such coal at a higher price in consequence of the rise in value. An action having been brought by the plaintiff to recover the loss sustained by the chartering of other vessels, and the difference in the price of the coals:

Held, that he was entitled to recover.

This action was tried before Brett, J. at the last Summer Assizes for Northumberland, when a verdict was returned for the plaintiff, leave being reserved to the defendant to move to enter it for him.

The action was upon a charter-party, and the declaration alleged that it was agreed thereby that the defendants' ship, the *Edith Emily*, should proceed to the Northumberland dock on the river Tyne, and there in the first or second week in Jan. 1872 should load 1300 tons of coal, and carry the same to Havre for delivery on payment of freight; and the declaration alleged that the said ship was not ready to load in the first or second week of January as aforesaid, whereby the plaintiff was put to expense in chartering other ships, and in buying coal to load them with at an increased price.

To this the defendants pleaded payment into court of 27l. 10s., the amount of increased freight, and never indebted as to the residue.

At the trial it appeared that after the making of the charter-party the plaintiff agreed with the proprietors of the Bebside Colliery to take of them 1300 tons of coal at 10s. 6d. a ton in the first or second week in Jan. 1872, and the ship *Edith Emily* was according to custom named by him as the ship to be loaded with such coal, and she was according to custom put on the "turn book" for such weeks. The ship lost her turn by not being ready by the default of the defendants, and, as by the custom of the Tyne, ships are loaded in regular turn, the plaintiff could not get his coal until he had procured another ship to carry it away, which ship would have to wait its turn. The defendants were aware of the custom of the Tyne. It further appeared that the plaintiff lost no time in chartering and loading two other vessels with the coal, but in the meantime the price of coal

had advanced 1s. 6d. per ton, and which advance he was obliged to pay to obtain the coal. No evidence was given that the plaintiff was under any contract to deliver coal at Havre at any stipulated price, and it was contended by the defendants that they were not liable for the higher price which the plaintiff had to pay for the coal, as what he had was proportionately more valuable. At the trial a verdict was returned for the plaintiff for 97l. 10s., being the total additional cost to which he was put, leave being reserved as before mentioned, and the court being at liberty to draw inferences of fact.

Herschell, Q.C. having obtained, in *Miehelmas Term 1872*, a rule to enter the verdict for the defendants upon the ground that the damages were not recoverable as being too remote.

G. Bruce (Holker, Q.C. with him) shewed cause, and contended that the custom being known to the defendants, the damages were the direct consequence of the breach and neglect of the defendants in not having the ship ready for being laden according to the charter-party; that there was *prima facie* evidence of the loss; and that the onus of rebutting this presumption lay upon the defendants, who should show that the plaintiff could have realized at Havre or elsewhere.

Herschell, Q.C., in support of the rule, argued that there was no evidence that the custom as to loading was known to the defendants, nor did it appear that the plaintiff had suffered any loss from having to give more per ton for the coal, since he may have made an equal sum upon its re-sale.

Kelly, C.B.—I am of opinion that this rule should be discharged. The plaintiff contracted with the defendants that he would be ready at a given time to ship a cargo of coals, and that the defendants should have their ship ready to receive it. The defendants failed to comply with their agreement, and the plaintiff had to charter other ships, and purchase coal at a higher price—at an increased price amounting in the whole to 97l. 10s. I think that was *prima facie* evidence, and indeed conclusive evidence of loss, unless rebutting evidence had been produced on the other side, and that such loss was occasioned by the default of the defendants. It was argued, because the coal bought was worth the extra 1s. 6d. a ton given for it, there was no loss, inasmuch as although the plaintiff had paid 97l. 10s. more than he would have paid if the defendants had performed their contract, he could, upon resale, get back the extra price. We have, however, no evidence in the case that the coal was of more value at Havre after its rise than before. If the coal had risen in value at Havre, it was for the defendants to have shown it, and they should have proved what really was the value of such coal at Havre, and, moreover, that the coal was intended not for the plaintiff's consumption, but for resale. If they had shown that they could have obtained an increased price at Havre, that would have gone in reduction of damages.

Martin, B.—I am of the same opinion. The only fact for consideration is, whether there was evidence to go to the jury that they might assess damages for the difference in the price of the coal. It is argued, how can it be said that the coal is not of the same value? That was for the defendants to prove. They might have given evidence of its rise at Havre, but they did not.

EX. CH.]

STEWART V. THE WEST INDIA AND PACIFIC STEAMSHIP COMPANY.

[EX. CH.]

PIGOTT, B.—I quite agree with the rest of the court. It was a question for the jury, and I think there was a *prima facie* case of a loss to the extent of the damages awarded. It is clear that the plaintiff had to give 1s. 6d. per ton more in consequence of the defendants' breach of contract, and any circumstance mitigating the loss, such as a rise in the market price of coal at Havre, ought to have been proved by the defendants, and not left to us to infer from a rise at the pit's mouth.

Rule discharged.

Attorney for the plaintiff, S. R. Hoyle, for Lisle, Durham.

Attorneys for the defendants, Shum, Crossman, and Crossman, for Turnbull, West Hartlepool.

EXCHEQUER CHAMBER.

Reported by J. BUCKLE, Esq., Barrister-at-Law.

JUNE 18 AND 27, 1873.

(Before KELLY, C.B., MARTIN AND CLEARY, BB., BRETT, GROVE, and DESMAN, JJ.)

STEWART V. THE WEST INDIA AND PACIFIC STEAMSHIP COMPANY.

Ship and shipping—General average—Loss to cargo by water let into ship to extinguish fire—British custom—Agreement to be bound by custom. Certain bark was shipped on behalf of the plaintiffs on board a vessel of the defendants for carriage from Santa Martha to London, under bills of lading containing the words "average, if any, to be adjusted according to British custom." The vessel having loaded her cargo was about to sail to her port of destination, when a fire broke out in the forehold. Every effort was made to extinguish the fire by playing water down the hatchways and through holes cut in the fore-castle deck; and this not being sufficient to subdue the fire, a hole was cut in the side of the ship, and her fore-compartment was thereby filled with water. The fire was in this manner extinguished, and if this course had not been taken, the remaining cargo (a portion having been discharged into lighters) would in all probability have been destroyed, and the ship most seriously damaged, if not rendered a total wreck, and the water poured into the ship having destroyed a large portion of the plaintiffs' bark, the plaintiffs brought an action against the defendants in respect of the loss. It having hitherto been the practice of British average adjusters to treat a loss occasioned by water in the manner above described as not a general average loss,

Held (affirming the decision of the Court of Queen's Bench), without determining whether the loss was, or was not, properly the subject of a general average contribution, that the plaintiffs were precluded from recovering by the words of the bills of lading that average, if any, should be "adjusted according to British custom." (a)

ERROR from the Queen's Bench on a special case.

(a) Since the decision of this case in the Court of Queen's Bench and the intimation of opinion there given, there has been a meeting of average adjusters, by whom it was resolved that a future loss by water used to extinguish a fire should be treated as a general average loss. As the meeting practically represented the whole body of average adjusters, it may be taken that the "British custom" will be, from the date of the meeting, in accordance with the resolution.—ED.

See report of the case in the court below, *ante*, vol. 1, p. 528; 27 L. T. Rep. N.S. 820.

The action was brought in respect of the loss of certain bark shipped on board the defendants' steamship *Venezuelan*, and consigned to the plaintiffs; and by consent of the parties the following special case without pleadings was stated for the opinion of the court:—

1. The plaintiffs are merchants carrying on business at Manchester under the style of firm of Robert Barbour and Brothers. The defendants are a company and registered pursuant to the provisions of the Companies' Act 1862, and are the owners of vessels trading regularly between the United Kingdom and the West Indies and South America, and amongst others of the steamship *Venezuelan*.

2. On the 19th Sept. 1871, the defendants' steamship *Venezuelan* left Liverpool with a general cargo of merchandise on a voyage to the West Indies. She arrived on the 8th Oct. at St. Thomas, and after discharging her cargo for that port proceeded on her voyage to the ports of Curacao, Santa Martha, Savanilla, and Colon, and having called at Curacao and there delivered her cargo for that place, came to an anchor in the port of Santa Martha on 16th Oct. The *Venezuelan* after discharging at Santa Martha all her cargo for that port, took on board there a general cargo of produce and merchandise for Savanilla, Colon, London, and Liverpool.

3. The general cargo taken on board the *Venezuelan* at Santa Martha, consisted of goods shipped by various persons, and amongst these goods were 180 serons of bark which were shipped on behalf of the plaintiffs for carriage to London under the terms of two bills of lading, one for 100, and the other for 80 serons. These bills of lading were in the same form, and the following is a copy of the one comprising the 100 serons:—"Shipped in good order and condition by Mr. Ide Mier, of Santa Martha, in and upon the good steamship or vessel called the *Venezuelan*, whereof Bremner is master for this present voyage, or whoever else may go as master, now lying in or off the port of Santa Martha, 100 serons bark, covered by consignee's open policy of insurance, being marked and numbered as per margin, and to be delivered in the like good order and condition, subject to the terms and conditions stated in this bill of lading, which constitute, the contract between the shippers and the Company, unto Messrs. Robert Barbour and Brother, of Manchester, or to his or their assigns, at the port of London, or so near thereto as steamers may safely get; freight to be paid at the port of destination of the goods (without any deduction, and before delivery if required) upon the gross weights or measurements taken on the landing of the goods from the above named steamer, as per present tariff issued by the West Indian and Pacific Steamship Company (Limited), unless otherwise specially stipulated in the margin hereof; average, if any, to be adjusted according to British custom. The company reserves to itself liberty for the steamers to sail with or without pilot, to tow and assist vessels in all situations, to proceed to the port stated in this bill of lading, via any other port or ports, in any order or rotation, whether in or out of the customary or advertised route, without the same being deemed a deviation, whatever may be the reason for calling at or entering each port or ports,

EX. CH.]

STEWART V. THE WEST INDIA AND PACIFIC STEAMSHIP COMPANY.

[EX. CH.]

to tranship or land and reship by lighter or otherwise the goods at the port of shipment and transhipment or at any port or ports, or into any other steamer or steamers, or to forward them from any port or ports by railway, and land, and water conveyance to port of destination; also to discharge the goods from the steamer as soon as she is ready to unload into bulk or temporary depot or lighter, or on a wharf at the shipper's or consignee's risk and expense after they leave the ship's deck. The company is not liable for any loss or detention of or damage or injury to the goods, or the consequences thereof occasioned by any or several of the following causes, viz.:—the act of God, enemies, pirates, theft on land or afloat, vermin, barratry of master or mariners, restraint of princes, rulers, or people, fire on board, in hulk, or in craft, or on shore, or wagons, stranding, collisions, explosions, or straining; perils of the sea, rivers, navigation, land transit, lightering, storage afloat or ashore, interruption to navigation by ice, transshipments, any act, neglect, or default of the pilot, master, mariners, engineers, servants, or agents of the company; accidents from machinery, boilers, steam, or defects in hull, engines or boilers, sweating, leakage, breakage, rust, decay, rain, spray, contact with, or smell or evaporation from other goods, effect of climate or heat of holds, absence, obliteration or inaccuracies of marks, numbers, destination or address on packages (in such cases the consignees to accept the goods as allotted by the agents of the ship), injury to wrappers, want of strength of packages, detention on board or ashore, however caused, at the ports of transshipment, or at other port or ports. The shipper or consignees to be responsible for the proper description of the goods and the due compliance with all regulations imposed by the authorities at ports of shipment and discharge, and to be liable for any fines, expenses, loss, or damage. The company is not liable for gold or silver—manufactured or trinkets—watches, clocks, timepieces, mosaics, bills, bank-notes of any country, orders, notes, or securities for payment of money, stamps, maps, writings, title deeds, paintings, engravings, pictures, statuary, silks, furs, lace, hats, cashmere, manufactured or unmanufactured, made up into clothes or otherwise contained in any parcels or packages, unless the value thereof be expressed in the bill of lading, and such extra freight paid as may be agreed upon, weight, contents, and description unknown."

4. While the *Venezuelan* was at Santa Martha so loaded as aforesaid and about to sail, a fire broke out at about 11 p.m. of the 18th Oct. in the forehold. Every effort was at once made to extinguish the fire by playing water down the hatchway by means of the fire-hose, and by cutting holes in the fore-castle deck and pouring water down on the cargo stowed in the forehold. This was to be continued to be done until about 4 a.m. of the next day, when the men at work near the forehold were driven out by the heat and smoke. The steamship was then turned stern on to the wind to keep the fire forward, and portions of the cargo stowed in the afterholds of the vessel were discharged into lighters. The fire-hose was kept continually playing down the forebath and the fore-castle skylights, but it did not subdue the flames, and about 8 a.m. the fire reached the upper deck. A hole was then cut in the side of the vessel, and her fore compartment was thereby filled with water. By

this means the crew ultimately succeeded in extinguishing the fire. If this had not been done, the remaining cargo would, in all probability, have been destroyed, and the ship most seriously damaged, if not rendered a total wreck.

5. The whole of the contents of the forehold were entirely destroyed by fire, and a great part of the cargo stowed in the adjoining holds was damaged or destroyed by the water which was poured or let into the vessel as aforesaid, in order to extinguish the fire.

6. It is admitted for the purposes of this case, that 152 of the 180 serons of bark shipped on behalf of the plaintiffs were destroyed by the water poured or let into the said steamship in the manner above described.

7. It has been the practice of British average adjusters in adjusting losses, to treat a loss occasioned by water in the manner above described as not a general average loss.

8. The *Venezuelan*, after discharging and unloading cargo and undergoing temporary repairs at Santa Martha, subsequently proceeded on her voyage, and delivered the various portions of the cargo to the respective owners or consignees thereof.

9. The court is to be at liberty to draw such inferences of fact as a jury would be justified in drawing.

The question for the opinion of the court was, whether the plaintiffs were entitled to recover from the defendants any sum of money by way of general average, contribution, or otherwise, in respect of the aforementioned loss of the said 152 serons of bark. If the court should be of opinion in the affirmative, then the court was respectfully requested to direct on what principles such sum was to be ascertained, and judgment was to be entered for the plaintiffs for such sum as should be ascertained in accordance with the said directions of the court by the parties themselves, or if they could not agree, by Messrs. Bailey, Lowndes, and Streakley, of Liverpool, average adjuster, with costs of suit. If the court should be of a contrary opinion, then judgment was to be entered for the defendant with costs of defence.

The Court of Queen's Bench, Cockburn, C.J., Mellor, Hannen, and Quain, JJ., held, that the loss of the plaintiffs' bark was properly the subject of a general average contribution, being a voluntary and intentional sacrifice of the bark, made under the pressure of imminent danger, and for the benefit, and with a view to secure the safety of the whole adventure then at risk; but, it having been hitherto the practice of English average adjusters to treat a loss occasioned by water, in the manner described in the case, as not a general average loss, that the plaintiffs were precluded from recovering by the words of the bills of lading stipulating that average, if any, "should be adjusted according to British custom." On this judgment error was brought.

Butt, Q.C. (with him *Cohen*), for the plaintiffs.

Milbourn, Q.C. (with him *R. G. Williams*), for the defendants.

The following authorities were cited:—

Bencks on Average, p. 243;

Baily on Average, p. 60;

Johnson v. Chapman, 19 C. B., N.S., 363;

2 Arnold Mar. Ins. pp. 813, 872;

Parsons on Shipping, book 1, c. 9, s. 21;

ADM.]

THE ABRAHAM—THE RIO LIMA.

[ADM.]

Nimick and Co. v. Holmes, 25 Pensey St. Rep. 36;
The brig, Mary, 1 Sprague (Amer.) 57;
Stevens on Average, p. 12;
Simmonds v. White, 2 B. & Cress. 805;
Hopkins Handbook of Average, p. 80;
Harris v. Scaramanga, 41 L. J. 170, C. P.

Cur. adv. vult.

June 27.—The judgment of the court was delivered as follows:—

BRETT, J.—If it was necessary in this case to determine whether the destruction of merchandise by water thrown upon it in the course of throwing water to extinguish a fire which is burning other merchandise in the same ship, is the subject of general average, we should desire time to consider a question which is no doubt of great importance, and upon which we know of no direct authority in the law of this country. But the bill of lading, which in express terms provides that "average, if any, is to be adjusted according to British custom," appears to us to admit of no other construction than that which has been put upon it by the Court of Queen's Bench. The custom or usage prevailing among average stater in England is uniform and invariable, that goods thus damaged or destroyed are not brought into account in an average adjustment. We agree with the court below that the phrase "British custom" in this bill of lading was intended to refer, and, upon a true construction, does refer, to this custom or usage, even if it be different from the British law, a point, which in this case, we do not determine. The judgment of the Court of Queen's Bench must therefore be affirmed.

Judgment affirmed.

Attorneys for plaintiff, Milne, Riddle, and Mellor.
 Attorneys for defendants, Chester and Co. for Haigh and Co., Liverpool.

COURT OF ADMIRALTY.

Reported by J. P. ASPIWALL, Esq., Barrister-at-Law.

Tuesday, April 29, 1873.

THE ABRAHAM.

Collision—Plea of inevitable accident—Onus of proof—Duty to begin—Practice.

In a case of collision, where the defendants plead inevitable accident alone, it lies upon the plaintiff to show a prima facie case of negligence against the defendants, and the plaintiffs must therefore begin.

THIS was a case of collision instituted on behalf of the owners of the ship *Uverstone*, against the barque *Abraham*, and her owners intervening. The petition of the plaintiffs alleged that the *Abraham*, being a vessel overtaking the *Uverstone*, neglected to comply with Art. 17 of the Regulations for preventing Collisions at Sea, in not keeping out of the way of the latter vessel. The answer of the defendants admitted that the *Abraham* was overtaking the *Uverstone*, but alleged that the *Abraham* had become unmanageable by reason of her rudder chains becoming entangled with her rudder head, and pleaded inevitable accident.

The Admiralty Advocate (Dr. Deane, Q.C.) and Webster, for the plaintiffs, submitted that on this state of the pleadings, the defendants ought to begin in accordance with the practice of the court.

Clarkson, for the defendants.—According to *The Marpesia* (26 L. T. Rep. N. S. 333; L. Rep. 4 P. C.

212; 1 Asp. Mar. Law Cas. 261), the onus is on the plaintiffs to show a *prima facie* case. [Sir R. PHILLIMORE.—I find that the practice of the court has hitherto been for the defendants to begin where the sole plea is that of inevitable accident; (*The Thomas Lea*, 2 Mar. Law Cas. O. S. 261.)] That is now overruled by the *Marpesia*.

Sir R. PHILLIMORE.—I think Mr. Clarkson's view is correct, and that the *Marpesia* rightly expresses what ought to be the practice of the court, and the *Thomas Lea* must therefore be considered as overruled.

Solicitors for the plaintiffs, Lowless, Nelson, and Jones.

Solicitor for the defendant, Thomas Cooper.

THE RIO LIMA.

Transfer of cause—Arrest—Warrant—Caveat—Practice.

Where an admiralty cause, instituted in rem against a ship, has been transferred from a County Court to the High Court of Admiralty, and no bill has been given in either court, and the ship is already under the arrest of the High Court in other suits, the High Court will order the issue of a caveat to prevent her release, in case the other causes should be withdrawn.

THIS was a motion for leave to arrest the vessel *Rio Lima* in the sum of £500, or for such an order as the court might deem meet for the purpose of affording the plaintiffs security for the amount of their claim and costs. The claim against the ship was for necessities; the cause was originally instituted in the Newcastle County Court, but was by order of the judge of the High Court of Admiralty, transferred to that court, under the 8th section of the County Courts Admiralty Jurisdiction Act 1868, on the ground that there were other suits pending in the High Court against the ship, in which she was under arrest. After the transfer the County Court released the ship. An appearance was entered in the County Court by one of the owners, and, on the cause being transferred, by two others, but no bail was given.

C. F. Jemmett, for the plaintiffs, submitted that the arrest was necessary, because the County Court had released the ship, and the plaintiff would otherwise lose all security for his claim. If the County Court had retained possession of the vessel, two sets of possession fees might have been incurred, whilst now that the vessel was released, the plaintiffs would not have any security unless some order were made by the High Court to arrest her, or to transfer the possession to the High Court.

Cohen, for the defendants, contra.—The arrest is unnecessary, as by rule 55 of the rules and regulations of this court, it is provided that where a ship is already under arrest, a caveat may be issued to prevent her release. [Sir R. PHILLIMORE.—The registrar tells me that the practice has hitherto been, to issue a warrant for arrest in each suit. It appears to me that the rule 55 is intended to apply rather to the case where the proctor seeking a caveat is concerned in a cause in which the ship is already under arrest.] I submit that the rule applies to any case where the ship is under the arrest of the court in any suit. The effect of a caveat will be, that the ship cannot be released without notice to the plaintiff's proctor. If a

ADM.]

THE PROCEEDS OF THE CORDELIA.

[PRIV. CO.]

warrant subsequently becomes necessary by the withdrawal of the arrest in the other suits, it can be issued on a future application.

C. F. Jennett, in reply.—Rule 53 applies only to cases where several suits of salvage are instituted, or where a proctor wishes to preserve his lien on the res for his costs.

Sir R. PHILLIMORE.—I do not see how the plaintiffs can be injured by the issuing of a *caesal* instead of a warrant for the arrest of the ship. I think he must be content with a *caesal*, and I shall order that a *caesal* issues to prevent the release of the ship.

Solicitors for the plaintiffs, *Ingledew, Ince, and Greening*.

Solicitor for the defendants, *Rosland Miller*.

THE PROCEEDS OF THE CORDELIA.

Discovery—Suit for master's wages—Practice.

To obtain discovery of documents, the affidavit in support of the application must allege some one particular document to be in the possession of the party from whom discovery is sought.

This was an application on behalf of the plaintiff in a master's cause of wages and disbursements, for discovery of documents in the possession of the defendant. The affidavit of the master, filed in support of the application, alleged as follows:—

1. This cause has been instituted by me to recover the amount due to me for wages and disbursements, earned and made whilst I was master of the said vessel.

2. During the time I was master of such vessel, I wrote several letters to A. Bragaw, the defendant in this cause, relating to the sailing of the said ship, and my accounts and vouchers, of which letters I kept no copies. I also sent him accounts and vouchers, of some of which I kept no copies. The said letters, accounts, and vouchers related to my claim in this cause.

3. I am advised and believe, that it is material to me, in order to support my claim on the trial in reference of this cause, and to prepare for the trial or reference thereof, to have such letters, accounts, and vouchers, or any other documents which the defendant may have in his possession relating to the matters in dispute in this cause, produced to me or to my solicitors, and that I shall derive material advantage and support from the production of the same.

4. I am advised and believe that I am entitled to the production of the said letters, vouchers, accounts, and documents, for the purpose of discovery and establishing my claim in this cause.

5. I believe the said letters, accounts, and vouchers, are in possession or power of the said defendant.

Clarkson moved the court to order the defendant to answer on affidavit, stating what documents he had in his possession or power relating to the matters in dispute in the cause, or what he knew as to the custody such documents were in, and whether he objected to the production of such as were in his possession or power. The plaintiff is entitled to know what documents are in the defendants' possession, under the Common Law Procedure Act 1854, sect. 50. The affidavit sufficiently shows that the defendant has in his control or possession documents relating to this claim.

Gibson, for the defendant.—The plaintiff is not entitled to this affidavit to discovery. By the rule at common law, he must earmark some document before he is entitled to discovery. The mere allegation that some documents are in the defendant's possession is too vague: (*Egane v. Louis*, L. Rep. 1 C. P. 656).

Clarkson, in reply.—The plaintiff has shown that letters and vouchers are in the defendant's possession, and that is enough. [Sir R. PHILLIMORE.—The dates are not in any way specified.] They are stated to have been during the time he was master.

Sir R. PHILLIMORE.—I am not disinclined to grant the application, provided that the documents are more earmarked than they are in the present affidavit. There ought to be some guide to the dates. For the sake of the practice of the court, I think the affidavit ought to be more precise. On an affidavit being filed which shall state specifically some one document to be in the possession of the defendant, I will make an order for discovery. The application may be renewed at an early date. (a)

Solicitors for the plaintiff, *Ingledew, Ince, and Greening*.

Solicitor for the defendant, *Thomas Cooper*.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Reported by J. F. ASHFALL, Esq., Barrister-at-Law.

March 30 and April 5, 1873.

(Present: The Right Hon. Sir J. W. COLVILLE, Sir BARNES PEACOCK, Sir MONTAGUE SMITH, and Sir R. F. COLLIER.)

BROWNING (app.) v. THE PROVINCIAL INSURANCE COMPANY OF CANADA (resps.).

Marine insurance—Policy—Principal and agent—Right to sue—Certificate or slip—Contract—Cargo—Total loss—Limitation of action.

A contract of marine insurance, entered into with underwriters by an agent in his own name, but without expressing the interest in the subject of insurance to be in any particular person, may be sued upon by the principal in whom the interest is.

Where the common form of policy of a marine insurance company contains the usual clause, "A. B. as well in his own name as and for and in the names of all and every other person or persons to whom the same shall appertain, &c.," and it is the usage of the company on accepting a risk to issue a certificate or slip as a provisional agreement entitling the assured to a policy in their common form, the certificate is to be construed as a contract containing the above clause, and, if the certificate is made out in the name of an agent, the principal on whose behalf the contract is made may (in Canada where there are no stamp acts as to agreements for marine insurance) sue upon the certificate in his own name.

Where ship and cargo are wrecked and cast ashore, but part of the cargo continues to exist in specie and is taken out, and, it being impossible to forward it to its destination, is sold by the salvors on the spot, there is no total loss of the cargo, actual or constructive, until the sale has taken place; and, consequently, a condition in a policy on the goods, that no action shall be maintainable on the policy unless commenced within twelve

(a) A further affidavit was filed, alleging the possession by the plaintiff of letters from the defendant, in which reference was made to letters of the plaintiff received by the plaintiff on particular dates, and also alleging the possession by the plaintiff of a copy of a letter sent by him to the defendant, and its date. On this affidavit the application was granted.

Priv. Co.] BROWNING (app.) v. THE PROVINCIAL INSURANCE CO. OF CANADA (RESP.). [Priv. Co.]

months after any loss shall have occurred, is complied with if an action, to recover for a total loss of the goods, is commenced within twelve months after the sale has taken place; the action need not be commenced within twelve months after the wreck.

There was an appeal from a judgment of the Court of Queen's Bench for Lower Canada, affirming a judgment of the Superior Court for Lower Canada, district of Montreal, in an action brought by the appellant against the respondents on an alleged contract of insurance of a cargo of flour.

The writ was issued on the 3rd March, 1869.

The declaration was also filed the 3rd March, 1869, and the first count set out a certificate of cargo insurance granted by the defendants to one Joel Leduc for 7,000 dots, on a cargo of flour, and alleged that the said Joel Leduc had insured the said goods as agent for the plaintiff, that the plaintiff was interested in the goods to the full value of the sum insured, and that the goods had been lost by perils of the sea. The count also contained an averment that the defendants were bound by custom to issue to the plaintiff a policy of insurance in accordance with the terms of the certificate, either in his own name or the name of Joel Leduc, and all others interested in the goods, and that they had not done so. The second count alleged generally that the plaintiff had insured the goods with the defendants through the agency of Joel Leduc, and the loss of the goods. The third count was a common money count for money had and received by the defendants to the use of the plaintiff.

The defendants filed on the 11th May, 1869, two pleas, and a *défense en fonds en fait*.

The first plea set up that the said Joel Leduc had previously insured the ship *Babineau and Gaudry* with the defendants, on the express condition that it should not remain in the Gulf of St. Lawrence after the 16th Nov., that the insurance of the cargo of flour being between the same parties and for carriage by the said ship was impliedly subject to the same condition, and that the loss occurred through the ship remaining in the Gulf of St. Lawrence after that date. The second plea set up a condition contained in the certificate of insurance that no action should be brought for any loss, except within one year next after the loss occurred, and averred that the loss of the cargo occurred more than a twelvemonth before action brought. The *défense en fonds en fait* traversed all the averments in the plaintiff's declaration, and in particular expressly alleged that the contract with Joel Leduc had been made with him personally, and not as agent of the plaintiff.

The plaintiff, on the 15th May, 1869, filed answers traversing the defendants' pleas, and he joined issue on the defendants' *défense en fonds en fait*.

The defendants on the 20th May took issue on the plaintiff's answers.

The facts as proved, or admitted, were as follows:

The plaintiff, who was a baker and merchant, living at St. John's, Newfoundland, instructed one Joel Leduc, who had acted as the plaintiff's agent for a long time previously, to purchase flour for him at Montreal, and forward it to him at St. John's, Newfoundland. Leduc accordingly purchased 1,063 barrels of flour and loaded them on board a vessel called the *Babineau and Gaudry*,

and drew bills upon the plaintiff for the amount of the flour, including his own commission.

In Nov. 1867, Leduc applied to the defendants' agent at Montreal, R. T. Routh, to insure the flour for the voyage to St. John's, and Routh, after communicating with the head office, granted him a certificate of insurance, which was in the following terms:

Provincial Insurance Company of Canada,
Certificate of Cargo Insurance, No. 116,
Montreal, 15th Nov. 1867.

Joel Leduc, Esq., has this day effected an assurance to the extent of seven thousand dollars on the under-mentioned property, from Montreal to St. John's, Newfoundland, shipped in good order and well-conditioned on board the schooner *Babineau and Gaudry*, whereof E. Vigneau is master this present voyage.

Said insurance to be subject to all the forms, conditions, provisions, and exceptions contained in the policy of the company, copies of which are printed on the back hereof.

(Sd.) R. T. ROUTH, Agent.
P. ALBERT VASS.

Description of Goods Insured.	Amount.	Rate.	Premium.
On 1063 barrels flour, paid 21st Nov. 1867. (Signed) R. T. ROUTH, P. ALBERT VASS.	\$7,000 0 0	4%	\$280 0 0

On the back were, amongst others, the following conditions:

It is furthermore hereby expressly provided that no suit or action against said company for the recovery of any claim upon, under, or by virtue of this policy shall be sustained in any court of law or chancery, unless such suit or action shall be commenced within the term of twelve months next after any loss or damage shall occur, and in case any such suit or action shall be commenced against said company after the expiration of twelve months next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced.

The interest of the insured in this policy is not assignable unless by consent of this corporation, manifested in writing, and in case of transfer or termination of the interest of the insured, either by sale or otherwise without such consent, the policy shall from thenceforth be void and of no effect.

Leduc paid the premium of insurance, and included the amount in the invoice he sent to the plaintiff and the bills that he drew on him. At the time the goods were insured the plaintiff had not paid the bills drawn upon him, and Leduc took the certificate of insurance in his own name, that he might be secure if the plaintiff did not meet the bills. No policy was ever issued, and there was no evidence of any agreement express or implied to issue a policy other than the certificate of cargo insurance, except the statement by one of the plaintiff's witnesses, Routh, the agent, who issued the certificate, that it was the custom of the defendants to issue policies of insurance in a form produced by him on all certificates of cargo insurance, the certificate of cargo insurance being a temporary substitute and binding till the policy was issued. The policies used by the company were in a regular printed form, and commenced as follows: "A. B. as well in his own name as for and in the name and names of all and every other person and persons to whom the same doth, may, or shall appertain, in part or in all; doth make assurance, and cause to be insured lost or not lost, &c." The plaintiff was proved to have paid the bills drawn on him by

PRIV. CO.] BROWNING (app.) v. THE PROVINCIAL INSURANCE CO. OF CANADA (resps.). [PRIV. CO.]

Leduc when due, and to have been interested in the goods to the amount of the sum insured at the time of their loss, but no transfer was ever made to him of the insurance with the consent of the defendants. It was admitted by the plaintiff that Leduc had previously insured the vessel *Babineau and Gaudry* with the defendants, by a policy containing a condition that the vessel should not remain in the Gulf of St. Lawrence after the 16th Nov. 1867.

The facts as to the sailing and loss of the vessel and cargo are fully set out in the judgment.

The case was heard in the superior court, before Beaudry, J., on the 21st March, 1870, and on the 31st of March that court gave judgment in favour of the defendants, on the ground that the loss occurred more than twelve months before the commencement of the action.

The plaintiff appealed to the Court of Queen's Bench, and the case was heard on the 3rd Dec., 1870, before Duval, C. J., and Caron, Badgley and Monk, J. J.; and on the 9th March, 1871, that court gave judgment, confirming the judgment of the court below. The majority of the court were of opinion that the action had been brought in due time and that the judgment of the superior court was in that respect erroneous. The judgment of the superior court was confirmed upon the ground that the contract of insurance was in the name of Leduc only, and that Browning could not sue upon it except it were made for Browning and in his name.

Against this judgment Browning appealed to Her Majesty in council, and alleged as the grounds of his appeal the following reasons:—

First, because it is established by the evidence that the said Joel Leduc in entering into the said contract of insurance was acting as the agent of the said Gilbert Browning; secondly, because the general rule of law that an undisclosed principal may take advantage of the contract entered into by his agent applies to policies of marine insurance; thirdly, because policies of marine insurance according to universal usage and the custom of the respondent company ensure to the benefit of any one beneficially interested at the time of loss in the property insured; fourthly, because the language of the policies of the respondent company is specially adapted to cover the interest at the time of the loss whoever may be the owner of the property; fifthly, because the policy on the hull of the *Babineau and Gaudry* did not in any manner control the insurance made upon the appellant's floor; sixthly, because no breach of warranty was established by the respondents; seventhly, because the action was commenced within due time; eighthly, because even although the court may have been of opinion that the agency of the said Joel Leduc in effecting the said insurance was not established, the appellant should under the counts for money had and received in his action have recovered the proceeds of his floor taken possession of and sold by the agents of the respondent company at Gaspé, the said proceeds having been as admitted by their inspector and manager received by the said respondent company. The appellant submits that under the said counts for money had and received he should have had judgment for either 533 dollars at least as the balance of the alleged proceeds of the floor after payment of salvage, or the total amount of 1796 dollars realised by the sale

of his floor, there being no proof of the value of the salvage services, but merely a statement of salvage made by the respondent Company.

Watkin Williams, Q.C. and *W. W. Kerr*, for the appellants.—First, on the question whether the appellant may sue on the contract made by his agent. In *Sims v. Bond* (5 B. & Ad. 389), it is said by Denman, C.J., "It is a well-established rule of law that where a contract, not under seal, is made with an agent, in his own name, for an undisclosed principal, either the agent or principal may sue upon it." An agent cannot escape liability under a contract which he has signed in his own name, but his principal may still take advantage of, or be sued upon the contract:

Higgins v. Senior, 5 M. & W. 834;

Humble v. Hunter, 12 Q.B. 310;

Smith's Leading Cases, 6th edit. p. 355;

Ramazzotti v. Döring, 7 C. B. N. S. 851.

In *Arnold on Marine Insurance* (4th ed. p. 223), it is certainly said that if it were not for the assignment clause in a policy, only the person in whose name it is effected could sue. In answer to this, however, I submit that there is no distinction between a contract of insurance and other contracts not under seal. If the agent has taken out the words "as well in his own name, &c.," and expressly described himself as owner of the goods, it might then be contended that the appellants could not come forward and claim an interest in them as against the respondents, and that is probably *Arnold's* meaning. This distinction is clearly pointed out by *Duer on Marine Insurance* (vol. ii. lect. ix. § 18). Moreover, his certificate of insurance was not the contract itself; it was only the memorandum of the contract. By the respondents' custom they were bound to issue a policy, in accordance with the certificate, containing the assignment clause. Where a memorandum for an agreement refers to another instrument containing full particulars of the contract, then both instruments are to be read together, as forming one and the same contract: (*Ridgway v. Wharton*, 6 H. of L. Cas. 238.) It was clearly the intention of these parties that the policy and not the certificate alone was to be the contract between them. The certificate is like the slips used in this country. There can be no doubt, on the evidence, that the floor was purchased on behalf of the appellant. When the floor was shipped deliverable to the appellant, the property at once passed to him, and he became liable for it:

Broome v. Hare, 4 H. & N. 822;

Joyce v. Stearns, 17 C. B. N. S. 84.

Secondly, with regard to the point that the action ought to have been brought within a year after the loss occurred. The loss having been proved, it lies on them to show when it occurred if they wish to avoid their contract. This is a limitation of our right to sue by express agreement. Such a limitation must be governed by the same rule of construction as is applicable to limitations imposed by law. It is quite clear that by Canadian law the appellant is only bound to bring this action within a reasonable time after the loss came to his knowledge, if it was impossible for him to have made his claim sooner: (*Civil Code of Lower Canada*, Nos. 2232, 2478.) The rule was the same by civil law: (*Mackenzie's Roman Law*, p. 186 *et seq.*) Moreover, there is no evidence to show that the loss of the vessel did not occur just before it

PRIV. CO.] BROWNING (app.) v. THE PROVINCIAL INSURANCE CO. OF CANADA (resps.). [PRIV. CO.]

came to the appellant's knowledge. The loss on the goods, however, clearly did not occur more than a year before action brought. This is a claim for the loss of the vessel the goods still existed in part at least, and any loss to be total could be constructive only, and the underwriters must have received notice of abandonment, and until this there could be no loss within the meaning of the limitation. Even if the loss is to be considered total, and no notice of abandonment necessary, the actual total loss did not take place until after the sale of the floor, whereby it was lost to the assured. The acts of the directors of the company, after the loss became known, must be considered as a waiver of the condition that the action must be brought within a year.

Sir J. Karslake, Q.C. and Bompas for the respondents.—Ledue was not a mere agent; he bought, and resold on commission, and so had an actual interest in the goods beyond the mere commission charged. He was a factor, or commission merchant, and had power to deal with the goods as he chose: (see Story on Agency, § 33.) This insurance was intended to cover Ledue's own interest and not that of the appellant. Until such time as the appellant accepted and paid the bills of exchange drawn upon him by Ledue, the interest in the goods remained in the latter, and it was for him to cover them by insurance. This he did, in his own name, and really for the purpose of securing himself in case the appellant failed to pay for the goods and not for the benefit of the appellant. Ledue having clearly an insurable interest, it must be taken that, as he has insured exclusively in his own name, his intention was to cover his own risk only. When a contract of insurance is not expressed to be for the benefit of all concerned, but a particular person is named therein for whose benefit the insurance is apparently effected, the contract must be taken to be limited to that particular person so far as the power to sue is concerned. Where a party insures on behalf of himself and others, but in his own name, the action must be brought in the name of the party to the contract. It cannot be said that the usual form of the company's policy, and not this certificate, is to be considered the contract between the parties, because, although a court of equity would compel the issuing of a policy, yet it would do so only on condition that the terms were no more extensive than those of the certificate and that the risks covered were no larger. In Phillips on Insurance it is said (§ 379), "only those interested in the subject at the commencement of the suit can be original parties to the policy, and they continue to be parties only while they have an interest. Others may become parties by stipulation, or transfer, either with them or in their stead. (§ 380.) Insurance made by a person in his own name only, without any indication in the policy that any other is interested, can be applied only to his own proper interest in the subject, or his interest as trustee, &c. In other words, a contract with A cannot be construed into a contract with B." A principal cannot sue upon a contract made in an agent's name and for the agent's benefit, and even if Ledue intended the policy to cover the interests of both, it is not enforceable, for a contract of insurance cannot be made by one man to cover the interests of several.

Watson v. Swann, 11 C. B. N. 8., 756.

United States v. Farnelle, 1 Paine's U. S. Circ. Ct. Rep. 252.

[Sir R. P. COLLIER referred to *Bell v. Gilson*, 1 B. & P. 345 and to *Vignier v. Swanson*, 1 B. & P. 346, note.] No doubt a consignee may sue upon a policy effected by an agent, but then it must appear that it was effected for the sole benefit of the consignee, and, moreover, it must appear on the face of the policy that it was as agent that the agent effected it. A contract of marine insurance is an undertaking to insure a particular interest, and not more than one unless so expressly stated. In this case the contract was, as the respondents had reason to believe, to insure Ledue's interest, and he could not by one and the same contract cover the interest of the appellant without notice of such intention to the respondents. In Duer, on Marine Insurance (Lect. IX. § 18), it is said, "Where a policy is effected in the name of a particular person, without general words, or by an agent on the sole account of a person named, the form of the contract necessarily fixes and limits the construction. The insurance can only be applied to protect the interest of the person named, and parol evidence to show that other interests were meant to be covered, or that other persons were interested in the subject insured, whether offered by the assured to enlarge, or by the underwriter to diminish the amount of a recovery, must be rejected. It is not explanatory, but repugnant and contradictory." Then as to the limitation. The loss occurred more than a year before the bringing of the action. This is the fair presumption from the evidence. After the vessel was last seen there was sufficient to cause her loss. The cargo, as soon as the vessel was wrecked, ceased to be of any use to any one, and therefore became at once a total loss. The respondents are not bound to show more than reasonable evidence that the loss took place at a time which precludes the action. If they establish the presumption that is sufficient. It is said that this condition as to limitation was waived by the directors of the company. If so, they had no authority to do so. They have authority to issue policies and insure vessels, but not to deprive the shareholders of any rights they may require under the contract: (*Montreal Assurance Co. v. McGillivray*, 13 Moore, P. C. C. 89.)

Williams, Q.C. in reply.—Ledue, as a commission merchant, had a lien upon the goods and the policy for the price paid, and was in the position of a quasi-vendor, and could have stopped in transit: (*Price v. Hony*, 3 East, 93.) The insurance effected by him was not upon his interest in the goods, but upon the goods themselves, and was for the benefit of his principal, to whom the property passed on shipment, subject only to the agent's lien. The agent, therefore, had a right to insure in his own name, and either he or his principal could sue upon the contract.

Wolf v. Horncastle, 1 B. & P. 316;

Skinner v. Stocks, 4 B. & Ald. 467;

Story on Agency, §§ 161, 162.

Watson v. Swann (*ubi sup.*) is not in point, as there the agent had effected the insurance for other purposes before attempting to apply it to his principal's risk. The loss did not actually occur on the goods until the sale by the company's agent: (*Farnworth v. Hyde*, L. Rep. 2 C. P. 204.)

April 5. — The judgment of the court was

PRIV. CO.] BROWNING (app.) v. THE PROVINCIAL INSURANCE CO. OF CANADA (respsa.). [PRIV. CO.]

delivered by Sir MONTAGUE SMITH.—This is an appeal from a judgment of the Court of Queen's Bench for Lower Canada, affirming a judgment of the superior court for the province, which dismissed the appellant's suit. The action was brought on a contract of insurance made with the respondents on 1063 barrels of flour shipped in the schooner *Babineau and Gaudry*, on a voyage from Montreal to St. John's, Newfoundland. The contract was in the name of Mr. Joel Leduc, who had purchased and shipped the flour for the appellant. Two objections have been made to the appellant's right to maintain the action, viz.: (1) that he cannot sue on the contract made in Leduc's name; and (2) that under a clause of limitation contained in the contract, his action is too late. The judge of the superior court decided against the appellant on the second objection. Upon the appeal in the Court of Queen's Bench, three judges held the action was brought in time, but that the appellant could not sue in his own name; one judge (Mr. Justice Badgley) alone upheld both objections.

The following general facts appeared on the evidence:—The appellant, who carried on business as a baker at St. John's, had for some time employed Mr. Leduc, a commission merchant, to make purchases at Montreal of flour and ship it to St. John's. In the usual course of this agency, Leduc, in November 1867, purchased 1064 barrels of flour, shipped it on board the *Babineau and Gaudry* (a vessel owned by himself) for St. John's, and insured it for 7000 dollars with the respondents in the form and manner which will be hereafter stated. The bill of lading stated the flour to be shipped by Leduc deliverable to the appellant or his assigns, and an invoice was sent by Leduc to the appellant, debiting the latter with the price paid for the flour, commission, the expenses of cartage, cooage and wharfage, and the premium on the insurance. Bills were drawn by Leduc on the appellant for the amount of this invoice, which were duly accepted and paid. The *Babineau and Gaudry* sailed from Montreal on the 16th Nov. 1867, and left Quebec on her voyage down the Gulf of St. Lawrence on the 20th. She was last seen, proceeding on her voyage, on the 22nd, and no more was heard of her until the middle of May, 1868, when the news reached Montreal that she was ashore on the Island of Anticosti in the Gulf of St. Lawrence. An agent of the respondents reached the island in the middle of June, and found the schooner lying bottom up. None of the crew appear to have been saved. A hole had been cut in the ship, out of which part of her cargo, including some of the appellant's flour had been taken, and some remained on board. The flour saved, or so much of it as could be recovered, viz., 547 barrels, was taken to Gaspé and sold by the respondents' agent there, for the gross price of 1796 dols. An account was made out by the agent, which, after debiting the flour with the share of salvage expenses, and other charges, showed the net proceeds to be 533 dols. The schooner was recovered and repaired.

It was contended in support of the first objection by the respondent's counsel that the insurance was in fact made by Leduc on his own behalf to protect his own interest, or, at all events, partly on his own behalf, and partly on that of the appellant. Their Lordships, however, feel little difficulty in coming to the conclusion, upon the evidence in the

case, that the insurance was effected by Leduc, as agent on behalf of the appellant, his principal. Leduc, who was called as a witness by both parties, states that the appellant from the purchase of the flour up to its loss was *le seul propriétaire, et le seul qui y avait intérêt*. Again, when examined by the respondent, he says in English, "the insurance was in my name, though it was really the plaintiff's." He, no doubt, also says that he made the insurance in his own name "in case of some accident, or that the appellant should not have met his drafts;" but further explanation given by him shows that what he wanted to have, and considered he had, was a lien on the policy which would end when his drafts were honoured. All the facts are consistent with what seems to be the effect of Leduc's evidence taken as a whole, viz., that the insurance was effected for the appellant and that Leduc had a lien upon the policy. Having paid for the flour with his own money, Leduc might in the event of the appellant's insolvency have had the right, as a *quasi vendor*, to stop in transitu, but it nowhere appears that he kept any control over the bills of lading, under which the goods were deliverable to the appellant or his assigns. The result of the evidence is that the property in the flour passed to the appellant, that it was shipped at his risk, insured at his cost, and that the insurance was effected by Leduc for him as the owner of it.

It was next urged that, if this were so, the appellant could not sue on the contract effected in the name of his agent. This objection makes it necessary to consider the form of the present contract, and how it was made. The chief office of the respondents is at Toronto, and their agent at Montreal, in taking insurances there, issues what are called "certificates of insurance" of a provisional kind, signed by the agent, upon which policies under the seal of the company are afterwards issued at Toronto. The certificate in this case, dated on the 15th Nov. 1867, commences as follows:—"Joel Leduc, Esq., has this day effected an insurance to the extent of 7000 dols. on the under-mentioned property from Montreal to St. John's, Newfoundland, shipped on board the *Babineau and Gaudry*, &c. The property is described as "1063 barrels flour." The certificate also states "the insurance to be subject to all the forms, conditions, provisions, and exceptions contained in the policy of the company, copies of which are printed on the back hereof." Routh, the agent of the respondents at Montreal, proved the form of policy used by the respondents, and it is set out in the record. This form runs thus:—"A. B., as well in his own name as for and in the name and names of all and every other person and persons to whom the same doth, may, or shall appertain in part or in all, do make insurance, &c. These words are the same as those usually inserted in Lloyd's and other English policies. It was contended that the certificate was a complete contract, and that as it did not contain these words the appellant could not sue upon it. Some authorities, principally American, were cited for this proposition, and *Arnould on Marine Insurance* (vol. i. p. 223, 3rd edit.) was also referred to. Mr. Arnould no doubt in this place states this to be so; but in another part of his book it is stated as a general rule that actions may be brought either by the broker whose name appears in the policy, or by the principal who instructed him to make it

PRIV. CO.] BROWNING app.) v. THE PROVINCIAL INSURANCE CO. OF CANADA (resps.). [PRIV. CO.]

(vol. ii. p. 1032). In England, policies are usually made in the name of the insurance broker, and it was long ago decided that the broker need not be described as agent to enable the principal to sue upon them (see *De Vignier v. Swenson*, 1 Bos. and Pul. 346 n.). In a recent case, in which it was held that the plaintiff under the circumstances there existing could not maintain an action on such a policy because the insurance could not be shown to have been made on his behalf, the right of the person who, in a case like the present, has been throughout the real principal, to sue on a policy made in the name of his agent, was not doubted (*Hatton v. Swann*, 11 C. B., N. S., 759). By the law of England, speaking generally, an undisclosed principal may sue and be sued upon mercantile contracts made by his agent in his own name, subject to any defences or equities which without notice may exist against the agent (see *Higgins v. Senior*, 8 M. & W. 834; *Calder v. Dobell*, L. Rep. 6 C. B. 486). There seems no sufficient ground for making a distinction in the case of marine policies of insurance, especially when, having regard to the ordinary course of business, it must be known they are commonly made by agents. If, indeed, any particular interest were described in the policy to belong to the person named in it, an objection might arise founded on the rule that written contracts cannot be contradicted by parol evidence. This objection, however, does not occur in this case, where the insurance is general on the flour, and no interest is expressly described. But if this were not the law in the case of a policy which did not contain the usual clause "as well in his own name," &c., it is not denied that it would be so in the case of one which does; and their Lordships think that in this case the certificate ought to be construed with reference to the proved usage of the respondents to treat such a document as provisional, entitling the assured to a policy in their common form, which would contain the above clause. This common form of the respondent's policy clearly shows that in their contemplation the person named in the certificate might be contracting as an agent for another; and, therefore, as against them, the contract ought to be interpreted as if the above clause were contained in it. It may be observed that the condition against assignment contained in the policy cannot affect the right of the appellant, on whose behalf the contract was originally made. The law of the province does not appear to differ from that of England upon the question under discussion. The code of Lower Canada allows policies to be made in the names of agents. Article 2402 commences as follows:—"The policy of marine insurance contains the name of the assured or of his agent," thus giving the express sanction of the law to well-known mercantile usage. It is right to observe that although it was suggested at the bar that there might be defences available against Leduc, if the action had been brought by him, none were stated which could have been established against him. For the above reasons their Lordships think that the Judges of the Court of Queen's Bench were wrong in giving effect to the first objection.

The second objection, that the action was not brought in time, is founded upon the following clause endorsed on the certificate:—"It is furthermore hereby expressly provided that no suit or action against the said company for

the recovery of any claim upon, under, or by virtue of this policy, shall be sustained in any court of law or Chancery unless such suit or action shall be commenced within the term of twelve months next after any loss or damage shall occur; and in case any such suit or action shall be commenced against said company after the expiration of twelve months next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced." The action was brought on the 3rd March 1839, which it was said was more than twelve months after the loss. It appears that the *Babinou* and *Gaudry* left Quebec on the 20th Nov. 1837, in company with a vessel, the *B. L. George*. The latter anchored at Les Éboulements, and whilst there the *Babinou* and *Gaudry* passed that place on her voyage down the Gulf of St. Lawrence. This was on the 22nd Nov., and nothing was heard of her at Montreal from that day until the middle of May 1838, when news came of her being ashore at Anticosti. It was proved that on the 24th Nov. a violent storm raged in the Gulf, which continued until the 1st Dec., and a strong probability is raised by this evidence that the schooner was capsized and driven on shore during that gale. But although this probability is, in their Lordships' opinion, exceedingly strong, they do not find it necessary, in their view of the case, to determine whether the evidence affords a presumption of fact of such strength that the majority of the Court of Queen's Bench were wrong in refusing, as they did, to act upon it. For, in this case, the insurance was not on the ship but on goods, and the point of time to be considered is not when the peril was encountered and the vessel driven ashore, but when the loss on the flour, for which indemnity is sought, accrued. It must often be uncertain whether the damage done to cargo by a peril insured against will result in a partial or total loss, and the assured is not bound in such cases to make his election how to treat it as soon as some incipient damage has occurred. It is obvious that, in many cases, there must be some lapse of time, greater or less according to circumstances, before the extent of the damage is developed, and that the assured must in the nature of things wait until it can be ascertained what the ultimate loss for which he is entitled to claim indemnity will really be. In the present case the disaster to the ship was not known either to the assured or the respondents until May 1838, and when the agent for the respondents reached the ship he found a hole had been cut in her side by the inhabitants of the island, through which they had taken out some of the flour. Part of the flour so taken out he recovered, and some barrels he took from the ship; the total quantity saved amounted 547 barrels. The flour so saved existed in specie, and was sold as flour, realizing the gross sum of 17½ dols. It must be taken as against the respondents, by whose agent the sale was made, that the flour saved could not have been taken on to St. John's, and that the sale of it was necessary. It results from these facts that a part only of the flour having perished, and more than one half having been saved, the loss was not in its inception total, and only became so when, by the course of events consequent upon the peril encountered, it was found to be impossible from the state of

PRIV. CO.]

SMITH AND OTHERS v. THE ST. LAWRENCE TOW BOAT COMPANY.

[PRIV. CO.]

the flour to carry it to its destination, and that it was necessary to sell it. The sale under this necessity at an intermediate port caused a total loss of the flour to the assured, whether actual or constructive is immaterial as regards the present point; for not until that time were the facts constituting a total loss ascertained, and the right of the assured to claim indemnity for such a loss matured. The present suit was commenced within a year afterwards, and the condition, which must receive a reasonable interpretation, was therefore in their Lordships' opinion complied with: (see with reference to this subject *Hone v. Salvador*, 3 Bing. N. C. 268; *Farnworth v. Hyde*, 18 C. B., N. S., 835; *Stringer v. English and Scottish Marine Insurance Company*, L. R. 6 Q. B. 676; Canada Code, Articles 2521, 2522, 2541, 2544.) In the result their Lordships are of opinion that no valid objection can be opposed to the right of the appellant to maintain the present action, to which, it may be observed, there is no defence whatever on the merits.

It appears from the English authorities above referred to that the sale, supervening upon the existing state of things, would cause an actual, and not merely a constructive, loss of the flour. Whether this would be so under Article 2522 of the Canada Code need not be considered, for no objection was taken for the want of notice of abandonment. Both parties at the bar assumed there had been a total loss of one kind or the other, and no question having been made that the flour was not worth the sum insured, the appellant is entitled to recover the full amount of the insurance, the respondents taking the salvage, i.e., the proceeds of the sale.

Their Lordships will humbly advise Her Majesty that the judgments of the Courts in Lower Canada ought to be reversed, and that judgment in the action ought to be entered for the plaintiff for the sum of 7,000 doles, with interest, according to the practice of the courts below, and that the appellant ought to be paid his costs in the courts below by the respondents. They must also pay the costs of this appeal.

Appeal allowed.

Solicitor for the appellant, T. Simpson.

Solicitors for the respondents, Bischoff, Bonapaz, and Bischoff.

Friday, March 31, 1873.

(Present: The Right Honrs. Sir JAMES W. COLLIER, Sir BARNES PEACOCK, Sir MONTAGUE E. SMITH, and Sir ROBERT COLLIER.)

SMITH AND OTHERS v. THE ST. LAWRENCE TOW BOAT COMPANY.

Contract to tow—Running tow aground—Fog—Pilot—Contributory negligence.

A steam-tug towing a sailing ship directs the course of both vessels so long as no directions are given by the person in charge of the ship in tow. The steam-tug is the moving power, but it is under the control of the master or pilot on board the ship in tow.

Where a ship in tow of a steam-tug, and in charge of a licensed pilot who has the control over and directs the course of both vessels, is navigating a river in a fog so dense that the banks of the river cannot be seen, and those on board the tug and ship in tow do not know in what direction they are going, it is negligence on the part of both

vessels to proceed; but as it is the duty of the pilot in charge to give orders to the tug to stop so as to enable the ship in tow to come to an anchor, the neglect on the part of the pilot to give such orders is contributory negligence, which will preclude the owners of the sailing ship from recovering against the owner of the steam-tug in an action for negligently running the sailing ship ashore by proceeding during the fog.

This was an appeal from a judgment of Her Majesty's Court of Queen's Bench for the province of Quebec, Lower Canada, confirming a judgment of Her Majesty's Superior Court for Lower Canada, district of Quebec.

The appellants are merchants residing at Toronto, in the province of Ontario, Canada, and were, at the time of the occurrence which gave rise to this action, the owners of a vessel called the *Silver Cloud*. The respondents are the owners of certain tow-boats on the Saint Lawrence, and, amongst others, of a tow-boat called the *Hero*.

In the year 1865 the appellants commenced an action in the superior court against the respondents, to recover damages for the loss of the said *Silver Cloud*, which ran aground in a fog while being towed by the respondents' said tow-boat the *Hero*.

The declaration, filed the 23rd Jan. 1865, in effect alleged that the plaintiffs were the owners of the *Silver Cloud*, and that the defendants agreed for 100 doles. to tow her safely from Montreal to Quebec; that, relying on the defendants' promise, the defendant placed her in tow of one of the defendants' tug-boats, which took her in tow; that whilst on the voyage the weather became foggy and navigation was thereby rendered dangerous; that the defendants' and their servant ought then to have brought the tug and vessel to anchor, which they could have done; that they, however, continued to prosecute the said voyage against the will of the persons in charge of the plaintiffs' vessel, and so carelessly navigated and directed the course of the tug that the vessel was run aground and greatly injured; that the vessel was so run aground solely through the negligence of the defendants' servants; and that the loss sustained by the plaintiffs was 17,333.04 doles, which they claimed to recover.

The declaration contained a second count which varied only in alleging the payment to the respondents for towing the *Silver Cloud* to have been a reasonable amount.

The respondents, on 3rd April 1865, pleaded the general issue and a perpetual peremptory exception, which alleged first—that the *Silver Cloud* was under the control of her own master, crew and pilot, who gave directions to the *Hero*, and that the negligence, if any, was theirs, and further that after the *Silver Cloud* was aground, her master and crew deserted her, but for which she would have been saved; secondly, that the *Silver Cloud* ran on shore from inevitable accident.

The appellants, on 10th April 1865, joined issue on the defendants' exception.

The result of the evidence was as follows:

The respondents admitted that on the 12th Nov. 1863, at Montreal, they, through their agent, agreed with the appellants to tow the *Silver Cloud* from the harbour of Montreal to the harbour of Quebec, for the sum of 100 doles. There was no evidence whatever, except this admission, as to the agreement entered into between the appellants and respondents. It was proved that it was usual

[Priv. Co.]

SMITH AND OTHERS v. THE ST LAWRENCE TOW BOAT COMPANY.

[Priv. Co.]

in the Saint Lawrence for vessels, when towed, to be in charge of a certified pilot (called a branch pilot), and for the tow boat to receive directions from such pilot as to its course, and to be under his control. At this date pilotage was not compulsory in these waters. (a)

In pursuance of this agreement a steam-tug belonging to the respondents, named the *Hero*, left Montreal on the 12th Nov. 1863, having in tow the *Silver Cloud*, and another vessel called the *Margaret Smith*, the *Silver Cloud* being nearest to the tug. The *Margaret Smith* was the larger of the two vessels, drawing eighteen feet of water, the *Silver Cloud* being a brigantine, drawing only twelve feet. The *Silver Cloud* was in charge of a branch pilot named Auguste Nand; the *Margaret Smith* was also in charge of a branch pilot, his name being Felix Hamelin; the *Hero* had two pilots on board, but neither of them were branch pilots. The vessels in tow were provided with compasses, but there was no compass on board the *Hero*. The *Hero*, and her vessels in tow, were detained several days by contrary winds on their way down the river: but they left a point in the river, called Batiscan, about mid-day on the 18th.

The evidence was somewhat contradictory as to the occurrences during the remainder of the voyage, but the evidence of Felix Hamelin, the pilot of the *Margaret Smith*, who was an independent witness and called by both parties, was as follows:—

The weather was clear till they reached a point in the river called Richelieu, when it became so foggy that they lost sight of land, and Hamelin then wished to come to anchor. Hamelin called to the pilot of the *Silver Cloud* to stop the *Hero*, and the latter then gave some orders to the *Hero* which thereupon went at half-speed. After about a quarter of an hour the fog lightened, and the land again became visible as far as Pointe Aux Trembles, and the *Hero* resumed her full speed. Some time afterwards, when opposite the Church of St. Augustine, which is six or seven miles lower down, and only about twelve miles from Quebec, it being then between five and six o'clock and nearly dark, the pilot of the *Silver Cloud* came to the stern of his vessel and told Hamelin that it would be better to anchor, as they might run against other ships; Hamelin, however, replied that there would be no danger, having then made up his mind to go on to Quebec that night, although the dusk and fog rendered it a matter of some risk. Shortly after, when opposite Cap Rogae, and about ten minutes before the accident, the fog became so dense that Hamelin lost sight of the *Hero*, and the vessels changed their course, and ran aground on the south side of the river, the vessels striking the ground almost simultaneously. This was about six o'clock. When the fog cleared, the bows of the vessels were found to be pointed up the river, in the opposite direction to that in which their course lay.

During the whole of this time the weather was perfectly calm, and the voices of persons on board either vessel could be heard on board the next vessel without difficulty. The pilots of the *Silver Cloud* and *Margaret Smith*, and the crew of the *Hero* were French Canadians, and the orders and

conversations which passed between them were entirely in French. The appellants called four witnesses, Nand, Drysdale, Gray and Landers, all of whom, however, belonged to the crew of the *Silver Cloud*, to prove that before the accident the pilot of the *Silver Cloud* gave express orders to the *Hero* to stop so as to let that vessel come to an anchor, and that if they had been obeyed the accident would have been avoided. These witnesses also gave evidence that the crew went forward and got the anchor ready, and were forward when the ship struck. The evidence of these witnesses was in many points contradictory, and the two latter could give no direct evidence as to the nature of the orders which were given, as they understood no French. The respondents, called eight witnesses from the crew of the *Hero*, who proved that the only order given by the pilot of the *Silver Cloud* was to go easy, which was immediately obeyed. Their evidence was strengthened by the fact, that during the latter part of the time they were stationed at the stern of the *Hero* expressly to be ready for the order to stop, which they expected to receive and wished to obey it promptly, and an independent witness confirmed their statement that no order to stop had been given during the last twenty minutes before the accident.

The vessel struck the ground shortly before low tide, and on the tide rising the *Hero* and *Margaret Smith* were got off without injury, but the *Silver Cloud*, having sprung a leak, became full of water.

The *Hero* remained on the spot till about ten o'clock, and then left and towed the *Margaret Smith* on to Quebec. The *Silver Cloud* appears to have floated as the tide rose, and to have moved further on the rocks; but about twelve o'clock she fell over on her beam ends, and her crew then left her. Efforts were afterwards made to float her into harbour for repairs, but, while preparations for this were being made, the chains used to hold her in her place not being strong enough, she was swept away by the tide and carried down the bed of the river. The injuries thus received were so great that, when finally raised, the wreck was sold for only 600*l.*, and the plaintiffs altogether sustained the loss mentioned in their declaration.

The evidence having been completed the case came on for hearing in the superior court before Meredith, C. J., on the 6th June 1868, and on the 15th Feb. 1869, the court gave judgment for the defendants, the now respondents, finding as a fact that no orders had been given by those on board the *Silver Cloud* to those on board the *Hero*, and holding that, the tug and tow being both subject to the order of the branch pilot on board the tow, and the pilot being aware of the causes of danger to which they were exposed, as well as the people of the tug, the crew of the tug, although they could not have been blamed if they had insisted on coming to an anchor, did not incur any legal responsibility towards the owners of the tow by waiting for orders from the branch pilot of the tow, whilst they in the meantime followed the course which one of the branch pilots was determined to pursue, and in which the other acquiesced.

The plaintiffs appealed to the Court of Queen's Bench and the appeal was heard on the 13th March 1871, before Davel, C.J., Caron, Drummond, Badgley, and Monk, JJ.; and on the 19th June 1871, the court gave judgment confirming the

(a) The Acts making pilotage compulsory in Canadian waters will be found referred to in *The Hibernian* (ante, vol. 1, p. 401).—Ed.

PRIV. CO.]

SMITH AND OTHERS v. THE ST.

LAWRENCE TOW BOAT COMPANY.

[PRIV. CO.]

judgment of the court below, Drummond and Badgley, JJ., dissenting.

The majority of the Court of Queen's Bench held that, it being the duty of the pilot on board the *Silver Cloud* to give orders, no order was given to the *Hero* to stop, and that those on board the *Silver Cloud* therefore brought about the accident by their own negligence. The minority of the court, after an elaborate review of the evidence, held that the evidence established that orders to stop had been given by the pilot of the *Silver Cloud*, and also that the tug, having entered into a contract to tow safely, was bound, without waiting for orders, to have provided for the safety of her tow by stopping as soon as the fog came on, and that having neglected to do so her owners could not avoid the responsibility of having knowingly encountered without necessity, visible and palpable danger.

From this judgment pronounced by Her Majesty's Court of Queen's Bench for the province of Quebec the owners or the *Silver Cloud* now appealed and humbly submitted that the judgment was erroneous for the following amongst other reasons: First, because the master of the steamer *Hero* persisted in confronting imminent danger in defiance of the orders given by the pilot of the *Silver Cloud*; secondly, because in the absence of any orders it was the duty of the master and pilot of the steamer *Hero* to use ordinary skill and diligence in the performance of the contract to tow, and that he did not do so; thirdly, because in the face of imminent danger which could only be avoided by stopping it was the duty of the master of the *Hero* to stop whether he received orders or not; fourthly, because the master of the steamer *Hero* well knew that the pilots and persons in charge of the vessels in tow were by reason of the fog rendered incapable of fulfilling their functions, and that they could no longer superintend the navigation of the steamer or do anything to avert or lessen the danger he was voluntarily incurring.

Butt, Q.C. and J. Edward Wilkins, for the appellants.—The evidence clearly establishes that the pilot of the *Silver Cloud* ordered the *Hero* to stop. But even if the court should be of opinion that no such order was given, yet the respondents are not absolved from liability. This action is founded upon a contract to tow, and such a contract implies that those on board the tug will exercise due diligence, care, and reasonable skill in the fulfilment of their engagements: (*The Julia*, 14 Moo. P. C. C. 210.) The owners of the tug-boat having by their own act placed themselves beyond the control of any one pilot by contracting with two vessels, each with a licensed pilot—who might give contrary orders, and who, as a matter of fact, did differ as to what orders should be given—they are responsible for any consequences that may ensue. In the steamer *Syracuse* (12 Wallace, U. S. Sup. Ct. Rep. 167), it is said that "if companies engaged in the business of tug-boats will, through greed of gain, undertake to transport from Albany to New York more canal boats in one tow than can be safely handled on the waters of New York, they must see that the large amount of property entrusted to their care is not placed in jeopardy through want of caution and foresight on the part of their steamers." [Sir M. SMITH.—It must be taken that the appellants consented to a second vessel being taken in tow. Moreover, it cannot

be said that the owners of tow boats are insurers of the vessels which they take in tow. They are not carriers.] It was admitted in the judgment of the superior court that the circumstances would have justified the crew of the tug-boat in disobeying the orders of the pilots if they had given them positive orders to proceed and in coming to an anchor. This clearly shows that the negligence of the respondents was of the grossest character. Admitting even that the pilot of the *Silver Cloud* ought to have given the order to stop and did not do so, this neglect on his part does not disentitle the appellants to recover against the respondents, because the negligence of the appellant did not directly and actively contribute to the accident.

Devies v. Mann, 10 M. & W. 546;

Taft v. Warman, 5 C. B. N. S. 373.

The direct cause of the accident was the persistency of the respondents in pursuing their course after they became aware of the risk, and by ordinary care could have avoided the consequences of their neglect. In *Shearman and Redfield on Negligence* (§ 36, p. 40, 2nd ed.), it is said, "According to the doctrine of the English decisions, which we have adopted in sect. 25, the plaintiff may recover, notwithstanding his own negligence exposed him to risk of injury, if the defendant, after becoming aware of the plaintiff's negligence, failed to use ordinary care and to avoid injuring him." The respondents here failed after the fog came on to use that ordinary care for which they had contracted, and which they were bound to exercise by stopping, so as to avoid injury to the appellants' vessel.

Sir J. Karalake, Q.C. and H. M. Bompas, for the respondents, were not called upon.

The judgment of the court was delivered by Sir B. PEACOCK.—This is a suit brought by the owners of the *Silver Cloud* against the St. Lawrence Tow Boat Company, who are the owners of the *Hero*, a steam-tug, which was employed for the purpose of towing the *Silver Cloud* upon the River St. Lawrence from Montreal to Quebec. The suit was brought for negligence in running the *Silver Cloud* aground during a dense fog. Chief Justice Meredith (the Chief Justice of the Superior Court) tried the case originally. He analysed the evidence very closely, and he came to the conclusion that the owners of the *Silver Cloud* were not entitled to recover.

It appears to be clear that when no directions are given by the vessel in tow, the rule in the case of tug steamers is, that the tug shall direct the course. The tug is the moving power, but it is under the control of the master or pilot on board the ship in tow. The *Hero* was towing two vessels, but their Lordships are of opinion that that does not make any difference in this case. If it had appeared that contradictory orders were given by the two vessels, and that the orders of one were obeyed in opposition to those of the other, the case might have been different. The vessels were proceeding in a dense fog; there were no means of seeing the banks of the river, nor of knowing where they were going; and no doubt there was negligence on the part both of those on board the ship and of those on board the *Hero* in proceeding in the way in which they did during the fog. If the *Silver Cloud* had given orders to the *Hero* to stop, and the *Hero* had neglected to obey those orders, then the negligence would have been solely on the part of the *Hero*. But if, on the

other hand, those on board the *Silver Cloud* did not give proper orders to the *Hero* to stop, then it appears to their Lordships that they were consenting to proceed in the fog, and that they contributed to the accident which occurred. The rule was clearly laid down by Lord Kingsdown in the case of *The Julia* (*ubi sup.*). Speaking of the duties of a tug steamer, he says, "a tug is to use proper skill and diligence, and is liable for any damage by her wrongful act. When the contract to tow was made, the law would imply an engagement that each vessel would perform its duty in completing it; that proper skill and diligence would be used on board each; that neither vessel, by neglect or misconduct, would create unnecessary risk to the other, or increase any risk which might be incidental to the service undertaken. If in the course of the performance of the contract any inevitable accident happened to the one without default on the part of the other, no cause of action would arise. If, on the other hand, the wrongful act of either occasioned damage to the other, such wrongful act would create a responsibility in the party committing it, if the sufferer had not by any misconduct or unskilfulness on his part contributed to the accident."

Their Lordships concur in the opinion expressed by the majority of the Judges in the Court of Appeal, that those on board the *Silver Cloud* did contribute to the accident. The case was tried by Chief Justice Meredith in the superior court, and, after analysing the evidence, he came to the conclusion that they did not give such orders to stop as they were bound to do. Upon appeal to the Court of Queen's Bench, three of the judges of that court came to a similar conclusion. Now, their Lordships are asked to reverse the decision of the superior court, and the decision of the majority of the Court of Queen's Bench, upon a question of fact. It would not be right for their Lordships to overrule the decision of those courts upon such a question unless they came to a clear conclusion that the judges or those courts had come to an erroneous decision. In this case, so far from their Lordships coming to that conclusion, their opinion is in accordance with that of the majority of the judges in the lower appellate court, and in accordance with that of the judge who tried the case (Chief Justice Meredith), that the owners of the *Silver Cloud* did contribute to the accident by their negligence in allowing the *Hero* to proceed in the fog without giving that vessel proper orders to stop when it was dangerous, and dangerous to the knowledge of those on board the *Silver Cloud*, to proceed in the state of the weather in which they were going on.

Under those circumstances, their Lordships will humbly recommend Her Majesty to affirm the judgment of the Court of the Queen's Bench, with costs.

Appeal dismissed.

Attorney for the appellants, J. T. Simpson.

Attorneys for the respondents, Bischoff, Bowdler, and Bischoff.

COURT OF QUEEN'S BENCH.

Reported by J. SHORR and M. W. McKELLAR, Esqrs.
Barristers-at-Law.

June 5 and July 5, 1873.

FISHER AND OTHERS v. THE LIVERPOOL MARINE INSURANCE COMPANY (LIMITED).

Marine insurance—Policy—Ship—Neglect to execute policy—Whether action will lie for neglect—Admissibility in evidence of slip—30 & 31 Vict. c. 23, ss. 7, 9.

*E. and Co. were agents of the defendants (a Liverpool Insurance Company) in London, to accept risks and receive premiums. Plaintiffs instructed P. and Co., insurance brokers in London, to insure some steel rails on board a ship for them; and on the 16th Nov. 1871, P. and Co. prepared a slip, which was initiated by one of the firm of E. and Co. for 1000*l.* A copy slip was sent to E. and Co., and by them forwarded the same night to the defendants in Liverpool, but the defendants did not send up a stamped policy. The amount of the premium and 2*l.* 6*d.* for policy duty were paid by P. and Co. to E. and Co. The vessel, with the steel rails on board, having been lost, the plaintiffs brought an action against the defendants to recover damages for the loss:*

Held (per Quain and Archibald, JJ., dissentiente Blackburn, J.), that the plaintiffs could not in any form of action recover against the defendants, as 30 & 31 Vict. c. 23, ss. 7 and 9, prevented the plaintiffs from making available a contract for marine insurance not expressed in a stamped policy.

Per Blackburn, J., dissentiente, that the sending to the defendants of the copy slip was a request to them to obtain a stamp and complete the policy, and on their acceptance of that request they entered into a new contract apart from the initiating of the slip, and that the plaintiffs could recover against the defendants for not using due skill and diligence in procuring a stamped policy in conformity with the request slip, and bringing the transaction to a conclusion within a reasonable time, either by executing or repudiating that policy; and that the slip was admissible in evidence, not for the purpose of enforcing it as a contract of insurance, but for the collateral purpose of showing that the defendants had not used diligence in bringing the matter to a conclusion within a reasonable time.

*Declaration, for that the defendants, by warranting to the plaintiffs that one Eames was duly authorised as their agent and on their behalf to accept certain risks and receive on their behalf certain premiums for insurance upon risks represented by the said Eames to have been accepted by the defendants, and in respect of policies of insurance drawn up and executed by the defendants, to cover such risks, induced and caused the plaintiffs to pay certain premiums for the said insurance, and certain other monies for the costs and expenses of the said policy of insurance by the said Eames, for and in respect of a risk accepted by him for and in the name of the defendants, upon a ship of the plaintiffs called the *Lizzie*, and for the said policy of insurance represented by the said Eames to have been prepared and granted by the defendants to the plaintiffs, and retained as usual in the hands of the defendants, and also thereby induced and caused the*

Q. B.] FISHER AND OTHERS v. THE LIVERPOOL MARINE INSURANCE COMPANY (LIMITED).

[Q. B.]

plaintiffs not to cover the said ship by other insurances, and to rely upon the said policy said to have been granted by the defendants; and the plaintiffs say that all conditions precedent were fulfilled, and all times elapsed, and all matters and things were done and happened necessary to entitle the plaintiffs to have the said warranty fulfilled and performed, and to sue the defendants for the breach of the said warranty hereinafter complained of; yet the plaintiffs say that the defendants were guilty of a breach of the said warranty in this respect, that the said Eames had not authority, as their agent, to accept the said risks and receive the said premiums for insurances as warranted as aforesaid, whereby the plaintiffs sustained great loss and damage, as in the second count hereinafter set forth; and the plaintiffs also sue the defendants for that the defendants, by falsely and fraudulently misrepresenting to the plaintiffs that one Eames was then duly authorised to act as their agent in accepting premiums for insurance, and also that the defendants had granted and accepted a policy of assurance in favour of the plaintiffs, covering a certain ship of the plaintiffs called the *Lizzie*, induced the plaintiffs to pay to the said Eames a large sum of money for and as a premium for such assurance, and for the price of a stamp for the said policy, and also to abstain from effecting insurances with other underwriters, whereas, in truth and in fact, no such policy was granted or executed by the defendants, nor was the said Eames authorised to receive premiums for the defendants, all which premises the defendants well knew at the time of the making of the said false representations, whereby the plaintiffs sustained loss and damage by paying the said sum of money to the said Eames without having the benefit of an insurance, and by abstaining from covering the said ship by other insurances, and by the said ship being lost by perils of sea, against which the plaintiffs then supposed they were insured, and the plaintiffs were otherwise greatly damaged; and the plaintiffs also sue the defendants for money payable by the defendants to the plaintiffs for money had and received by the defendants to the plaintiffs' use.

Pleas (1) to the first count, that the defendants did not warrant as therein alleged; (2) that they are not guilty of such breach of warranty as therein alleged; (3) that they did not induce or cause the plaintiffs to act as therein alleged; (4) to the second count, not guilty; (5) as to the residue of the declaration, never indebted.

On these pleas issue was joined.

The case came on to be tried before Brett, J., at the Liverpool Summer Assizes 1872, when the learned judges held that there was no evidence to go to the jury of breach of warranty or of misrepresentation, but gave leave to amend the declaration so as to cover the facts, and thereupon a verdict was found for the plaintiff for 1000*l.*, leave being given to the defendant to move to enter a verdict for them if there was no evidence upon an amended declaration which should have been left to the jury, or if the learned judge ought not to have amended. All the material facts of the case are stated in the judgment of Blackburn, J. (*post*.)

The case had been argued once before Blackburn and Quain, JJ., when those learned judges differed in opinion, and the rule was ordered to be argued a second time, when there should be a third judge present.

Benjamin, Q.C. and Macpherson showed cause against the rule.—The question is, whether an action in any form will lie against the defendants under the circumstances of the case, and it is submitted that an action will lie. The plaintiffs being interested in a certain vessel, desired to insure it, and employed the defendants as their agents to effect the insurance. By accepting that office the defendants undertook, on receipt of the premium, to issue a policy; and this they were bound to do by law; and if by their neglect to do so they have occasioned loss to the plaintiffs, they are liable for it. The plaintiffs sue not in contract but in tort for a breach of duty. [BLACKBURN, J.—Surely you are in effect suing upon a contract. QUAIN, J.—It was a contract with the defendants that they, on receipt of the premium, should issue a policy.] There is a clear distinction between the two classes of cases, an action in tort often lying where an action in contract would not lie: See *Langridge v. Levy* (2 M. & W. 519), where an action was held to lie for falsely and fraudulently warranting a gun to have been made by a particular maker, and to be a good, safe, and secure gun, and selling it as such to the plaintiff's father, for the use of himself and his sons, one of whom (the plaintiff), confiding in the warranty, used the gun, which burst and injured him. The defendants rely on the provisions of 30 & 31 Vict. c. 23. Sect. 7 of that Act provides that "no contract or agreement for sea insurance (other than such insurance as is referred to in the 55th section of the Merchant Shipping Act Amendment Act 1862) shall be valid unless the same is expressed in a policy; and every policy shall specify the particular risk or adventure, the names of the subscribers or underwriters, and the sums insured; and in case any of the above-mentioned particulars shall be omitted in any policy, such policy shall be null and void to all intents and purposes." Sect. 8 contains similar nullifying words as to policies for periods exceeding twelve months. It provides that "no policy shall be made for any time not exceeding twelve months, and every policy which shall be made for any time exceeding twelve months shall be null and void to all intents and purposes." But no such strong words are used when the statute comes to deal with the question of stamping. Sect. 9 provides that "no policy shall be pleaded or given in evidence in any court, or admitted in any court to be good or available in law or in equity, unless duly stamped." [BLACKBURN, J.—The question really is, whether you can recover on a slip to the same extent as you can on a stamped policy? The policy must be stamped in order to be given in evidence; but the various steps taken by the parties in anticipation of this valid contract are perfectly legal. They may come to an understanding as to the form which the agreement is to take. If the plaintiffs had not paid to the defendants the amount of stamp duty, it is admitted that it would be contrary to the policy of the Stamp Act that they should be allowed to recover in this action; but the plaintiffs having paid the amount of stamp duty, have done all they can to meet the requirements of the Stamp Act; and there is nothing to prevent the plaintiffs from making the defendants liable for a breach of duty in not, after receiving the amount of the stamp duty, obtaining the requisite stamp and issuing the policy. There has been no evasion or attempt at evasion of the

Stamp Act on the part of the plaintiffs. It is acknowledged that there can be no valid policy unless it is stamped, but the statute does not say that the slip may not be used to prove other things. *E. g.*, it may be used for the purpose of convicting offenders against the statute; sect. 13 providing that "if any person shall become an assurer upon any sea insurance, or shall subscribe or underwrite, or otherwise sign or make, or enter into any contract, agreement, or memorandum, for or of any sea insurance, or shall receive or contract for any premium or consideration for any sea insurance, or shall receive, or charge, or take credit in account for any such premium or consideration as aforesaid, or shall wilfully or knowingly take upon himself any risk, or render himself liable to pay, or shall pay or allow, or agree to pay or allow, in account or otherwise, any sum of money, upon any loss, peril, or contingency relative to any sea insurance, unless such insurance shall be written on vellum, parchment, or paper duly stamped; or if any person shall be concerned in any fraudulent contrivance or device, or shall be guilty of any wilful act, neglect, or omission, with intent to evade the duties payable on policies under this Act, or whereby the duties may be evaded, every person so evading shall for every such offence forfeit the sum of 100*l.*" This section clearly shows that there are collateral purposes for which an unstamped policy is admissible in evidence. Now the plaintiffs do not use it in the present case to show that there has been a contract of insurance, but to show that through the default of the defendants the plaintiffs have been prevented from obtaining a contract of insurance. The claim is for unliquidated damages to recover the amount of the loss sustained owing to the defendants' neglect of duty. If the plaintiffs are held not entitled to recover, it will follow that the party who has provided the money for the stamp duty will have to suffer, and not the party who received it. In *Ionides v. The Pacific Fire and Marine Insurance Company* (ante, vol. 1, p. 141; L. Rep. 6 Q. B. 674; and on appeal, ante, vol. 1, p. 330; L. Rep. 7 Q. B. 517) it was held that notwithstanding sect. 7 of 30 & 31 Vict. c. 23, a slip may be given in evidence, though not valid as a contract, as evidence of the intention of the parties. Blackburn, J., in the court below, said: "As the slip is clearly a contract for marine insurance, and is equally clearly not a policy, it is by virtue of these enactments not valid, that is, not enforceable at law or in equity; but it may be given in evidence wherever it is, though not valid, material; and in the present case it is material." And in the Court of Exchequer Chamber, Kelly, C.B. said: "The second question is, whether this slip was admissible in evidence at all, and if it were, whether it was admissible in evidence for the purpose for which alone it was used on the trial of this cause. Now, it is quite true that under the statute in question (30 Vict. c. 23, ss. 7, 9), the document called a slip, although it is binding in point of honour between parties circumstanced as these parties were, is made void as a contract, and as such inadmissible in evidence. It is not like an agreement for a lease, upon which an action can be brought for the non-acceptance of the lease, or the refusal to grant a lease; but as a contract for a policy of insurance to be afterwards made, is a mere nullity. It does not, however, follow that it is not admissible in

evidence for a great variety of purposes. In this case it is unnecessary to do more than consider whether it is admissible in evidence for the purpose of showing what the two parties intended at the time they entered into this transaction; in other words, whether they intended it to be a policy pursuant to a previous contract, although that contract was not binding, or whether the policy was a new, separate, and substantive contract, to be construed without reference to the previous acts of the parties. . . . If it had been applied to a purpose forbidden by the Act of Parliament, I should not have hesitated to say that it ought not to be considered as admitted, or if admitted applied to any such purpose. But for many purposes it may legitimately be used, as in cases where a fraud is suggested, or where there is a plea, as here, of misrepresentation, the slip may be evidence of the fraud or of the misrepresentation charged. Suppose a ship, with a view to an insurance from a port in South America, which had been under blockade a little while before the date of the policy, and the slip, at the instance of the plaintiff, described the port as an open port, and the question had arisen whether the policy had been procured by misrepresentation, or whether there was a concealment of the material fact that the port had been under blockade; no one can doubt that upon the collateral question of misrepresentation, the slip would be admissible in evidence to prove what the plaintiff had represented. It is quite enough, therefore, to say that here it was not given in evidence to prove a binding contract between the parties, or to contradict or to explain, or in any way affect the construction of the policy in question; but it was given in evidence only to show what their intention was in preparing the policy. For that purpose I am clearly of opinion that it was admissible in evidence." The point for which the slip is sought to be used in the present case is clearly a collateral one, and the authority of the case cited shows that for such a purpose it is admissible in evidence. *Dutton v. Poulter* (2 B. & S. 174) was also referred to.

R. G. Williams and James P. Aspinall (Aspinall, Q.C. with them) in support of the rule.—A slip is a contract for sea insurance; it is a contract to execute an instrument by which the vessel named shall be duly insured; and that is the only contract in the case. There is no such thing as a contract merely to make and deliver a policy. The contract for a sea insurance arises immediately on the initialling of the slip. Apart from the Stamp Acts, the slip would be a good contract of sea insurance; but the statute has provided that "no policy shall be pleaded or given in evidence in any court, or admitted in any court to be good or available in law or in equity, unless duly stamped." The cases of *Cory v. Patton* (ante, vol. 1, p. 225; L. Rep. 7 Q. B. 304), and *Ionides v. The Pacific Fire and Marine Insurance Company* (supra), could never have arisen if a slip could in any way be made enforceable in an action. In the last cited case, the court distinctly say that "it is void as a contract, and as such inadmissible in evidence;" "as a contract for a policy of insurance to be afterwards made, it is a mere nullity." Now it is only as a contract for a policy of insurance afterwards to be made that the slip can in any way be made available in the present action, and as such it is "a mere nullity." A contract to execute

a policy of insurance is indisputably a contract for sea insurance, and therefore comes expressly within the application of the Stamp Act. What is a sea insurance and what is a policy are defined by the 4th section, which provides that "the expression 'sea insurance' means any insurance (including reinsurance) made upon any ship or vessel, or upon the machinery, tackle, or furniture, of any ship or vessel, or upon any goods, merchandise, or property of any description whatever, on board of any ship or vessel, or upon the freight of or any other interest which may be lawfully insured in or relating to any ship or vessel; and the word 'policy' means any instrument whereby a contract or agreement for any sea insurance is made or entered into." In *Xenos v. Wickham* (L. Rep. 2 Eng. & Ir. Ap. 314; 2 Mar. Law Cas. O. S. 557), Willes, J. says: "The statutes requiring contracts of marine insurance to be in writing and stamped (35 Geo. 3, c. 63, s. 11; 54 Geo. 3, c. 144, ss. 3, 4, 5) annuls contracts not so framed; consequently a marine policy or contract for a marine policy, to be valid, must be in writing, which by the consent of both parties, shall represent the contract between them." But for the decided cases, it might have been supposed that, upon the slip being completed, there was a contract upon the part of the assurers to prepare and hand over a policy according to the slip; and that although, because of the statutes, no action could be maintained as upon a policy of insurance, yet an action might be maintained for not preparing a policy. And cases have been tried without objection upon the notion that the insurance is complete from the date of the slip. But the law, as settled by the decisions upon the construction of the statutes referred to, is that as there can be no valid insurance or contract for an insurance, unless by writing with the statutory requisites, the slip by itself has no hindering force. Thus, it has been held that, notwithstanding the slip, the proposed assured, upon the one hand, can insist upon being assured, and can retract his order and refuse to accept the policy; (*Warwick v. Slade*, 3 Camp. 1279), where the employer retracted the broker's authority after the slip was signed, though before the policy was completed; and, on the other hand, that the slip imposes no liability upon the proposed insurer, and there is no remedy against him until the policy is complete; (*Parry v. The Great Ship Company*, 4 B. & S. 556; 1 Mar. Law Cas. O. S. 387.) To give effect to a slip, as sought to be done in the present action, would be to give it the same effect as a policy, and thus to frustrate the clear intention of the Stamp Acts. It is submitted that the absence of a duly-stamped policy is a fatal obstacle to the plaintiffs' recovering in any form of action against the defendants.

Cour. adv. vult.

July 5.—The Court being divided in opinion, the following judgments were now delivered:

BLACKBURN, J.—In this case, on the trial before my brother Brett at Liverpool, the plaintiffs had a verdict for 1000*l.*, subject to leave to move to enter a verdict for the defendants reserved by the learned judge, in the following terms, "if there was no evidence upon an amended declaration or if I ought not to have amended." The Common Law Procedure Act 1852, sect. 222, gives the judge at Nisi Prius power to make all amendments on such terms as he thinks fit; and requires that all such amendments as may be necessary for the purpose

of determining in the existing suit the real question in controversy between the parties, shall be made. No suggestion was made, either at the trial or on the argument, that there were any terms which it was proper to impose. That being so, we must construe this reservation as meaning that if there is any form of declaration under which the evidence at the trial would prove the plaintiff's right to recover, the verdict is to stand.

Mr. Aspinall obtained a rule on four grounds, thus stated in the rule: First, that there was no evidence to go to the jury; secondly, that no action will lie on the slip alone without a policy; thirdly, that no interest was shown in the plaintiffs; fourthly, that the learned judge should not have allowed the declaration to be amended. Against this cause was shown in the first instance before my brother Quain and myself, when we were agreed that there was no foundation for the objection that no interest was shown in the plaintiffs, and that was disposed of on the argument, and we need not further notice it. On the other points we felt so much difficulty that we directed a second argument when my brother Archibald could be present, and after that argument the court took time to consider.

To make the case intelligible it is necessary to state the material part of the evidence. From the judge's notes it appears that the defendants, a Liverpool insurance company (limited), employed the firm of Eames and Co. as their agents in London, to accept risks and receive premiums in London. One of that firm was called as a witness and gave evidence that the course of business was that he accepted risks for the defendants by himself initialling the slips. That when he had initialled the slip a copy of the slip (as he called it) was sent to him. This appears to have been the practice described in the 7th paragraph of the case stated in *Xenos v. Wickham* (14 C. B., N. S., 438). In that case I expressed (at p. 454) an opinion to which I still adhere, that what is here called the copy of the slip is not, like the first slip, in legal effect, a memorandum of the terms on which the parties agree to insure, but a request unto or mandate to the company to make out and execute a policy according to the practice. The witness proceeded to explain that the course of business was that the witness always forwarded the copies of the slips or request notes to the defendants at Liverpool on the same night that they were received by him in London. A circular, approved by the defendants, informing the public that Eames and Co. were their London agents, was put in. The plaintiffs had instructed John Patten, jun. and Co., insurance brokers in London, to issue for them steel rails, and on the 16th Nov. 1871 Patten and Co. prepared a slip which was put in evidence at the trial, and which has been produced before us. It was headed in print, "Cash acc., John Patten, jun. and Co." and was dated 16th Nov. 1871. Then in writing followed:

Barrow.		Larv.		New York.	
Steel rails.				f. p. a.	
f. s. a.				£880)	
f. s. & s.				60/ 0/0.	

Below followed several sums initialled by different parties. These sums in all amounted to 4200*l.* Amongst them was "1000*l.*, T. R. E." It was proved by the evidence of Mr. Eames that these were his initials. No evidence was given as to

Q. B.] FISHER AND OTHERS v. THE LIVERPOOL MARINE INSURANCE COMPANY (LIMITED). [Q. B.]

the effect of this; but there is no doubt that in mercantile understanding this amounted to an agreement between the brokers, Patten and Co., and Eames (acting for the defendants) to insure on the ship *Lizy*, on a voyage from Barrow to New York 1000*l.*, part of 6880*l.* on steel rails, free of particular average, and of general average, and of capture and seizure at 6*½* per cent., and that the premiums were to go into the cash account. I will consider the effect of the revenue laws on this afterwards. The copy slip or request note was made out by Patten and Co., and sent to Eames and Co. who, on the same night, sent it on to the defendants at Liverpool. It was not stated by any witnesses when this was done. In regular course it ought to have been done directly after the slip was initiated, and the stamped policy ought then to have been sent up by the defendants to Eames and Co. duly executed by them soon after. Had this been done in November the amount of the premium in this case 30*l.* less 10 *o*/*p* on that amount for discount, or in this case 27*l.* making the net sum 25*l.* 13*s.* would have been payable on the 8th Dec. by the broker to the defendants. And as the defendants would have advanced for the broker the amount of the stamp, that would have been due at once, though for convenience sake the actual payment would in practice, no doubt, be made at the same time when the larger sum for the premiums was paid. The defendants, for some reason not explained but probably connected with their being in liquidation, neglected to send up the stamped policy. Patten and Co.'s clerk proved that be several times called for it at Eames and Co., and was told that it had not come up, and that Eames and Co. would write to the defendants sharply about it. At last, on the 29th Jan. 1872, the defendants' liquidators wrote a letter to Eames and Co. inquiring whether this slip was to go forward. Eames immediately communicated with Patten and Co., and in consequence of their directions the slip was put forward, and Eames and Co. forwarded to Patten and Co. an account of which the following is a copy:

The Liverpool Marine Insurance Co. (Limited).
London agency,
Eames & Co.,

St. Michael's House,
Cornhill, E.C.

To premiums for the month of	
Jan'y. 1872, less brokerage and	225 13 0
10 per cent. discount for cash	
Policy duty	0 2 6

225 15 6

Note.—The discount will be forfeited in default of prompt payment on the 8th Feb.

This account, it will be observed, is made out exactly as if there had been a fresh slip initiated in January, and the stamp had been duly procured by the defendants. For some reason, not explained, actual payment was not made by Patten and Co. till the 13th March, on which day they paid the amount to Eames and Co. by a cheque payable to defendant's order. Eames and Co., by virtue of an authority which they had from the defendants, indorsed that cheque and received the money. These facts are very strong evidence that as between Eames and Patten it was understood that the company had undertaken the duty of preparing the policy. The defendants never did prepare or execute any stamped policy. The *Lizy* was totally lost, and then the defen-

dants refused to execute any policy or to pay the insurance.

The main contention of the defendants was that the plaintiffs could not recover unless the court, in a direct contravention of the 30 Vict. c. 23, sects. 7 & 9, permitted the plaintiff to make available a contract for marine insurance not expressed in a stamped policy; and on the pleadings as they stood at the trial this was the case. But the learned judge was of opinion, and we think quite correctly, that if by any amendment the pleadings could be made such as to enable the plaintiffs to recover for the breach of the defendants' duty, without contravening the statute, that amendment should be made. He asked the jury three questions: First, did the defendants authorise Eames to issue slips, and accept risks, and receive premiums; secondly, did the defendants, by approving the circular and the authority which they gave to Eames to issue slips and accept premiums, give the plaintiffs reasonable ground to believe, and did the plaintiffs believe, that if they paid the premium and stamp on a slip initiated by Eames they, the defendants, would issue a policy in accordance with the slip? thirdly, were the plaintiffs prevented by the conduct of the defendants from insuring elsewhere? The jury found for the plaintiffs, and the verdict was entered for 1000*l.*, subject to the leave already mentioned.

I have come to the conclusion that the plaintiffs may in this case recover without infringing the existing revenue laws. In *Morden v. Reid* (3 East, 572) the Court of King's Bench decided that the then Stamp Acts forbade them to look at the slip for any purpose. In that case the defence was that a material representation was made to the first underwriter to induce him to subscribe, which representation the defendants contended was to be taken to have been made to all the rest of the underwriters who acted on the credit of that first underwriter without the necessity of repeating it to each. It is obvious the underwriter who was the first in this sense, was the first underwriter who agreed to subscribe, and first initiated the slip, not the one who first signed the policy; but the court thought themselves bound to hold the contrary. A subsequent statute (54 Geo. 3, c. 144) provided for the stamping of slips, but I believe that slips never were in practice stamped, though that Act remained on the statute book till the 30 & 31 Vict. c. 23. The whole of the Stamp Acts were, as far as related to marine insurance, repealed by 30 & 31 Vict. c. 23, and therefore we need not inquire whether the monstrous injustice done in *Morden v. Reid* was really forced upon the King's Bench by the then Stamp Acts. It has been determined on the construction of the now existing Act, that though the slip being a contract for insurance, not expressed in a stamped policy is void as a contract; and as such, not admissible for other purposes: (*Jonides v. Pacific Marine Company*, ante, vol. 1, p. 330; *L. Rep.* 7 Q. B. 523, in the Exchequer Chamber; *Cory v. Patten*, *L. Rep.* 7 Q. B. 304; *ante*, vol. 1, p. 225; *Lishman and others v. Northern Marine Assurance Company*, *L. Rep.* 8 C. P. 216; *ante*, vol. 1, p. 554.)

In the case now before us Patten and Co., as brokers to the plaintiffs, had undertaken a duty to use due care and diligence about procuring, making,

Q. B.] FISHER AND OTHERS v. THE LIVERPOOL MARINE INSURANCE COMPANY (LIMITED).

[Q. B.]

and completing the insurance for them. When a slip is initialled the contract is binding in honour but not in law; and the broker's duty requires him to take the further steps to procure it to be made binding in law. For this purpose it is necessary that the policy should be drawn up on stamped paper, and the brokers have to advance the stamp and see that the policy is properly drawn up, and then to take care that within a reasonable time the matter is concluded. The broker does not undertake that the underwriter who has initialled the slip shall sign the policy, though that is the way in which in the great majority of cases the matter is concluded. As soon as the underwriter has signed, the premiums are as between the assured and the underwriter paid, the underwriter taking in satisfaction of them the broker's personal promise to pay at the end of the customary period, subject to the customary deductions. But if the underwriter refuses to sign there is no mode either at law or in equity to force him to do so. The matter in that case is concluded by this breach of honour on the part of the underwriter; and if the broker has used due diligence to bring it to a conclusion, either one way or the other, within a reasonable time, he has done his duty. If the broker has been negligent, and in consequence of the final conclusion of the matter has been unreasonably delayed, the broker is responsible to his principal for the damage sustained through that delay. That damage must depend on circumstances. If, notwithstanding the delay, the risk will be still taken by other underwriters at the same premiums the damage would generally be nothing. If the risk was still insurable, but at an enhanced premium, the measure of damages would generally be the increase of the premium. But if, in consequence of the delay, news of the loss had come, or for any other reason, the risk was no longer insurable, the damage would generally be the amount which would have been recoverable if a stamped policy had been duly executed within a reasonable time. In order to prove the case against the broker it would be necessary to give in evidence the slip, not for the purpose of enforcing it as a contract of insurance; but for the collateral purpose of showing that the broker had not used due diligence in bringing the matter to a conclusion within a reasonable time, so that the principal might be insured elsewhere if this underwriter did not insure him, and I think on the authority of the cases above cited the slip is admissible for such a purpose.

Then it seems to me that on the usage stated in *Xenos v. Wickham* (14 C. B., N. S., 457), and followed in this case, the effect of giving to a company a request slip, or copy slip, and of the company accepting it, is that the company by what I consider a fresh arrangement, no part of the contract made by initialling the slip, take on themselves that which would otherwise be the duty of the broker, viz., to use due skill and diligence about preparing the policy properly and bringing the transaction as regards the company's subscription to a conclusion in a reasonable time. And for this undertaking the mere fact that they were trusted with that duty would be a sufficient consideration. I do not think that the company by this acceptance of the request slip promises to execute the policy. That it had already done by initialling the slip, and the acceptance of the

request slip carries that contract no further. But I think that it does by what, when the practice first began, must have been in each case an express subsequent agreement, and what I think still is a subsequent agreement, though now a casual one, take upon itself a responsibility co-extensive with that which the broker would otherwise have undertaken. If the company at once returns the request slip, and without any delay informs the assured that it will not execute a policy, though bound in honour so to do, I do not think that any action would lie against it. The assured would then be at liberty to insure elsewhere. But if the company is guilty of unreasonable delay, the damages to which it would be liable would, I think, be just the same as the broker would have been liable to if he had been guilty of the same delay. And I see nothing inconsistent with the objects of the revenue laws in enforcing a contract to pay the government for the stamp. Nor do I see any reason why we should strive to turn the second independent contract into a part of the first, in order to bring the same within the letter of the statute, if it is not within its spirit. In the present case I think the evidence and the answer of the jury to the first question put by my brother Brett, would prove a count framed on the undertaking of the defendants to use due skill and diligence in framing a stamped policy in conformity with the request slip, and bringing the transaction to a conclusion within a reasonable time, either by executing or repudiating that policy. And I think that the evidence and the answers of the jury to the two and three questions show a breach of that duty and damage sustained by the plaintiffs justifying the verdict for 1000*l.* And I think that by giving effect to that verdict, that we should not transgress the 30 Vict. c. 23, as we should neither treat the contract for assurance contained on the slip as valid, nor make it available at law as a policy, but merely receive it in evidence for the collateral purpose of showing the duty which the defendants took upon themselves and neglected.

I think therefore that the rule should be discharged, but as the majority of the court are of a different opinion, it must be made absolute.

The judgment of Quain and Archibald, JJ. was delivered by

ARCHIBALD, J.—The question in this case is, whether upon the facts, and assuming the necessary amendment made, the plaintiff is under any form of declaration entitled to recover, notwithstanding the provisions of the 30 Vict. c. 23. The facts as proved are fully set forth in the judgment of our brother Blackburn, and it is unnecessary therefore to repeat them in detail. Those which are the most material relate to the difference in regard to the preparation of the stamped policy, between the usage in the case of private underwriters and that which prevails in the case of insurance companies.

In the former case, after the slip has been initialled, the usage is for the broker of the assured to advance the stamp, draw up the policy on stamped paper, and present it to the different underwriters for execution. But in the case of an insurance company, after the slip has been initialled by an agent of the company, it is retained by the broker of the assured, and a copy of it is then sent to the company by the

[Q. B.]

FISHER AND OTHERS v. THE LIVERPOOL MARINE INSURANCE COMPANY (LIMITED).

[Q. B.]

broker, in order to enable the company to prepare the policy. The policy is then drawn up on stamped paper by the company, who themselves advance the stamp and execute the policy ready to be delivered to the assured or his broker. The duty of the broker of the assured in ordinary cases, and the measure of damages for any breach of it, are well established and understood, and if the evidence in this case satisfied us that a precisely analogous duty unconnected with and separate from a promise to execute the policy, was undertaken by the defendants' company, we should have no doubt that the consequences of a breach of duty by the company would be similar to those of a breach by the broker.

It appears to us also that inasmuch as the slip, though invalid as a contract, would be admissible in evidence for the collateral purposes of establishing the existence and the breach of such a duty—see *Ionides v. The Pacific Marine Insurance Company* (ante, vol. 1, pp. 141, 330; L. Rep. 7 Q. B. 525); *Cory v. Patton* (ante, vol. 1, p. 225; L. Rep. 7 Q. B. 304)—the plaintiff would, if the declaration could be made to assume such a shape, be entitled to recover. Indeed, this seems to us to be the only conceivable form of declaration upon which, if at all, the defendants can be rendered liable; for the 30 Vict. c. 23, expressly renders invalid any contract or agreement, for sea insurance, unless it be expressed in a policy (in which also certain prescribed particulars must be specified) and prohibits its being pleaded or given in evidence, or admitted into any court to be good or available in law or in equity, unless duly stamped, i.e., stamped before being signed or underwritten. So that no action can be directly maintained upon the slip itself, which in the opinion of all of us amounts to an agreement for sea insurance within the meaning of the Act. (Per Willes, J., in *Xenos v. Wickham*, L. Rep. 2 H. of L. Cas. 296.)

It is abundantly clear that, in consequence of the provisions of the Act, the engagements entered into by initialling the slip cannot be directly enforced, either at law or in equity; and being therefore only binding in honour, it is open to unconscientious men to break it, unless it can be indirectly enforced in the manner and on the grounds suggested by brother Blackburn in his judgment, whether it can or not, in the present case, depends upon the true nature and effect of the usage with respect to the preparation of the policy. In the case of private underwriters, the engagement entered into by initialling the slip must, having regard to the course of business, be understood to be an engagement to execute a stamped policy when it has been prepared and presented by the broker. In the case of insurance companies, it is equally understood to be an engagement to execute a stamped policy, at some time and under some circumstances; and the question is whether it does not also import that the company are, on receipt of the slip, to procure the stamp and fill up the policy. Where or how the difference of usage between the case of private underwriters and that of companies first sprung up does not appear. The monopoly of the two old companies—the Royal Exchange and the London Assurance—was done away with in 1824 by the 5 Geo. 4, c. 114; and it may be that when other companies were first established for carrying on the business of marine insurance, the

practice as it exists between policy brokers and private underwriters, was in the first instance adopted, and that the present practice of sending a copy of the initialled slip to the company, in order that they, and not the broker, might procure the stamp and prepare as well as execute the policy, afterwards came into use; or it may be that from the first the latter course was found to be the most convenient. However this may be, it makes in our judgment little difference to the question under consideration; for it appears to us that when this became the fixed and settled usage, the only reasonable implication from the initialling of the slip on behalf of a company is that it is an engagement, not merely generally to execute a binding policy, but to execute it in accordance with the usual and accustomed course of business, including, therefore, an undertaking, on receipt of the copy of the slip, to procure a stamp and fill up the policy. If then this be (as we think it is) the true effect of the transaction, the agreement being one and entire, and including as part of it, an undertaking to execute the policy, i.e., an agreement for sea insurance, the statute applies and presents an insuperable obstacle to any action founded on a supposed breach of duty in not procuring a stamp and preparing a policy, or in failing to give notice within a reasonable time that the company decline to prepare and execute it.

It is contended that in the case of companies there are in fact two separate transactions, first, the initialling of the slip constituting an agreement to execute a policy; secondly, an agreement on a new and separate consideration, upon receipt and acceptance of the copy slip, to do all that it is the duty of a broker to do in the case of private underwriters. We are wholly unable to concur in this view. It appears to us that there is no evidence of any such second agreement, separate and distinct from the agreement which arises from initialling the slip, namely, to execute the policy. In our opinion there is only one agreement, viz., that which is to be implied in accordance with the usual course of business, from the initialling of the slip. Nor do we think that there is any duty cast upon the company, separate and distinct from the rest of their agreement, or which bears any true analogy to the well-known duty of a policy broker. The copy slip sent by the broker of the assured to the company, is sent merely for the purpose of enabling the company to prepare and fill up the stamped policy; and we do not think that it imposes on them any fresh duty different from that which they had already undertaken, or transforms the company into brokers for the assured. The broker in his endeavor to procure the completion of the policy, has to deal with third persons, over whose intentions or decision in the matter, he has of course no control. If, when he has done all that his duty in the matter prescribes, the underwriter should decline to execute the policy, the broker would be discharged if, within a reasonable time, he gave notice of it to his employer, in order that the latter might effect or direct an insurance to be effected elsewhere. But the company, if any analogous duty were supposed to be incumbent on them, would certainly not fulfil it by merely preparing a stamped policy ready for execution in their office, if they stopped short of executing it; and if it were added to their supposed duty, that

Q. B.]

MERCHANT SHIPPING COMPANY (LIMITED) v. ARMITAGE.

[Q. B.]

they were, within a reasonable time after they decided not to execute, to give a notice of such intention, this would imply a duty to make up their minds within a reasonable time, whether to keep or break their agreement, a duty altogether unlike anything undertaken by a broker. We are unable upon the facts to find that there is any such duty undertaken upon a new consideration, or any duty whatever severable from the contract to insure in the usual and customary manner; and upon the whole, therefore, we are of opinion that there is no possible form of action, under the circumstances of the case, which could be maintained without contravening the 30 Vict. c. 23.

For these reasons we are of opinion, that the rule to enter the verdict for the defendants must be made absolute.

Rule absolute.

Attorney for plaintiffs, *McDiarmid*.

Attorneys for defendants, *Venns and Son*.

Friday, June 6, 1873.

MERCHANT SHIPPING COMPANY (LIMITED) v.
ARMITAGE.

Charter-party—Lump sum freight—Entire discharge and right delivery—Loss of part of cargo by fire.

By a charter-party made at Colombo it was agreed that the plaintiffs' ship which was there should load there, or sail and proceed to Cochin, and there load from the defendants, the charterers or their agents, a full and complete lading. The ship being so loaded was to proceed to London and discharge; a lump sum freight of £5000 to be paid after the entire discharge and right delivery of the cargo in cash two months after the date of the ship's report inwards at the custom house, or under discount at 5 per cent., at option of charterers' agents.

*The plaintiffs' ship proceeded to Cochin, and was there put up by the defendants as a general ship and loaded with a full and complete cargo, the property of various merchants, and shipped under several bills of lading. On her voyage from Cochin to London the cargo was found to be on fire, and the ship had to be scuttled. Afterwards the water was pumped out, the damaged cargo was sold and accounted for by plaintiffs to the owners; the remainder of the cargo was re-laden on board and brought to London in the ship. The defendants had paid freight in proportion to the cargo and distance, but refused to pay the balance of the lump sum freight, about 1150*l*, which was claimed in this action.*

Held, that the plaintiffs were entitled to this sum, and also to interest from the time agreed for payment in cash.

THIS was an action for the recovery of 1152*l*. 18*s*. 1*d*. and interest, as hereinafter mentioned. By the consent of the parties and by order, the following case was stated for the opinion of the court without any pleadings:

The plaintiffs are a company carrying on business as shipowners in the City of London, and were and are the owners of the ship *Clyde*, hereinafter mentioned, and the defendants are merchants carrying on business at Colombo and London.

On the 25th Jan. 1872, the ship was lying in the harbour at Colombo, and upon that day the charter-party, hereinafter set out, was made and

entered into by Edward Shrewsbury, the master of the said ship, on behalf of the plaintiffs and the defendants. The charter-party was as follows:

Colombo, 25th Jan. 1872.

1. It is this day mutually agreed between Edward Shrewsbury, of the good ship or vessel called the *Clyde*, classed A 1 in Lloyd's, of the registered tonnage of 1151 tons or thereabouts, now lying in the harbour of Colombo, whereof he is master, of the one part, and Messrs. Armitage Brothers, of Colombo, merchants, on the other part, That the said ship being tight, staunch, and strong, and every way fitted for the voyage, shall, with all convenient speed, load here or sail and proceed to Cochin (orders to be given on or before the 25th inst.), and, if ordered to Cochin, there load from the said charterers or their agents, completing at Colombo or Tuticorin, if so required by charterers, a full and complete lading of legal merchandise, which full and complete lading the captain binds himself to receive on board and properly stow, but not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture, and being so loaded shall therewith proceed to London into the East or West India Docks, and discharge there as customary.

2. The act of God, restraints of prince and ruler, the Queen's enemies, fire, and all and every other dangers of the seas, rivers, and navigation of whatever nature and kind soever during the said voyage always excepted.

3. A lump sum freight of 5000*l*. to be paid after the entire discharge and right delivery of the cargo in cash two months after the date of the ship's report inwards at the Custom House, or under discount at 5 per cent per annum (or at the Bank rate if higher) at option of charterers' agents.

4. Thirty-five working days are to be allowed the said charterers (if the vessel be not sooner despatched) for loading, to commence and be continued from the time of the vessel having a clear hold and ready for that purpose, the master giving charterers or their agents written notice twenty-four hours in advance to that effect. And the charterers to have the option of keeping the vessel fifteen working days on demurrage, paying 20*l*. per day to be paid to the master day by day.

5. All goods to be brought to the vessel and taken from alongside at the risk and expense of the freighters.

6. The master to sign bills of lading at any rate of freight required, without prejudice to this charter-party; but should the aggregate freight by bills of lading amount to less than the lump sum of 5000*l*. already stipulated for, the difference to be deducted from the amount to be drawn for disbursements, and the balance, if any, to be paid in cash at the rate of exchange for sight bills existing at the time of the ship's clearing at Colombo.

7. The owners of the ship to have an absolute lien on the cargo for the amount of freight stipulated for except as to the captain's draft for disbursements and commission as before mentioned, in case of default.

8. And it is hereby agreed that the charterers are to furnish cash for the disbursements of the ship at port of loading at current rate of exchange not exceeding 750*l*., free of interest, but subject to a commission of 2*l*. per cent. and cost of insurance, for the due appropriation of which the charterers are not to be held responsible, and for which and agency commission, the master shall give his draft on the owners payable in London at sixty days' sight; and in the event of the bill not being accepted or paid at maturity, the amount to be deducted from freight at settlement thereof together with interest and cost of insurance.

9. The ship to be consigned to owner's agents in London, and in case of the vessel having to put into the Mauritius, the vessel to be consigned to Messrs. Blyth Brothers and Co. there, or to Messrs. Thompson, Watson, and Co. at the Cape of Good Hope.

10. A survey certificate to be supplied by the captain (if required) to the effect that the vessel is in every way fitted to carry a dry and perishable cargo to any port in the world.

11. The captain to carry cargo for charterer's benefit in any cabin store room or other place not absolutely required for use during the voyage.

12. The charterers to have the option of appointing their own storekeepers at the expense of the master, but at not exceeding current rates; but the captain is not

Q. B.]

MERCHANT SHIPPING COMPANY (LIMITED) v. ARMITAGE.

[Q. B.]

thereby relieved of the responsibility regarding the proper stowage of his vessel.

13. The captain and charterers to be at liberty to add any clause to this charter-party by mutual consent, without prejudice to this agreement.

14. In default of performance of this agreement it is hereby mutually agreed that the amount of freight herein agreed for to be paid and taken as liquidated damages for such default.

(Signed) F. SHREVEBURY.
(Witness) ARMITAGE BROTHERS.

In accordance with the orders of the defendants, the said ship proceeded to the port of Cochin, and was there put up by the defendants as a general ship and loaded with a full and complete cargo, the property of various merchants, which cargo was shipped under several bills of lading signed by the captain upon the orders of defendants. The total amount of the bill of lading freight was estimated by the charterer at 499*l.* 10*s.* 6*d.*, and was payable in London on delivery of the goods there.

The said ship with the said cargo on board sailed from the said port of Cochin upon her voyage to London under the said charter-party, and on the 2nd May 1872 the said cargo was found to be on fire; the master of the said ship, after attempting ineffectually to extinguish the fire at sea, put into Table Bay, which was the nearest port of refuge; and after a survey it was found expedient, in order to extinguish the fire, to scuttle the said ship; as it was deemed that the said fire could not be otherwise extinguished, the said ship was scuttled in Table Bay, and the said fire was thereby extinguished.

After the said fire had been extinguished, the water was pumped out and the greater portion of the cargo was unladen; and as a large quantity thereof was greatly injured by fire and water, surveys as customary were called, and the surveyors pronounced a great part of the said cargo unfit for reshipment, and it was therefore ordered to be sold, and it was sold accordingly; and the proceeds thereof were paid into the hands of the plaintiffs, who have since accounted for the same to the owners of the goods sold.

The remainder of the said cargo was reloaded on board the said ship; and on the 9th June 1872, the said ship having undergone some repairs, resumed her voyage to London with the remainder of the said cargo on board, and with no other cargo, and arrived in port and proceeded to the West India Docks, and on the 12th Aug. 1872 was reported inwards at the Custom House.

The bill of lading freights upon the cargo which arrived in London have been received by the plaintiffs, and amount to the sum of 348*l.* 7*s.* 10*d.*, and the defendants advanced to the master at Cochin the sum of 364*l.* 14*s.* 1*d.* for disbursements of the said ship, making together the sum of 384*l.* 1*s.* 11*d.*; but the defendants have not paid the plaintiffs the sum of 1152*l.* 18*s.* 1*d.*, being the balance of the said lump freight of 5000*l.* mentioned in the said charter-party; and they refuse to pay the same to the plaintiffs.

The court may draw inferences of fact.

The question for the opinion of the court is—

Whether the plaintiffs are entitled to payment by the defendants of the balance of the said sum of 5000*l.* under the said charter-party, after giving credit for the said aggregate sum of 384*l.* 1*s.* 11*d.*, which has been received by them on account thereof.

If the court shall be of opinion in the affirmative, then judgment shall be entered up for the plaintiffs for the balance of the lump freight of 5000*l.*—viz., 1152*l.* 18*s.* 1*d.*, with costs of suit.

And if the court shall be further of opinion that the plaintiffs are entitled to interest, then for a further sum for interest to be calculated for such period at such rate and by such person as the court may direct.

If the court shall be of opinion in the negative, then judgment with costs of defence shall be entered up for the defendants.

Sir J. B. Kurlake, Q.C. (with him Petheram) argued for plaintiffs.—Although there was here only a part delivery of the cargo, the whole lump freight is payable under this charter-party. In the case of the *Norway*, before the Privy Council (2 Mar. Law Cas. O. S. 17, 168, 254; 3 Moo. P. C., N. S., 245, Browning and Lushington 404; in the court below 12 L. T. Rep. N. S. 57), the words of the charter-party were that the freighter promised and agreed to "pay, or cause to be paid as freight for the use and hire of the vessel 11,250*l.* lump sum, if ordered to the United Kingdom, Havre, or Bordeaux; 11,250*l.* if ordered to Antwerp or Marseilles, the master guaranteeing to carry 3000 tons dead weight of cargo upon a draft of 26*t.* of water, or to forfeit freight in proportion to deficiency;" . . . "payment whereof to become due and to be paid as follows, viz., 2000*l.* to be advanced on the vessel clearing at Liverpool, subject to insurance only, say 1000*l.* by freighter's acceptance at four months, and 1000*l.* at six months, sufficient cash for ship's disbursements, not exceeding 2500*l.* to be advanced at Calcutta, and the necessary disbursements, if ordered to the rice ports subject to interest and insurance only, all at current rate of exchange, for six months' bills on London against the captain's receipts. Such advances to be made on account of chartered freight, and the balance as follows, viz., one third in cash on arrival at port of delivery, and the remainder on true and final delivery of the cargo at the port of discharge by good and approved bills payable in London or cash."

Some of the cargo was jettisoned, and some spoilt was sold. The judgment upon this point is to be found at p. 264 of 3 Moo. P. C., N. S. "The next question is whether, in respect of the rice jettisoned and that which was sold, there ought to be a deduction from the lump freight because they were not delivered. We think that there ought to be no deduction. It is obvious that this question stands on a somewhat different footing from that on which it stood when it was decided by the learned judge below, because it was then taken for granted that the jettison and sale, and consequent failure to bring home the goods, were owing to the misconduct of the master. But in the view we take of this part of the case, it must be understood that they were owing to the perils of the sea, and that the master was free from blame in the matter. Although the lump sum was called 'freight' in the charter-party and bills of lading, yet we think it is not properly so called, but that it is more properly a sum in the nature of a rent to be paid for the use and hire of the ship on the agreed voyages. The charter-party expresses that a sum of 11,250*l.* is to be paid as freight for the 'use and hire of the ship,' and this lump sum is to cover both the outward and homeward voyages, without any distinction as to how

Q. B.]

MERCHANT SHIPPING COMPANY (LIMITED) v. ARMITAGE.

[Q. B.]

much of it is to be attributed to the onward and how much to the homeward voyage. If this be so, the shipper has had the full consideration for the money agreed to be paid. The ship took out the salt, and received the rice on board, and performed her homeward voyage according to her engagement, and the event, that by the act of God it became impossible to carry to the port of destination the rice jettisoned and the rice sold, ought not to affect the shipowner's right to receive the full amount of the stipulated payment. It was objected, on behalf of the respondents, that by the charter-party the remainder of the lump sum is made payable only on "true and final delivery of the cargo at the said port of discharge." But this does not necessarily mean that the whole cargo originally shipped must be delivered. It may well have been intended merely to fix the time for payment to be the time of the delivery of such cargo as the ship brings with her to the port of discharge. And it should be observed that the "one third in cash" is made payable "on arrival at the port of delivery," without any reference to the cargo the ship shall bring with her. It is right to add that we do not mean to express an opinion that, even if the jettison and sale had been attributable to the negligence of the master, there ought to have been a deduction. Perhaps in this case the proper remedy of the shipper would have been by a cross action. But it is not necessary to decide this point, which does not now arise. This decision of the Privy Council applies to the present case, and was acted upon by the Common Pleas in a case more nearly resembling this, on the 31st May last (*Robinson v. Knight*, since reported since, p. 19; 23 L. T. Rep. N. S. 820). There the charter-party was dated London, 3rd Oct. 1872, and it was agreed between Robinson, the owner of the ship *Nile*, now expected at Copenhagen, and Knight of Landan, merchant, the charterer, that the said ship should, with all convenient speed, having liberty to take an onward cargo direct or on the way for owner's benefit, sail and proceed to Riga, to load at Bolderna or Multilgraben, or so near thereto as she might safely get, and there load from the agents of the said affreighter a full and complete cargo of latwood; and being so loaded should thence proceed to London or so near thereto as she may safely get, and deliver the same on being paid freight as follows: a lump sum of 315*l.*; the freight to be paid in cash, half on arrival and remainder on unloading and right delivery of the cargo, less four months' discount on half at 5 per cent. per annum. The deck load was lost on the voyage by perils of the sea, and Keating and Brett, J.J., hold that the freighter must pay the whole sum, whatever cargo was delivered.

Watkin Williams, Q.C. (with him *Coke*) for the defendant.—The charter-party in *The Norway* differs from this. There a lump sum was to be paid "as freight for the use and hire of the vessel," whilst taking one cargo out from, and bringing another back to, London; here the ship, at the date of the charter-party, was at Colombo, and she was merely to proceed to Cochín and bring a cargo to London, "a lump sum freight of 5000*l.* to be paid after the entire discharge and right delivery of the cargo." Under this clause the owners can recover nothing without a right delivery of the cargo, although they might be entitled to recover freight *pro rata*, as in *Luke v. Lyde* (2 Burr. 882).

This was not a lump sum for the use and hire of the ship, but a lump sum for freight, which cannot be earned except by carriage and delivery. This is in accordance with American law, and it is to be found clearly laid down by Thompson, J., in *Post v. Robertson* (1 Johnson's Rep., New York Supreme Court, 26), "The contract of affreightment is an entire contract; and the general rule is that unless it be entirely performed by a delivery of the goods at the place of destination, no freight is due." And, further on, "According to the terms of the charter, the freight is made payable on the delivery of the cargo. The delivery, therefore, is a condition precedent. And where a contract is entire, and the promise to pay depends on a condition precedent, to be performed by the other party, such condition must be performed before the other party is entitled to receive anything." [*BLACKBURN, J.*—The contract in that case was to pay on the delivery of the homeward cargo; there was no completion of the voyage and no delivery.] *Bright v. Cooper* (Brownlow & Goldsborough's Rep. 21), referred to in Abbott, 11th edit. p. 395, was an "action of covenant brought upon a covenant made by the merchant with the master of a ship, viz., that if he would bring his freight to such a port, then he would pay him such a sum, and shows that part of the goods were taken away by pirates, and that the residue of the goods were brought to the place appointed and there unloaded, and that the merchant had not paid, and so the covenant broken; and the question was whether the merchant should pay the money agreed for, since all the merchandise were not brought to the place appointed; and the court was of opinion that he ought not to pay the money, because the agreement was not by him performed."

Sir J. B. Karslake was not heard in reply.

BLACKBURN, J.—I think this question is settled by the decision of the Common Pleas in *Robinson v. Knight*. The only distinction between the *Norway* and the present case is that in the *Norway* the contract was for payment of a certain sum as freight for the use and hire of the ship during two voyages, whilst the amount was to be paid here upon one voyage after the entire discharge and right delivery of the cargo. The latter words are almost identical with those of the charter-party in *Robinson v. Knight*, and as they have been held by a court of concurrent jurisdiction to be within the rule laid down in the *Norway*, we must follow that decision. Our judgment will be for the plaintiffs, and if the defendants still believe in the distinction drawn between this charter and the *Norway*, they must go to error.

QUAIN and ARCHIBALD, JJ., concurred.

Sir J. B. Karslake asked for interest upon the amount claimed by the plaintiffs, and referred to 3 & 4 Will. 4, c. 42, s. 28: "Upon all debts or sums certain, payable at a certain time or otherwise, the jury may, if they shall think fit, allow interest to the creditor at a rate, not exceeding the current rate of interest, from the time when such debt or sums certain were payable if such debt or sums be payable by virtue of some written instrument at a certain time." Moreover, interest is recoverable here at common law as damages.

BLACKBURN, J.—I am inclined to consider this amount as freight due to the plaintiffs; therefore, according to the usage of trade, we should, as a jury, give interest at 5*l.* per cent. from two months

[C. P.]

ALLISON v. THE BRISTOL MARINE INSURANCE COMPANY.

[C. P.]

after the 12th Aug. last, the date of the ship's report inwards at the Custom House, to the present time.

Judgment for plaintiffs.

Attorneys for plaintiffs, *E. Saxton.*

Attorneys for defendants, *Thomas and Hollams.*

COURT OF COMMON PLEAS.

Reported by H. F. FOULST and JOHN ROSE, Esqrs.,
Barristers-at-Law.

Wednesday, June 4, 1873.

ALLISON v. THE BRISTOL MARINE INSURANCE COMPANY.

Insurance — "Freight" and "freight payable abroad" — One half freight payable in advance.

The plaintiff's vessel was chartered to carry a cargo of coal from Greenock to Bombay, where the plaintiff was to be paid at the rate of 42s. a ton for all coal delivered. It was also agreed that one half of the freight should be paid as soon as the goods were put on board at Greenock. After the goods were put on board, and one half the freight had been paid, the plaintiff effected two policies of insurance with the defendants, one being for 500*l.* on "freight" valued at 2000*l.*, the other being for 700*l.* on "freight payable abroad," valued at 2000*l.* The defendants did not see the charter-party, nor were they informed that one half the freight had been paid. During the voyage the vessel was wrecked, but one half the cargo was saved and delivered to the consignees at Bombay. The defendants refused to pay for a total loss, alleging that they were only liable to pay on the portion of goods lost, as one half the freight had been earned.

Held, that the interest insured was the interest the plaintiff had in one half the freight payable at Bombay, and that the plaintiff was at liberty to show what was intended to be insured by the terms "freight" and "freight payable abroad."

THE declaration stated that the plaintiff, by his agents duly authorised, caused to be made with the defendants a policy of insurance, dated the 23rd April 1867, whereby the plaintiff caused himself to be insured, and the defendants by and through their directors authorised in that behalf, became insurers to the plaintiff to the amount of 700*l.*, upon "freight payable abroad," valued at 2000*l.*, in the ship called the *Merchant Prince*, at and from Greenock to Bombay, and that the plaintiff thereupon paid the premium of 5*l.* 9s. for the insurance, and certain goods loaded on board the vessel at Greenock to be carried on the voyage, and the ship, whilst proceeding on the voyage, and during the continuance of the risk, was lost by the perils of the seas, and the freight was by the perils insured against wholly lost, and all conditions necessary to entitle the plaintiff to be paid the said sum of 700*l.* happened, &c., yet the defendant has not paid the same.

The second count was on a similar policy, dated 13th April 1867, insuring 500*l.* on "freight," valued at 2000*l.*, in the *Merchant Prince*, alleging a total loss.

Plens. — Except as to 250*l.* parcel of the money claimed, payment into court of the sum of 440*l.*; secondly, as to the sum of 250*l.* so excepted, payment before action brought.

Issue thereon.

In March 1867, the plaintiff was the owner of

the ship *Merchant Prince*, and he chartered the vessel, then in the Clyde, to proceed to Greenock. By the charter-party it appeared that she was there to load a full and complete cargo of coals, and thenceforth to proceed to Bombay, or as near thereto as she might safely get, and deliver the same alongside any craft, steamer, or floating depot, wharf, or pier, where she could be afloat, as ordered by the consignee. The freight was to be paid on unloading and right delivery of the cargo, at and after the rate of 42s. per ton of 20*cwt.* on the quantity delivered, in full of all port charges, &c., as customary, such freight to be paid, say one half, in cash, on signing bills of lading, less four months' interest at Bank rate, but not less than 5 per cent. per annum, 5 per cent. insurance, and 2½ per cent. on the gross amount of freight in lieu of consignment at Bombay, and the remainder on right delivery of the cargo, agreeably to the bill of lading.

The bill of lading was indorsed with a stamped receipt, dated 13th April 1867, by the plaintiff for 228*cd.* 18s. from the charterer, being an advance of half freight on the shipment.

The cargo, to the amount of 2178 tons, was duly shipped under the bill of lading, and the vessel sailed for Bombay on the 22nd April 1867. She encountered rough weather on the voyage, and on the 8th Aug. she struck on a rock about eight miles from Bombay, where she eventually became a complete wreck.

The consignees of the ship, who were communicated with, at once employed salvors for the benefit of the ship and cargo, and in the result about one half the cargo (1050 tons) was carried to Bombay, and there sold by the consignees for the benefit of the parties ultimately interested, and the rest of the cargo was totally lost.

The defendants disputed their liability to pay for a total loss, on the ground that the prepayment of freight was to be considered as a payment of so much per ton, and must be so apportioned among the whole cargo; and that as the insurance covered half the whole freight, the loss sustained must also be apportioned, and the underwriters pay only half the actual loss; that is, half the freight that would have been payable in Bombay if the full cargo had been delivered.

The defendants having before action paid on account 250*l.*, paid 440*l.* into court in respect of the two policies for 700*l.* and 500*l.*, and refused to pay the remainder.

At the trial, before Brett, J. and a special jury, a verdict was found for the plaintiff, for the damages in the declaration, leave being reserved to the defendants to move to enter a verdict.

C. Russell, Q.C. accordingly obtained a rule, enjoining upon the defendants to show cause why the verdict should not be set aside, and instead thereof a verdict entered for the defendants, on the ground that on the facts proved there was no loss of freight beyond the sum of money paid into court, or why the verdict should not be reduced to such sum as the court should determine.

Watkin Williams, Q.C. and McLeod showed cause. — Although one-half the freight under the charter-party has been earned, there has been a total loss of the freight covered by the two policies, and the question is, whether the true interest of the plaintiff was insured. The question depends, to a great extent, on the construction of the policy of insurance and the charter-party; but

C. P.]

ALLISON v. THE BRISTOL MARINE INSURANCE COMPANY.

[C. P.]

there are no words in the policy which refer to the charter-party, and the policy is in the ordinary form of a policy on freight at and from Greenock. If the assured has a partial interest, can he not appropriate the sum insured to his particular interest? or can the underwriter say that part of the freight is earned, or that he will only pay upon part? Take the case of a mortgagee of a ship. It is clear he can apply to his own peculiar interest a policy on the ship: (Arnold on Marine Insurance, 2nd edit. 301.) So in *Ireing v. Richardson* (2 B. & Ad. 193), where a mortgagee effected policies at two offices on a ship, valued in each policy at 3000*l.*, and, the ship being lost, he received, on the two insurances, 3700*l.* An action being brought against him by one set of underwriters, to recover back their portion of the sum paid above 3000*l.*, and the question being whether the defendant had received more than the actual value of the ship insurable, and insured by him, it was held that it was properly submitted to the jury, whether, in effecting the policies, the defendant meant to insure his own interest only, or that of the mortgagor also: a mortgagee, at least since the Register Act (6 Geo. 4, c. 110), not being an owner to any greater extent than that of the value mortgaged, and the mortgagor continuing the owner. So, if a ship be mortgaged for 900*l.*, and the mortgagor and the mortgagee agree together that the ship is to be insured at the expense of the mortgagor, but the policy is to be taken out at the expense of both for 1000*l.*, the mortgagee is covered, but you cannot tell what interest the mortgagor has; and if the intention was to cover the interest of both, then, I say, the interest of both would be covered. It was certainly here not the intention of the shipowner to cover the whole freight, for he is only interested in one half. If a broker raise one quarter of a ship for the carriage of goods for 200*l.*, and he obtains parcels for which the freight which he will receive will amount to 500*l.*, and he then goes to Lloyd's and insures the freight for 300*l.*, which is all he can earn, would the underwriter, if the goods in his compartment be lost, be able to say that he was not entitled to recover for a total loss, as the insurance was on the goods in the ship. If he was only interested in the goods in a particular part of the ship, it is competent for him to say his interest was only partial. Suppose a part owner takes out a valued policy for 32-64ths of 5000*l.*, in a ship worth 10,000*l.*, the underwriter cannot say this is an insurance of value of the whole ship. For, in the case of a person who takes out a policy in a general form, it is a policy to cover his interest; of course it may be a policy to cover the whole interest, but he may show he has insured his part interest. Suppose a shipowner carries a cargo, part of cotton and part of grain, for which the freight is to be 2000*l.*, payable in advance for the cotton, and 2000*l.*, payable at the port of destination for the grain. He insures the freight for 2000*l.* May he not say, the grain is the only interest I have at stake, as I have been paid for the cotton. My contention makes the underwriters liable for all freight, being the amount paid above in advance at Greenock. He cited

2 Dorr, Lect. xiii. s. 18;

Dundas v. Jones, 4 Mansf. 467;*Rising v. Burdett*, Marshall on Insurance, 730.

Charles Russell, Q.C. and Benjamin, Q.C.—
There are two questions: first, does this freight

mean the entire freight of the voyage? or, secondly, is it a total loss which is intended to be covered? The defendants are willing to pay one half the loss. The plaintiff says the meaning of the policy is, that although the underwriters had no notice of a prepayment of freight, and that he was only intending to insure the part remaining unpaid for, yet they have agreed to pay no less more than one half the goods carried not delivered. The plaintiff was interested in every ton carried: (Phillips on Insurance, part 2, s. 1204.) A valuation of the freight of a ship is presumed to be that of a full cargo, or the charter of the entire ship, and is so applied, unless the phraseology of the policy or the circumstances are ground for a different construction. If, therefore, only a part of the freight of any entire cargo is at risk at the time of a loss, the valuation is applied *pro rata* in adjusting the loss. What was the real interest insured here? Was the plaintiff entitled, in respect of one half the cargo, to demand the freight at Greenock? The words in the charter-party, "such freights," refers to the quantity put on board, and not to the quantity delivered, and it is a payment in consideration of the shipowner allowing the charterer to put the goods on board, and strictly not freight at all. [BRETT, J.—The prepayment is only an estimate, and the difference is to be paid at Bombay.] If the plaintiff is only interested in one half the cargo, does he mean that the interest does not attach until one half the cargo is put on board, or that it ceases to attach if the cargo is jettisoned. The plaintiff's contention is, that the risk is to begin when the goods are put on board, and must continue day by day, until they are landed at the port of destination. The old law was, that no freight was earned except on what goods are delivered, but modern commerce and modern laws have altered that, and now payment of freight is often made in advance.

BOYLL, C.J.—The claim in this case arises upon two policies of insurance effected by the plaintiff with the defendant, one for 500*l.*, the other for 700*l.*; the first was on freight, valued at 2000*l.*, the second, which was on "freight payable abroad," was also valued at 2000*l.* The first was effected after the charter-party had been entered into, and is dated 13th April 1867, the second after payment had been made on account of freight, and is dated 23rd April. The charter-party is dated 7th March, and chartered the *Merchant Prince* to proceed to Greenock, and there load, in the usual manner, a full cargo of coals, and thence to proceed to Bombay and there deliver them; the freight to be paid on unloading or right delivery of the cargo, at and after the rate of 42*s.* sterling per ton of 20*cwt.* on the quantity delivered, and such freight is to be paid say one half in cash on signing bills of lading for four months' interest at Bank rate, but at not less than 5 per cent. per annum, 5 per cent. for insurance, and 2½ per cent. on the gross amount of the freight in lieu of consignment at Bombay, and the remainder on right delivery of the cargo, agreeably to bills of lading, less cost of coal short delivered, in cash, at current rate of exchange for bills on London at six months' sight. The shipment having been made, one half freight was paid to the plaintiff, which was estimated on the amount of coals shipped. The payment so made was a payment on account. After the ship had proceeded on her voyage she was lost on a reef near Bombay, and half the cargo was jettisoned. The

C. P.]

ALLISON v. THE BRISTOL MARINE INSURANCE COMPANY.

[C. P.]

rest was delivered at Bombay. The plaintiff had received at this time one half the freight, in pursuance of the terms of the charter-party, and by it, it appears to me, the freight was to be paid on the amount alone delivered, and by the express terms of the charter-party there is no liability for the payment of freight except for the amount of goods delivered. It is said that the payment of half freight may be taken as a payment in respect of each ton of goods shipped, but I cannot assent to that proposition. The payment was made on account and in respect of the amount of goods to be delivered. Under these circumstances, and further, taking the rate of freight stated in the charter-party, and calculating the amount already paid, we see that the shipowner could claim no further sum in respect of the charter-party. Now, if the voyage had been performed, the plaintiff would receive half the amount by payment in advance, and the other half upon his arrival at the port of destination, for which he would also have a lien on the cargo; but, by the events which have happened, the plaintiff has lost one half his freight by the perils of the sea. We then come next to the consideration of the question whether the plaintiff has insured that which he has lost, and whether the policy of insurance will cover this loss. This depends on the construction to be put on the policy, and it is to be borne in mind that the second policy was made after the payment on account of the freight had taken place. Now at the time these policies were made, what could be subject to a sea risk? One half the freight had been paid, and therefore only the other half could be exposed to peril. There can be no doubt, and indeed it is not disputed, that the plaintiff intended to insure the freight which was exposed to peril, and it is equally plain that the plaintiff was only interested in that portion of the freight, and therefore the only remaining question is, whether it is or it is not covered by the terms of the policy. Sometimes an insurance is effected on freight, sometimes on chartered freight, or even on advances made on account of freight. In these instances there is no specification of what is intended to be insured. The term freight generally is applied to cases of goods carried in a ship and delivered, but it would equally apply to a payment in the nature of dead freight, or for the increased value of goods to the owner, arising from their carriage from one place to another, which was the point which arose in *Flint v. Flesnyng* (2 B. & Ad. 46), and has been recognised ever since. It would include the case where a ship was ready to go to sea, but was prevented by some unexpected peril insured against, and from the time of Lord Ten-terden the term has borne a wide and general meaning. In *Flint v. Flesnyng*, he said that if it be a necessary ingredient in the composition of freight that there should be a money compensation paid by one person to another, the benefit accruing to a shipowner from using his own ship is not freight. But if the term freight, as used in the policy of insurance, import the benefit derived from the employment of the ship, then there has been a loss of freight. It is the same thing to the shipowner, whether he receives that benefit of the use of his ship by a money payment from one person who charters the whole of the ship, or from various persons who put specific goods on board, or from persons who pay him the value of his own goods at the port of delivery, in-

creased by their carriage in his own ship. The assured may fairly consider that additional value as freight, and so term it in a policy. And so in *Phillips on Insurance*, cap. 3, sect. 11, the author says:—" 'Freight,' in the common acceptation of the term, is either the amount paid by the hirer of the ship to the owner for the use of it, or the amount paid to the shipowner for the transportation of goods. The term is also used to signify the cargo. In insurance, the term 'freight' signifies the earnings or profits derived by the shipowner or the hirer of the ship from the use of it himself, or by letting it to others to be used, or by carrying goods for others." These terms would all be included in the definition which I adopt, viz., the benefit derived from the employment of the ship. This being the meaning of the term, the freight would be included in the meaning of the policy. This general meaning having been attached by underwriters to the term "freight," it seems to me that if they desire to limit the word, it is for them to do so. The modes of payment of freight are known to be various, and it is a common practice to pay part in advance, and several provisions are generally inserted in the charter-party to regulate the manner of such payment. I think, therefore, these policies would include anything in the nature of freight; here nothing was said to alter the usual proceeding in such matters. No inquiry was made, and we cannot suppose that anything but the ordinary course was to be pursued. The policy does not specify what freight is insured and what not, and the subject-matter would therefore depend upon the facts. The facts here show what was at risk, viz., half the freight of the entire ship. That was intended to be covered, and was lost. The words are sufficient to cover such a loss, and the plaintiff is entitled to recover the whole amount.

BURR, J.—The plaintiff seeks to recover the balance of loss, and as half only of the freight was insured, the defendant has paid 50 per cent., and says the plaintiff must show a total loss before he is entitled to succeed. It is suggested that the plaintiff has a right to assume that the insurance of freight was in respect of the whole goods on board, and that the defendant would not be bound to pay unless there was a total loss. The plaintiff, on the other hand, urged that the insurance was on the only freight in which he had an insurable interest. With regard to the first part, I had some little doubt whether the defendant was not entitled to assume that these policies were on all the goods on board the ship, as generally policies on freight would apply to the whole cargo on board, but Mr. Williams has convinced me that where a policy of insurance is in general terms, we must confine the assurance to that which was intended to be insured at the time, although the insurer did not disclose what was intended to be insured to the underwriter. As the policy was in general terms, if the assured intended only to insure a part of his interest, either party might show that which was really intended to be insured, and by evidence these policies might be shown to apply to something less than all the goods on board ship. The court here are to draw inferences of fact. Now the only thing the plaintiff could effectually insure was the freight payable abroad. The whole interest, therefore, was about 2000*l.*, and this policy was made out on freight generally valued at 2000*l.* That was the only interest he had, and the inference is irresistible, that

C. P.]

IMPERIAL OTTOMAN BANK v. COWAN; COWAN v. IMPERIAL OTTOMAN BANK.

[C. P.]

this was the freight he intended to insure, and which he would, under the terms of the charter-party, lose, if all the goods were not delivered at Bombay. The real point then is, what is the proper interpretation of the charter-party? Did the charterer lose the whole freight he had at risk, or only part? On that part of the case, I have very little doubt. The freight is to be paid on unloading and delivering of the cargo, at the rate of 42s. per ton on the quantity delivered. To average the payment at Bombay, you must ascertain the amount which is due on the whole cargo, and then deduct the amount prepaid in Greenock. I cannot think it was a prepayment of one guinea a ton; it is an estimated amount of the whole, and therefore I think the insurance was on what the plaintiff had at risk, and that it has been totally lost. My judgment must therefore be for the plaintiff.

GROVE, J.—When an insurance has been effected in general terms, either party may show what in fact was insured, and here the charter-party becomes important. Here the assured may show that he has one half the freight at risk, and that is his only interest in the concern, and unless there is something repugnant in the policy, he ought to recover.

Rule discharged.

Attorney for plaintiff, James Cotterill.

Attorneys for defendants, Argles and Ranslie.

Thursday, June 5, 1873.

THE IMPERIAL OTTOMAN BANK v. COWAN; COWAN v. THE IMPERIAL OTTOMAN BANK.

Bill of lading—Mixed cargo—Delivery of the cargo to different consignees.

In Jan. 1868, C. and Co., the defendants, contracted to purchase 1400 quarters of rye, then at Salonica, from the plaintiffs, at 41s. per quarter free on board, March shipment, the plaintiffs finding the vessel. The plaintiff having chartered the *Agatha*, the captain on loading her informed the bank that she would take from 200 to 300 quarters of rye beyond that ordered by the defendants. The plaintiffs being unable to obtain any rye, purchased seventy quarters of maize to make up the cargo. The rye and maize were shipped on board, and one bill of lading was made out for both rye and maize and sent to the plaintiffs. The maize was then offered to the defendants, and two invoices and two bills of exchange were made out, one for the rye, the other for the maize. The defendants who refused to have anything to do with the maize, had in the meantime sold the rye to C., but C. on finding there was not a clean bill of lading refused to accept either it or the bill of exchange. The plaintiffs on being informed of this informed the defendants that they would discharge the maize from the ship at their own expense, and shortly afterwards indorsed the bill of lading as follows: "Deliver the rye to Messrs. C. and Co. or their order, and the within mentioned maize to us or our order. The delivery of the maize, and the freight, and all charges thereon to be at our expense, and the maize to be delivered so as not to interfere with the working and delivery of the rye."

Held, that the delivery of a clean bill of lading was not a necessary condition of the contract, the

plaintiffs having been ready to pay all the expenses incident to the maize being included in the bill of lading, and also absolutely and unconditionally to deliver the rye in time; and also that there was a sufficient delivery to entitle the plaintiffs to recover for non-acceptance.

SPECIAL CASE.

1. The Imperial Ottoman Bank has its principal place of business at Constantinople, with a branch at Salonica, and an agency in London, and Messrs. Cowan and Co. are merchants carrying on business at 33, West Register-street, Edinburgh.

2. The bank in addition to its ordinary business has been and is in the habit of making purchases of grain in the Levant, and of disposing of the same to or to the order of persons requiring such grain, and of reimbursing itself by drawing on the latter. Messrs. Horsley, Kibble, and Co., of 79, Gracechurch-street, in the City of London, are commission agents, and the bank has been and is in the habit of forwarding to them offers of grain with a view to their effecting the sale of the grain to merchants in the United Kingdom, the bank paying Messrs. Horsley and Co. a commission on these transactions.

3. Prior to the 4th Jan. 1868, the bank at Salonica forwarded to Messrs. Horsley and Co. an offer of a parcel of 1400 quarters of Orphano rye, March shipment, at 42s. free on board, and on the 4th Jan. Messrs. Horsley and Co. communicated this offer to Messrs. Cowan and Co.

4. The following correspondence in reference to this offer then took place between Messrs. Horsley, Kibble, and Co., and Messrs. Cowan and Co. On the 4th Jan. 1868, Messrs. Horsley and Co. sent on one of their printed forms a notice of this offer. The following is a copy thereof:—

79, Gracechurch-street, E.C.
London, 4th Jan. 1868.

Grain.

We have the following firm offer by wire for The Imperial Ottoman Bank.

Subject to any mistakes in transmission.

Particulars.

1400 quarters Rye.

at Orphano.

Shipment in March.

Price 42s. f. o. b.

Terms—Three months from date of bill of lading. For further particulars apply to

HORSLEY, KIBBLE, and Co.

To Messrs. Cowan & Co.

On the 6th Jan. 1868, Messrs. Cowan and Co. telegraphed to Messrs. Horsley, Kibble, and Co., offering 41s. for the rye, and wrote to Messrs. Horsley, Kibble, and Co. on the same day as follows:—

Dear Sirs—Your favour of the 4th instant duly to hand, and in answer to your offer of rye, we telegraphed to you offering 41s. and have your answer. Rye is under offer until 6th, if not taken, will write, but have no authority to take under 42s. We will await your communication.—Yours, obediently,

COWAN and Co.

And on the 7th Jan. 1868, Messrs. Horsley and Co. replied as follows:—

Dear Sirs—We have yours of the 6th, and telegraph and wire our friends to ship the 1400 quarters rye at 41s. free on board, they providing vessel.—Yours, &c.,

HORSLEY and Co.

5. On the 7th Jan. 1868, Messrs. Cowan and Co. filled up a lithographic form which was supplied to them by Horsley and Co., and returned the same to Messrs. Horsley and Co.

London. Edinburgh, 7th Jan. 1868.

Gentlemen,—Your friends at Salonica can purchase

[C. P.]

IMPERIAL OTTOMAN BANK v. COWAN; COWAN v. IMPERIAL OTTOMAN BANK.

[C. P.]

and ship for our account by sailing vessel to U. K. or continent the following quantity of rye: About 1400 qrs at not over 41s. per 480lb. f. o. b.

Your friends will execute the order under the limit, if practicable. For cost they will please draw on us payable in London at 3 m. d. which drafts will be duly accepted on presentation.

The order is to be telegraphed at our expense in words or cypher at your option (we taking the risk of any errors in transmission), and it is to remain in force until cancelled by Yours respectfully,

COWAN AND CO.

6. On the 9th Jan. 1868, Messrs. Horsley and Co. wrote to the bank at Salonica a letter from which the following is an extract:—

Firm offers. We are obliged by yours offering 1400 quarters of Orphano rye, March, at 42s. f. o. b., but have not been able to find buyers at the price. We have, however, forwarded you from our friends, Cowan and Company, Edinburgh, a counter offer of 41s. per 480lb. f. o. b. for the 1400 quarters rye, and we wait to learn whether this is accepted, March shipment, you finding vessel.

7. In reply to the said letter of the 9th Jan. 1868, the Bank at Salonica on the 14th Jan. 1868, wrote to Messrs. Horsley, Kibbie, and Co., a letter from which the following is an extract:—

We have been able to execute Messrs. Cowan's order for 1400 qrs. rye at 41s. f. o. b. Orphano shipment in March. We are trying to charter a vessel of the suitable size.

8. Messrs. Horsley and Co. having informed Messrs. Cowan and Co. that their offer had been accepted, received instructions from them to resell the rye. Accordingly on the 28th Jan. 1868, Messrs. Horsley and Co., acting under the instructions, sold through Messrs. P. and A. D'Arcy, a cargo of from 1400 to 1800 quarters of rye to Messrs. Cornelle, David, and Co., and the following is a copy of the contract of sale:—

London, 28th Jan. 1868.

Sold by order for account of Messrs. Horsley and Company to Messrs. Cornelle, David, and Co. a cargo of 1400 quarters of rye, of fair average quality of the season at the time of shipment. To be shipped at Orphano by a vessel not inferior to A 1 in red Lloyd's or 5-6ths. 1. 1. French, Italian, or Austrian Verritas (Greek and Turkish flags excepted) shipment to be made not later than the 10th April next at the price of 32s. less 2 per cent. (say 32s. less 2 per cent.) per quarter of 480lb. sound or damaged, cost freight and insurance to a safe direct port on the continent between Havre and Hamburg, both inclusive, and to discharge as per charter-party agent, calculating provisionally (till final outcome is ascertained) as customary, per quarter of 480lb. No charge for damage. All accidents of the sea (pumping up grain excepted) which may cause a deficiency in invoice weight, to be for buyer's account, and provisional invoice in such case is to be final as to measure, and the weight is to be adjusted by the average weight of the sound grain delivered.

Payment by cash in London, less interest at 5 per cent. per annum or bank rates of the day on which the invoice is handed, at buyer's option, for the unexpired term of three months from date of bill of lading, in exchange for bill of lading and policy of insurance to be for 2 per cent. over invoice amount, including the 2½. Sellers to pay our commission of ½ per cent. whether this contract is or is not cancelled.

Computation of weight to be as customary at the port of discharge. In case of prohibition of export or blockade preventing shipment contract to be cancelled. Payment to be made for the cargo within seven days from the day notice is given to the buyer that the documents are ready for delivery. Sufficient lay days are to be reserved for discharging. In case of any dispute respecting this contract it is agreed by buyers and sellers to leave the same to the arbitration of two London corn dealers, one of whom is to be nominated by each party, or their umpire, and to be bound by their award, or by the award of their umpire. Orders to be given in sufficient time before signing bill of lading.

9. The above mentioned purchase by Messrs. Cowan and Co. was one of a series of purchases which had been made by them from the bank through Messrs. Horsley and Co. who acted in these transactions as agents for, and received commission from, the bank. These purchases were made by Messrs. Cowan and Co. for the purpose of resale, and Messrs. Horsley and Co. were aware of this fact. The date on which the bank first heard of the aforementioned resale to Messrs. Cornelle, David and Co., was on or about the 6th Feb. 1868, but the bank was not then, or any time prior to the shipment of the rye as hereinafter mentioned, aware of the terms of the resale, farther than that the cargo was sold for shipment not later than the 10th April 1868. This circumstance was communicated to the bank in a letter of the 6th Feb. 1868, written by Messrs. Horsley and Co., from which letter the following is an extract:—

Please note that the cargo is sold for shipment not later than the 10th of April.

10. The bank chartered for the carriage of the rye a vessel called the *Agatha* by a charter-party which was dated the 2nd March 1868. (Then followed the charter-party.)

11. On the 17th March the brokers of Messrs. Cornelle, David, and Co. gave notice to Messrs. Horsley, and Co., that the destination of the cargo of rye was Antwerp, and notice having been given to the bank of the place to which the cargo was to be sent, the vessel was thereupon ordered to go to Antwerp to discharge her cargo.

12. Early in April the captain of the *Agatha* informed the bank at Salonica that the vessel would take from 200 to 300 quarters of rye beyond the 1400 quarters so ordered by Messrs. Cowan and Co., but although the bank used all reasonable endeavours, it was found impossible to purchase the additional quantities of rye, and the bank consequently instructed the agents to complete the cargo by purchasing the only grain then to be found at Orphano, and on the 7th April 1868 informed Messrs. Horsley as follows:—

Agatha. The captain has informed us that his vessel will take 200 or 300 quarters over the quantity of rye we have at Orphano (1400). Notwithstanding all our efforts we have been unable to procure the necessary rye to complete, this article being entirely absent. We have, however, instructed our agent to complete the cargo with the only cereal which is to be found there, i.e. maize, which we will invoice at the lowest possible price. Should Messrs. Cowan and Co. refuse to accept it, it will then have to be sold on our account. We, however, trust they will make no difficulty in accepting it, as we had chartered the vessel for 186 tons, i.e. about 1450 qrs., and it is not our fault if it takes more.

Accordingly, seventy-eight quarters of maize were purchased by the bank and shipped on board the *Agatha*, together with 1447 quarters of rye, and then the cargo of the *Agatha* was completed.

13. The rye and maize were shipped on board the *Agatha*, and a bill of lading was duly signed by the master and handed to the bank. The bill of lading was in the usual form, and was indorsed as follows:—

Deliver to the Imperial Ottoman Bank, London Agency, or order.

Four is Jacques Imperial Ottoman.
A. NOUËT, Directeur.

There was no separate bill of lading for the rye. The maize and rye were so loaded on board the ship that the one could without difficulty or delay be discharged and delivered separately from the other.

C. P.]

IMPERIAL OTTOMAN BANK v. COWAN; COWAN v. IMPERIAL OTTOMAN BANK.

[C. P.]

14. Two invoices were duly made out, one for the rye and one for the maize. Two bills of exchange, dated respectively the 7th April 1868, at one month's date, were drawn by the bank at Salonica on Messrs. Cowan and Co., one for the sum of 2959*l.* 15*s.* 1*d.*, the other for the sum of 151*l.* 9*s.* 1*d.* The bill for 2959*l.* 15*s.* 1*d.* was drawn after one month's date, instead of three months, in pursuance of an agreement duly entered into for that purpose.

15. The bill of lading was sent by the bank at Salonica to the bank in London, and the invoices and bills of exchange were forwarded by the bank at Salonica, through the London branch, to Messrs. Horsley, Kibble, and Co., to be by them tendered to Messrs. Cowan and Co., and on the 24th April the invoices and drafts were forwarded to Messrs. Cowan, in a letter, of which following is extract:

Agatha. Enclosed invoices and drafts for costs. The maize is on the same bill of lading as the rye, and dated 7th April, as there would no doubt be a loss on the maize we presume you will wish to leave it for account of shippers, but if you will accept the bill we will get an undertaking from the bank to hold you harmless for so doing.

The 16th and 17th paragraphs contained correspondence between Messrs. Horsley and Co. and Messrs. Cowan.

18. Messrs. Cornille, David, and Co., on the 2nd May, informed Messrs. Horsley and Co. that they could not accept the *Agatha's* documents against the contract of the 26th Feb., unless the buyers for whom they acted as commission agents consented to take the rye off their hands, and on the 4th May the following letter was sent:—

Messrs. P. and H. D'Arcy.

Dear Sirs,—Confirming our memorandum of 1st instant, we now beg to refuse positively the *Agatha's* cargo of Orphanos rye in consequence of our buyers rejecting it as not in accordance with contract of Jan. 25th, and we return the copy of invoice you sent us, and will be obliged for a cheque for our commission, say £73 14*s.*, and another for the profit our buyer loses, which at the exchange of 25 francs, 12*s.* is £22 14*s.*, without prejudice to claiming further charges in case of arbitration.—We are, dear Sirs, yours truly, CORNILLE, DAVID, AND CO.

20. On May 7, Messrs. Horsley and Co. sent Messrs. Cowan the following telegram:—

The Imperial Ottoman Bank here requests you will return to-day the draft against rye, per *Agatha*, accepted or not.

On the same day Messrs. Cowan and Co. answered this telegram by the following:—

We are in receipt of your telegram, and send you, as requested, Ottoman Bank Draft, £2959 15*s.* 1*d.* unaccepted.—Yours, &c., COWAN AND CO.

21. On the 8th May, Messrs. Cowan and Co. having refused acceptance of the said draft, Messrs. Horsley and Co. wrote to the bank as follows:

Enclosed is the bill on Cowan and Co. for rye per *Agatha*, unaccepted, for which we wired yesterday at your request.—Yours, &c., HORSLEY AND CO.

On the same day Messrs. Cowan and Co. wrote to Messrs. Horsley, Kibble, and Co., the following letter:—

8th May 1868.

As we did not state yesterday our reasons for returning the draft against rye per *Agatha* we do so now, and will thank you to communicate them to the Imperial Ottoman Bank. We refused to accept the draft because the bank had not given us a proper bill of lading for the rye. We presume the question will be settled by arbitration, and we shall be glad to hear that it is arranged. We can hardly doubt its decision will be against our buyers.—Yours, &c., COWAN AND CO.

And on the 11th May a copy of this letter was forwarded by Messrs. Horsley and Co. to the bank.

Subsequently, the question whether Messrs. Cowan and Co. had broken their contract with Messrs. Cornille, David, and Co., by not delivering proper shipping document, was submitted to arbitration, and on the 30th May 1868, the arbitrators awarded that the cargo of rye per *Agatha* was not a proper tender under the contract, and that there was due to Messrs. Cornille, David, and Co. the sum of 85*l.* 14*s.*, in full of all claims for nonfulfilment of the contract.

On the 13th May 1868, the solicitor for the bank wrote to Messrs. Cowan and Co., calling upon them to accept the bill of exchange for 2959*l.* 15*s.* 1*d.*, and to perform their contract, and on the 14th May he sent the following letter:—

60, Threadneedle-street, London, E.C.
14th May, 1868.

Imperial Ottoman Bank and Yourselves

Dear Sirs,

I have this morning seen Messrs. Horsley and Co., and understand from them that Mr. Nicholson, of Lime-street, is your London solicitor. I would suggest that you should put him in communication with me. I beg to give you notice on behalf of the bank that they do not and never have required you to take the maize, nor to accept the bill for it, but they are prepared to hand over to you the bill of lading, it being arranged that maize is to be delivered to them, and that they will discharge the maize from the ship at their own cost, and so as in no way to interfere with the delivery to you or your order of the rye. I believe you have already been informed of this, but I think it desirable to formally repeat the notice.—I remain, Gentlemen, your obedient servant, Messrs. Cowan and Co. G. M. CLEMENTS.

On the 21st May 1868, the solicitor for the bank wrote to Mr. Nicholson the following letter:—

60, Threadneedle-street, E.C.
21st May, 1868.

Imperial Ottoman Bank and Cowan.

Dear Sirs,

With reference to my letter to Messrs. Cowan, of the 14th instant, I am authorised by the Imperial Ottoman Bank to say that they are willing the bill of lading shall be specially indorsed to the effect that the rye is to be delivered to the Imperial Ottoman bank or their order. And that it is to be so delivered at the bank's expense and risk, and so as not to interfere with the working and delivery of the rye. The bill of lading so indorsed will be handed to Messrs. Cowan.—I remain, Dear Sirs, yours truly, G. M. CLEMENTS.

J. Wilson Nicholson, Esq.

To this Mr. Nicholson replied, that in consequence of the Ottoman Bank having failed to supply Cowan and Co. with a proper document for the shipment of rye, they have lost their sale, and shall therefore proceed against the bank for all damages and losses which they may sustain.

22. On the 16th June 1868, the bank indorsed the said bill of lading so indorsed, together with the sum of 35*l.* (which was sufficient to cover all possible charges for freight or otherwise in respect of the said carriage), to Messrs. Cowan and Co., who then refused to take the bill of lading and to accept the said bill of exchange for the price of the rye, or otherwise pay for the same. On the 5th July 1868, the *Agatha* arrived at Antwerp, and Messrs. Cowan and Co. might, if they had then chosen so to do, have obtained the rye without delay or difficulty.

23. After the arrival of the ship at Antwerp, the rye was by arrangement between the bank and Messrs. Cowan and Co. sold by the bank without

C. P.]

IMPERIAL OTTOMAN BANK v. COWAN; COWAN v. IMPERIAL OTTOMAN BANK.

[C. P.]

prejudice to the rights of any of the parties concerned, and the amount realised thereby, after payment of freight and expenses, was the sum of 1860*l.* 1*6s.* 2*d.*, which was received and retained by the bank. The bank claims of Messrs. Cowan and Co., by reason of their not having taken to the said rye and accepted the said bill of exchange drawn on them for the price thereof, the sum of 1098*l.* 1*8s.* 11*d.* (being the difference between the said sum of 2859*l.* 1*5s.* 1*d.*, for which the said bill of exchange was drawn, and the said sum of 1860*l.* 1*6s.* 2*d.*), and also the sum of 217*l.* 1*4s.* 1*d.*, being interest on the said sum of 2859*l.* 1*5s.* 1*d.*, from the time the said bill would have become payable, until the 29th Oct. 1893, when the said sum of 1860*l.* 1*6s.* 2*d.* was realised by the bank (such sums of 1098*l.* 1*8s.* 11*d.* and 217*l.* 1*4s.* 1*d.*, making together the sum of 1316*l.* 1*3s.*), and also interest on the said sum of 1098*l.* 1*8s.* 11*d.*, from the 29th Oct. 1893 to the present time.

Messrs. Cowan and Co. claim of the bank, by reason of their being prevented from performing their contract with Messrs. Corneille, David, and Co., the sum of 235*l.* 1*5s.* 1*d.* After the time when the bill of lading and the bill of exchange were first tendered to Messrs. Cowan and Co., the price of rye had fallen, so that, except by reason of the said resale to Messrs. Corneille, David, and Co., there was no loss to Messrs. Cowan and Co.

24. The shipment of the rye is to be taken to have been in all respects regular and correct, except so far as it may have been irregular and incorrect by reason of the maize having been shipped in the same vessel together with the said rye, and by reason of the maize and the rye having been both included in the same bill of lading.

The court is to be at liberty to draw such inferences of fact as a jury would be justified in drawing.

The questions for the opinion of the court are: First, whether the bank has any right of action against Messrs. Cowan and Co.; secondly, whether Messrs. Cowan and Co. have any right of action against the bank? If the court shall answer the first question in the affirmative, then judgment shall be entered in the first action for the bank for such sums as the court shall direct, with costs; and if in the negative, then judgment shall be entered in the first action for Messrs. Cowan and Co., with costs. If the court shall answer the second question in the affirmative, then judgment shall be entered in the second action for Messrs. Cowan and Co. for such sum as the court shall direct, with costs; and if in the negative, then judgment shall be entered in the second action for the bank, with costs.

H. Matthews, Q.C. and J. C. Mathew, for the Bank.—The contract is contained in the letters of the 7th and 9th Jan. It is a condition of the contract that there shall be a single bill of lading for the rye. Suppose no ship of the right size could be found, and that the captain says I will not issue separate bills of lading, I presume the bank would be entitled to say, we have done the best we can, but we could only get one bill of lading. It is not a condition precedent to the bankers' right to recover. [KEATING, J.—Take the case where the shipment was only a small proportion of the whole, would it not be hard for the consignee to have to pay the whole freight to get his goods?] It might be, but he would have his remedy over. If the defendants wanted to have the documents in a

particular form, they must stipulate for them. He cited

Brown v. Harc, 4 H. & N. 823;
Green v. Siebel, 7 C. B., N. S., 747; 2 L. T. Rep. N. 8, 745.

Field, Q.C. (with whom was Holl.) for Messrs. Cowan.—All the documents previous to the 7th Jan. are to be read as part of the case. The master had a lien on the rye for the freight of the maize. The invoice of the rye only was sent in to the purchasers, yet the defendants are asked to accept a bill of exchange for both rye and maize, on condition of being held harmless by the bank. The case of *Wait v. Baker* (2 Ex. 1) is in point, and that case has been confirmed by the Exchequer Chamber in *Turner v. The Trustees of the Liverpool Docks* (6 Ex. 543). In *Kreuger v. Blanck* (L. Rep. 5 Ex. 179; 23 L. T. Rep. N. S. 128; 3 Mar. Law Cas. O. S. 470), the defendant ordered of the plaintiffs a "small cargo of lardwood, of about the following lengths, &c., in all about sixty cubic fathoms," and the plaintiffs accepted the order. The plaintiffs not being able to procure a vessel of the exact size, chartered a vessel to the defendant's port loaded with eighty-three fathoms. On the arrival of the vessel the plaintiffs' agent unloaded, measured, and set apart timber to answer defendant's order, and tendered him a bill of lading for that quantity, and a draft for acceptance; but the defendant declined to accept, on the ground that the cargo was in excess of the order. In an action for nonacceptance of the goods, it was held that "cargo" meant a whole cargo and not a parcel of a cargo, and that the plaintiffs had not complied with the order, so as to entitle them to maintain an action. So, in a similar manner, the contract here is to be construed as if there were a distinct clause referring to the bill of lading.

Henry Matthews, Q.C. in reply.

KEATING, J.—These are cross actions—the one brought by the Imperial Ottoman Bank against Messrs. Cowan and Co., for non-acceptance of certain rye, and the other brought by Messrs. Cowan and Co. against the bank for special damages, and also for nondelivery of the rye. I am of opinion that the bank are entitled to our judgment, and this will also dispose of the second action. It seems that, through the intervention of Horsley and Co., who were agents to the bank, the contract was entered into to deliver 100 quarters of rye to the defendants, Cowan and Co., and the question seems to be whether there was such a delivery as would entitle the plaintiffs to recover as against the defendants. I think there was. The whole of the difficulty has arisen in consequence of the bill of lading. Cowan and Co. agreed to take the rye at a certain price, and, in accordance therewith, the rye was shipped free on board. But the Ottoman Bank at the same time shipped about seventy or eighty quarters of maize on the same vessel, and one bill of lading was made out, to include both the rye and the maize; the captain, therefore, having a lien on the whole cargo for the freight of either the rye or the maize. The plaintiffs then forwarded the invoices of both the rye and the maize to their agents in this country, who forwarded them to the defendants, who had, in the meantime, effected a sale of the rye. When it came to the knowledge of the sub-vendee that the bill of lading included both rye and maize, he refused to complete the purchase. It is quite clear that the

C. P.]

TULLY v. TERRY.

[C. P.]

defendants, having effected a sub-sale, it was a matter of indifference to them what the form of the bill of lading was; all they wanted was the difference in price they sold it for. Mr. Matthews has argued that the contract was performed; for when the rye was shipped on board the property vested in the defendant, so as to take it out of the plaintiffs' hand. That is too broad a proposition; for when the rye was on board, and the bill of lading was sent to obtain delivery, the bank could have exercised such property over the rye that it should not pass, and if it becomes necessary to decide this question, I should say they did exercise such a power over the property. But I do not think we need decide that question, for what the plaintiffs contracted for was free delivery of the rye to the defendants. It is not necessary to go into what occurred when the sub-vendor first objected; the defendants did in terms object, and that was by their letter of the 8th May. It seems at that time the bill of lading was in an objectionable form, and one in which they were not bound to accept, for the shipowner would have a lien for the freight of the maize. However the rye did not arrive until the 5th July, and before that time, after a correspondence, the bank proposed to remove the objections to the bill of lading by offering the rye free from the maize, and offering to indorse the bill of lading, so as to remove any objection there could possibly be, in order that free delivery of the rye might be had. Consequently when the *Agatha* arrived at Antwerp, Cowan and Co. might have obtained the rye without any difficulty. On their behalf, it has been insisted that they had a right to the bill of lading before the arrival of the ship, but I do not find anything that points to a free bill of lading in the contract at any period. What the contract entitles the defendants to is a free delivery of the rye, and this the plaintiffs were willing to give them. Under these circumstances, our judgment must be for the plaintiffs.

BRETT, J.—I am of the same opinion. In the first instance there is no doubt that a contract was made between the bank and Messrs. Cowan for the sale of the rye, and it is equally clear that the defendants subsequently refused to accept it. It was submitted on behalf of the defendants that they were entitled to a clean bill of lading, but the plaintiffs disputed that proposition, and also that it was a condition precedent to their right to recover. This was a contract for an unascertained quantity of rye, and is a contract by which the vendors, who were abroad, contract to deliver a certain quantity free on board at Orphanos for the March shipment. Upon such a contract the property does not pass, but the vendor is entitled to put the goods on board ship to pass the property, and the question in all these cases is, whether the vendor put the goods on board with the intention that the goods should pass. The goods having been put on board the vendors sent an invoice to the defendants, but they sent the bill of lading in a form which made it a bill of lading for goods deliverable to themselves; so far that is not conclusive to show they did not intend the goods to pass. But let us see what they do then: they endorse the bill of lading to their own agents, and send out a draft for acceptance. The bill of lading was detained, but the bill of exchange sent forward, and this is I think quite enough to show the property did not pass to the defendants. If upon the arrival of the ship the plaintiffs were to offer

to give the defendants an endorsed bill of lading, they must give a clean bill after the arrival, although if the plaintiffs had gone to the defendants and offered the rye, they might have called on them to accept it without any bill of lading at all. It seems the plaintiffs were bound to offer a clean and unconditional bill of lading upon arrival; yet the conditional endorsement calling on the captain to deliver one half of the cargo to one party and the remainder to another party is good; and it is foned that the rye could have been delivered without difficulty; however the plaintiffs went further, for they not only offered the bill of lading with a special endorsement, but they also tendered the defendants the money for freight, and then the case finds they might have had the delivery of the whole of the rye at the ship's side without the imposition of any duty whatever upon them. I therefore think the plaintiffs are entitled to recover in the first and also in the second action, as the bank have done all they are bound to do, and have committed no breach of duty.

GEORGE, J.—I am of the same opinion. I have been unable to see in what respect the defendants can complain of having lost anything under this contract. Mr. Field was obliged to admit all that the defendants could claim was to have dominion over the rye on the arrival of the ship. Now it appears by the case that they had it in the clearest possible manner. The plaintiffs tendered 35*l.* for freight and other charges incident to the maize, and on the arrival of the ship the defendants might have obtained the rye without trouble. They had then all they asked for; they had dominion over the subject matter of the purchase which they under this contract claimed.

Judgment in the first action for the plaintiffs, and in the second action for the defendants.

Attorney for plaintiffs, Clements, and Bircham and Co.

Attorney for defendants, Gedge.

May 5 and June 15, 1873.

TULLY v. TERRY.

Bill of lading—Quantity and quality unknown—

No alteration in effect.

*The Avoca was chartered to ship a cargo of grain at Ibraia and deliver at a port in the United Kingdom on being paid freight, "7*s.* per imperial quarter delivered," and in event of any part of the cargo being delivered in a damaged condition, the freight should be payable "on the invoice quantity taken on board as per bill of lading, or half freight on the damaged or heated portion, at the captain's option."*

The cargo was shipped under a bill of lading, describing the quantity as 1021 kilns, and the captain before signing the bill of lading added a memorandum, "quantity and quality unknown."

The captain, on his arrival at a port in England, having experienced bad weather, gave notice to the indorsee of the bill of lading that he claimed to exercise the option given to him by the charter party, and requested to be paid freight on the invoice quantity.

Held, that the addition of the memorandum to the bill of lading, "quantity and quality unknown," did not take away the captain's right to be paid

C. P.]

TULLY v. TERRY.

[C. P.]

freight on the invoice quantity taken on board (a).

SPECIAL case on appeal from the County Court of Kent, to recover a balance of freight alleged to be due to the plaintiff in respect of a cargo of barley. The facts of the case fully appear in the judgment of the court.

Gibson, for the appellant, the plaintiff.—It is material to look at the object of the clause of the charter-party, "that in the event of the cargo, or any part thereof, being delivered in a damaged or heated condition, the freight should be payable on the invoice quantity taken on board, as per bill of lading, or half freight upon the damaged or heated portion, at the captain's option." The merchant might claim to pay on the original quantity shipped, where the grain swells by heat, and not by its measurement, at the port of discharge, as was held in the case of *Gibson v. Sturge* (10 Ex. 622), and the custom is to pay one half freight on the damaged portion where the grain swells. The master is absolutely concluded against the quantity put on board by the Bill of Lading Act against all *bond fide* indorsees of the bill of lading, and as the master cannot tell who will have possession of the bill of lading, on his arrival at the port of discharge, he naturally endeavours to protect himself.

[KEATINGE, J.—The judge below seems to have thought that the condition was neutralised by the words "quantity and quality."] The addition of the words "quantity and quality unknown," have only the significance given to them by Bramwell, B. in *Jessel v. Bath* (L. Rep. 2 Ex. 267), where he said: "This document, although apparently contradictory, means this, a certain quantity of goods has been brought on board, which is said by the shipper for the purpose of freight to amount to so much, but I do not pretend or undertake to know whether or not that statement of weight is correct. On a bill of lading so made out, I think no one can be liable in such an action as the present." The quantity delivered was never proved. [HONYMAN, J.—In *Hudson v. Perry* (3 Taunt. 303) it was decided that if the master guards himself by acknowledging "that the contents are unknown," so that he does not charge himself with the receipt of any goods in particular, the bill of lading alone is not evidence, either of the quantity of the goods or of property in the consignee.] The bill of lading is *prima facie* evidence of the amount of goods against the shipowner.

Leban v. General Steam Navigation Company, ante, vol. 1, p. 435; 36 L. T. Rep. N. 8. 435.

G. M. Lanyon, for the respondent.—The clause, half-freight, is put into the charter-party for the benefit of the charterer. We are not entitled to pay more than the full freight on the sound cargo, and one-half freight on the damaged portion. Secondly, as to the words, "quantity and quality unknown;" if the word quality had been left out, the shipowner could recover. The words are binding on the charterer, and not binding on the shipowner or captain. He cited

Hudson v. Perry, 3 Taunt. 303.

Gibson, in reply.

Cur. adv. vall.

June 15.—The judgment of the court (Keatinge and Honyman, JJ.) was delivered by KEATINGE, J.

(a) For American cases on the construction of the words "weight and content unknown," see *Clark v. Barnwell* (12 Howard's U. S. Sup. Ct. Rep. 723); *Fernard v. Hudson* (3 Sumner, 405); *Shepherd v. Naylor* (5 Gray, 561); *Kelley v. Bouker* (11 Gray, 428).—Ed.

—This was an action brought in the County Court of Kent, to recover a balance of freight alleged to be due to the plaintiffs, who were owners of the bark *Arcoea*, in respect of a cargo of barley shipped at Ibraia in Sept. 1872. The County Court judge consulted the plaintiffs, but referred to this court the question whether such consult was right. The case was heard in Easter Term, before my brother Honyman and myself. The *Arcoea* was chartered by charter-party, dated 2nd Sept. 1871, to ship a cargo of grain at Ibraia, and deliver at a port in the United Kingdom on being paid freight, "7s. per imperial quarter, delivered;" and it was provided that, in the event of the cargo, or any part thereof, being delivered in a damaged or heated condition, the freight should be payable "on the invoice quantity taken on board, as per bill of lading, or half freight, upon the damaged or heated portion, at the captain's option, provided no part of the cargo be thrown overboard or otherwise disposed of on the voyage." A cargo of barley was accordingly shipped at Ibraia under bills of lading describing the quantity 1021 kilos, which the captain signed, but before doing so he added the memorandum usually added in cases of grain cargoes, "Quantity and quality unknown." The *Arcoea* experienced bad weather on her homeward voyage; and the captain having reason to believe that some of the cargo would be heated, gave notice on arrival to the defendant, who had become indorsee of the bill of lading, that he claimed to exercise the option given him by the charter-party, and required payment of freight upon the invoice quantity as per bill of lading. The *Arcoea* discharged her cargo at Ramsgate. The quantity of barley actually delivered did not clearly appear; but it was argued that eighty quarters were damaged by heating. There was no suggestion of fraud on the part of the plaintiffs. The defendants paid into court a sum calculated upon the quantity he alleged to have been delivered, but the plaintiffs claimed to be paid upon the invoice quantity, as per bill of lading, according to the terms of the charter-party. The County Court judge was of opinion, that in consequence of the above-mentioned addition by the captain to the bill of lading, that document ceased to indicate any particular invoice quantity of barley to have been taken on board, and consulted the plaintiffs. We do not concur in that opinion. The liability of grain cargoes to heat during the voyage, thereby causing an increase, often considerable, in its bulk, doubtless suggested the insertion in charter-parties of the clause referred to, and which is now so common in the case of cargoes shipped from the Danube; the object being to protect the merchant from having to pay full freight on the larger quantity caused by the heating, the freight having—in consequence of the decision in *Gibson v. Sturge* (10 Ex. 622)—been made payable on the quantity delivered; and the provision seems in such cases the more necessary, from the fact that those cargoes, frequently sold as floating cargoes, pass from hand to hand by transfer of the shipping documents or by reference to them, so that the arrangement by which it may become unnecessary to ascertain the quantity of the damaged portion of the cargo becomes one of great mercantile convenience; nor do we think this at all affected by the addition made by the captain at the foot of the bill of lading, the object of that memorandum being merely to protect the captain against any

[CHAN.]

HART v. HERWIG.

[CHAN.]

mistakes that might occur in the invoice quantity in the bill of lading, in case of alleged short delivery or deterioration not caused by his default. It was argued, in conformity with the decision of the court below, that the effect of the memorandum was to strike out the invoice quantity from the bill of lading, but we think no such effect can be given to it; and we are fortified in that opinion by the case of *Cosens v. Bingham* (2 El. & B. 836), where in a contract of sale of a cargo afloat, the quantity stated in the bill of lading was construed to be the quantity to be paid for, notwithstanding a similar memorandum in the bill of lading. Upon the whole, therefore, we are of opinion, that the event having happened by reason of which the captain, according to the terms of the charter, had the right to be paid freight upon the invoice quantity in the bill of lading, he did not lose that right by the addition of the memorandum referred to, and consequently that the appellants are entitled to our judgment. We think the costs of the appeal ought to follow the event, and be paid by the respondent.

Judgment for the appellants.

Attorneys for appellants, Mercer and Mercer; for Edwards, Ramsgate.

Attorneys for respondent, Parker and Co.

COURT OF APPEAL IN CHANCERY.

Reported by E. STEWART BOOTH and H. PRAT, Esqrs.,
Barristers-at-Law.

Wednesday, April 30, 1873.
(Before the LORDS JUSTICES.)

HART v. HERWIG.

Foreign contract—Specific performance—Jurisdiction—Substituted service—Vendor out of jurisdiction—Subject matter of contract within jurisdiction—Injunction.

An Englishman entered into a contract abroad with a foreigner for the purchase of a ship, then on her homeward voyage to Cork, the purchaser to take possession of the ship immediately after the delivery of the homeward cargo at any place whither she might be ordered. The ship was ordered to Sunderland, where she discharged her cargo.

On a motion by the purchaser for an injunction to restrain the removal of the ship from Sunderland;

Held (affirming the decision of Malins, V.C.), that substituted service on the captain in charge of the vessel was sufficient, and that the court had jurisdiction to restrain the removal of the ship pending the suit.

This was an appeal from a decision of Malins, V.C.

The hearing in the court below is reported ante, vol. 1, p. 572, where the facts of the case are sufficiently stated.

The Vice-Chancellor having granted an injunction to restrain the removal of the ship from Sunderland pending the suit, and having previously ordered substituted service on the captain in charge of the ship, the defendants (the vendor and the captain in charge of the ship) appealed.

Glasse, Q.C. and Cosens Hardy, for the appellants.—This court has no jurisdiction to decree specific performance of a contract of this kind against a vendor who is out of the jurisdiction. At all events, this is not a case for substituted

service. *Drummond v. Drummond* (14 L. T. Rep. N. S. 822; L. Rep. 2 Eq. 335; and on appeal, 15 L. T. Rep. N. S. 337; L. Rep. 2 Ch. 32) shows that the vendor should have been served abroad under Consolidated Order X, Rule 7, under which the court has jurisdiction to direct service of its process abroad. But this is not a case in which the court will exercise its jurisdiction even in that way, as is shown by the decision of the full court of appeal in *Davis v. Park* (28 L. T. Rep. N. S. 295) where an order for service on a defendant out of the jurisdiction was discharged on the ground of the suit being in respect of a purely foreign contract. Under the Common Law Procedure Act a Court of Common Law would have no jurisdiction to order service abroad upon the vendor in a case like this, and, that being so, it cannot be right for this court to assume such jurisdiction. This is not such a contract as this court will enforce; the remedy is by action for damages. They also referred to

Cookney v. Anderson, 8 L. T. Rep. N. S. 295; 1 De G. J. & S. 389.

Cotton, Q.C. and Dauncey, for the respondent.—Substituted service on the captain in charge of the ship was sufficient, as he was in communication with the vendor till just before the filing of the bill, and was in possession of the ship as agent for the vendor:

Hops v. Hope, 4 De G. M. & G. 328, 341-3;

Hobhouse v. Courtney, 12 Sim. 140.

The court has jurisdiction to decree specific performance of a contract for sale of a particular chattel. The principle is that the contract passes the property, and the vendor becomes a trustee for the purchaser. *Holroyd v. Marshall* (7 L. T. Rep. N. S. 172; 10 H. of L. Cas. 191) shows that this principle applies to personal property as well as to real estate. The ship itself is within the jurisdiction of the court, and that being so, *Larivière v. Morgan* (26 L. T. Rep. N. S. 859; L. Rep. 7 Ch. 540) shows that its removal may be restrained. If the injunction is dissolved, that will be a practical denial of justice to us, for we have no other remedy. They also cited

Gladstone v. Muenster Bey, 7 L. T. Rep. N. S. 477; 1 H. & M. 465.

Cosens Hardy having been heard in reply,

Lord Justice JAMES said: Now that this matter has been fully discussed, it is clear that it is an important matter, and that it deserves the full discussion which it has received. I am of opinion that there really is no objection whatever to any part of either of the orders which the Vice-Chancellor has made. In the first place, I am of opinion that the order for substituted service is quite in accordance with the established principles and practice of this court. It is an order for substituted service upon the man who in this country was the authorised agent of the person abroad, in respect of the very thing which is the subject matter of the suit, and the service upon that agent is as effectual to all intents and purposes as service upon the gentleman himself would be. With regard to the substantial question whether this court has jurisdiction to prevent a specific chattel from being removed out of the jurisdiction until the question is tried, I am of opinion that although, of course, if this suit were a suit for damages only, or which could result in damages only, the plaintiff must go and seek the forum of the defendant in order to enforce that claim for

[CHAN.]

HART V. HERWIG.

[CHAN.]

damages, for according to the established comity of nations that would be the right thing to do, yet where the contract, as in this case, although it is a contract made abroad, and by a gentleman abroad, is a contract to deliver a thing in specie to a person in this country, and the thing itself is brought here, that then the right thing and the honest thing to do is that the vendor should deliver it here; and the court here, in the exercise of its discretion, will see that that thing to be delivered in this country does not leave this country, so as to defeat the right of the plaintiff to have it so delivered. I am of opinion that if the converse case had arisen, and the ship had been in Hamburg, and the contract had been enforced through the intervention of the tribunal there, no one would ever have supposed that there was any violation of international rights, or any violation of the comity of nations, as between this country and the city of Hamburg or the Empire of Germany, or whatever the country might be to whose tribunal the application would properly have been made. Having regard, therefore, to the nature of the contract, the subject matter of the contract, the place where the contract was and is to be specifically performed, I am of opinion that the order of the Vice-Chancellor was quite right to keep the ship here so that it might be delivered in performance of the contract, and not to allow the ship to go, as was suggested by the Lord Justice, all over the world under such circumstances as actually to prevent the contract from ever being fulfilled. For it would be utterly impossible for the plaintiff to ascertain what he was to pay or how he was to get the ship. The right of this plaintiff was to have the ship delivered to him in exchange for the purchase money. The purchase money is *primâ facie* 4750*l.* It is possible that that may have to be reduced to some extent by showing that the ship has arrived in a damaged state over and above ordinary wear and tear. But I do not think that, because there may be an uncertainty as to what the amount of the reduction is to be, it ought to make any difference as to the security which the defendant is entitled to have before the possession of the ship is interfered with. Therefore I think the order ought to be varied to that extent, that is to say, the plaintiff must undertake to pay into court the sum of 4750*l.*, and there will be an order upon him to pay that sum of money into court within fourteen days. The motion will, however, be refused with costs, because that condition does not substantially affect the question which has been brought before our notice.

Lord Justice MELLISH.—I am entirely of the same opinion. Mr. Glasse relied very much on the analogy of the Common Law Procedure Act, which, he said, did not give the court of common law jurisdiction in this case, and he argued that if the court of common law had not jurisdiction it could not be right for the court of equity to assume jurisdiction. But really the analogy of the Common Law Procedure Act, when you come to examine the case, is really against that argument, and not in favour of it. It is quite true that if you simply look at an action brought upon a contract to recover damages, the contract having been made abroad, the defendant could not, under the provisions of the Common Law Procedure Act, be served abroad; and if he did not choose voluntarily to appear in the action in this country,

the plaintiff, for the purpose of recovering damages for a breach of the contract, must have gone to Hamburg, and could not have sued him here. But if, on the other hand, the contract had been of such a nature that the property had passed, and the chattel having been sent to this country, the agent of the owner, by the authority of the owner, had refused to deliver it in this country, then, if that had been the state of things, an action of detinue or trover could have been brought, because the whole cause of action would have arisen here. Now the real truth is, that in the view of the court of equity the property has passed from the defendant. The plaintiff, upon complying with the conditions substantially, is to be considered as the owner. I think that shows very clearly that if the Common Law Procedure Act does not violate, as I am clearly of opinion that it does not violate, any rule of the comity of nations, we shall not violate any rule of the comity of nations by saying that we have jurisdiction to compel the defendant, who has agreed to sell his ship to an English subject, and has agreed in the result, according to the terms of his contract, to perform that contract in England, namely, at Sunderland, which was to be the port of discharge, who has voluntarily sent the ship to Sunderland, and who has voluntarily given directions to his agent, the master, to perform that contract—we shall not violate any rule of the comity of nations by saying that we have jurisdiction to compel the defendant to perform that contract. I am quite clearly of opinion that we are not in the least degree infringing any rule of the law of nations by saying that this court, which is the only court which can compel the actual specific performance of the contract, has jurisdiction so to compel its performance. This is peculiarly a case for the interference of the court, inasmuch as if specific performance were denied to the plaintiff, he practically would get no justice at all, because the loss which he would sustain by a breach of the contract, that is to say, the amount of value of the ship over and above the purchase money, would be the damages which he could recover, and it would be almost impossible for him to prove with any satisfaction in Hamburg how much the ship was worth, or that it was worth anything beyond the sum that he was giving, so as practically to make out that he was damaged at all. In fact, he has entered into this contract for the purchase of the ship, and he is entitled to the ship. There may be a doubt as to what the purchase money is to be, but that he is entitled to the vessel there appears to be no doubt at all; yet he might actually, although he would be unable to prove it in Hamburg, suffer very considerable damage. I am, therefore, clearly of opinion that the order of the Vice-Chancellor is substantially correct.

Appeal accordingly dismissed with costs.

Solicitors for the appellants, *Parker and Clarke*.
Solicitor for the respondent, *Hickin*, agent for *Brown and Son*, Sunderland.

H. OF L.]

RANKIN AND OTHERS v. POTTER AND OTHERS.

[H. OF L.]

HOUSE OF LORDS.

Reported by DOUGLAS KINGSFORD, Esq., Barrister-at-Law.

Monday, May 5, 1873.

(Present: Lord CHELMSFORD, Lord COLONBY, and Lord HATHERLEY.)

RANKIN AND OTHERS v. POTTER AND OTHERS.

Marine insurance—Insurance of chartered freight to be named on homeward voyage during outward voyage—Total loss actual or constructive—Perils of the sea—Notice of abandonment.

The plaintiffs as mortgagees in possession of a ship, entered into a charter-party, with De M. in Feb. 1863, by which it was agreed that the ship should proceed from the Clyde to Southland and thence to New Zealand with a cargo for the owners' benefit, and having arrived and discharged the same, and being made tight, staunch, strong and fitted for the voyage, should proceed to Calcutta, and there being tight, staunch, &c., should load from the factors of the freighter a cargo and convey it for certain freight to Liverpool or London. The plaintiffs then insured the homeward chartered freight in ordinary terms against perils of the sea during the outward voyage to New Zealand, and thirty days after arrival there.

The ship arrived in New Zealand in April 1863, damaged by weather and by having been aground. Surveys were held, but the extent of the damage could not be ascertained, because there was no dry dock, nor other appliances, necessary for a full examination. The captain was delayed at the port in New Zealand by want of funds for repair of the ship, and meanwhile the ship was used as a storehouse for coals at a rent.

In April 1864, funds having arrived and some repairs having been done, the ship proceeded in ballast to Calcutta. There the agents of De M., having heard that De M. had failed in Dec. 1863, refused to have anything to do with the ship, or to provide a cargo. The ship was then fully examined, and it was found that the damages were much more serious than had been supposed, and that the cost of repairs would exceed the value when repaired.

Thereupon, in Aug. 1864, the plaintiffs gave notice of abandonment to the underwriters on ship and to the underwriters on freight, but neither notice was accepted.

In an action on the insurance on freight:

Held (affirming the judgment of the Court of Exchequer Chamber), first, that there was a total loss of the freight by the perils of the sea whilst the policy was still in force; secondly, that there was no necessity for a notice of abandonment, such notice only being necessary where something exists which can be taken by the underwriters for their benefit; and, thirdly, that the conduct of the owners with respect to the ship did not prejudice their claim against the underwriters on freight.

THIS was an appeal from a judgment of the Court of Exchequer Chamber, reversing a decision of the Court of Common Pleas, by which a rule to set aside a verdict found for the defendants was discharged.

The claim was upon a valued policy upon chartered freight. At the time of entering into the charter-party, the ship *Sir W. Byre* was on an outward voyage from the Clyde to New Zealand for owner's benefit, and it was agreed

that on arrival there she should be made staunch and strong, and proceed thence to Calcutta, and load there a cargo for the charterer, and carry the same to England, for which her owners were to be paid an agreed sum. The policy was effected two days after the charter-party, and covered the freight to be earned under the charter-party, not during the homeward voyage, but during the outward voyage to New Zealand, and thirty days after arrival. The facts are fully set out in the opinions of the judges, and the judgments of the Lords, but a clear statement of facts will be found in the judgment of Willes, J., in this case in the Court of Common Pleas (3 Mar. Law Cas. O. S. 122), and in *Barker v. Janson* (3 Mar. Law Cas. O. S. 28).

The case will be found reported in the Common Pleas, 3 Mar. Law Cas. O. S. 122; L. Rep. 3 C. P. 562; in the Exchequer Chamber, 3 Mar. Law Cas. O. S. 374; L. Rep. 5 C. P. 545.

Benjamin and Cohen for the appellants.

Sir G. Honyman, Q.C., Butt, Q.C., and Lanyon for the respondents.—The following cases and authorities were referred to:

- Roux v. Salvador*, 1 Bing. N. C. 526; 3 Id. 260;
Knight v. Faith, 15 Q. B. 640;
Benson v. Chapman, 5 C. B. 530;
Fleming v. Smith, 1 H. of L. Ca. 513;
Colony v. London Assurance Company, 5 M. & S. 447;
Moss v. Smith, 9 C. B. 94;
Rosette v. Gurney, 11 C. B. 176;
Stewart v. Greenock Marine Insurance Company, 2 H. of L. Ca. 159;
Scottish Marine Insurance Company v. Turner, 1 Macq. H. of L. Ca. 334;
Idle v. Royal Exchange Assurance Company, 8 Taunt. 755;
Mount v. Harrison, 4 Bing. 398;
Morris v. Crockett, 14 East 465;
Cambridge v. Anderson, 2 B. & C. 601;
Farnworth v. Hyde, 3 Mar. Law Cas. O. S. 187, 429.
 14 C. B., N. S. 719; 18 L. 825;
King v. Walker, 3 H. & C. 209;
Hamilton v. Mendes, 2 Burr 1210;
Barker v. Janson, and *Potter v. Campbell*, 17 L. T. Rep. N. S. 473, 474 note; 3 Mar. Law Cas. O. S. 28.
Kelly v. Solar, 9 M. & W. 54;
Townsend v. Orvindy, 2 L. T. Rep. N. S. 537; 8 C. B. n. l. 477;
Stringer v. English and Scotch Marine Insurance Company, 38 L. J., 321, Q. B.; L. Rep. 4 Q. B., 676; 3 Mar. Law Cas. O. S. 446;
Foley v. United Fire and Insurance Company, 22 L. T. Rep. N. S. 108; L. Rep. 5 C. P. 105; 3 Mar. Law Cas. O. S. 352;
Phillips on Insurance, sects. 1490, 1507, 1640, 1650, 1664;
Arnould on Marine Insurance, Part 3, a. 6.

The following questions of law were then propounded to the judges.

1. Was there a loss by the perils insured against during the term of the policy?
2. Was notice of abandonment either of ship or freight, or of both, necessary to enable the plaintiffs to recover for a total loss on the policy on freight?
3. If notice of abandonment was necessary, was the notice given in time?
4. If notice of abandonment of the ship was necessary in order to make a constructive total loss of the ship, and such notice was not given in time, does the want of due notice as to the ship affect the right of the plaintiffs upon the policy on freight?
5. Was there any such conduct on the part of

the assured, after the time of the alleged constructive loss of the ship, as discharged the underwriters from their liability upon the policy on freight?

6. Ought the judgment to be for the appellants or the respondents?

Feb. 24.—Brett, J.—My Lords,—In order to answer your Lordships' questions, it seems to me convenient to determine, in the first place, what is the correct interpretation of the policy in respect of which those questions arise, and to point out its peculiarity. What is the subject-matter insured? The description is that the insurance is made "on homeward chartered freight." Having regard to the surrounding circumstances when the policy was made, to these words of reference, and to the statement in paragraph 7 of the case, the policy is not on homeward freight generally, i.e., on any homeward freight, but on the homeward chartered freight to be earned under the charter-party of the 9th Feb. 1863. It was argued that the subject-matter insured was not freight strictly so called, but some right which the counsel described at different times in different terms. It seems to me that those terms are either other phrases to describe the charter-party freight I have mentioned, or that they do not describe what is the only subject-matter insured by this policy. The voyage insured, as descriptive of the voyage during which the perils insured against may arise, is a voyage "at and from the Clyde to Southland, while there, and thence to Otago (New Zealand), and for thirty days in port there after arrival." This is a different voyage from and does not comprise any part of the voyage on which the charter-party freight can be earned, which latter is a voyage from Calcutta to Liverpool or London. The subject-matter insured then is freight: the freight insured is not any but one particular freight; it is not freight which might be earned on the voyage insured or part of it; the goods in respect of the carriage of which the insured freight may be earned cannot be at risk during any part of the voyage insured; and therefore the loss of freight covered by this policy cannot occur through damage to goods by a peril insured against, but only through damage to the ship. Assuming, then, this to be a valid policy, which is not disputed, the true interpretation of the contract seems to be, that the insurers undertake to indemnify the assured if there be a loss of the freight to be earned by the charter-party, in consequence of and proximately caused by such damage to the ship from a peril insured against during the voyage from England to New Zealand, as will prevent the assured from being able to earn the whole or any part of the charter-party freight on the voyage from Calcutta to England. The next matter material to be observed seems to me to be that there is only one contract to which the plaintiff and the defendant are both parties, namely the policy, and there are only two contracts with which both of them are concerned in this matter, namely, the policy and the charter-party referred to in the policy. The defendant is in no way a party to the policy on ship. He incurs no liability under it, and has no rights by virtue of it. It seems, therefore, contrary to all rule to argue either as for or against him from anything depending for its materiality on the existence or non-existence of the policy on ship.

It seems to me convenient, in the next place, to consider what does or does not amount to

a loss, and what amounts to a total loss under ordinary policies on freight. On an ordinary policy on "freight in general terms" there is no loss at all on freight for which the underwriter on freight is liable by reason of partial damage to the ship, however great, causing an average loss of a policy on ship, or of partial damage to cargo causing an average loss, however great, on the cargo generally under a policy on goods. There is a partial loss of freight under a general policy on freight if there be a general average loss caused by a peril insured against giving rise to a general average contribution; or under certain circumstances if there be a total loss of part of a cargo; or if in case of total loss of the ship the cargo be sent on in a substituted ship; or if in case of a total loss of the cargo the ship earn some freight in respect of other goods carried on the voyage insured. There may be an actual total loss of freight under a general policy on freight, if there be an actual total loss of ship, or an actual total loss of the whole cargo. An actual total loss of ship will occasion an actual total loss of freight, unless when the ship be lost, cargo be on board, and the whole or a part of such cargo be saved, and might be sent on in a substituted ship so as to earn freight. An actual total loss of the whole cargo will occasion an actual total loss of freight, unless such loss should so happen as to leave the ship capable, as to time, place, and condition, of earning an equal or some freight by carrying other cargo on the voyage insured.

It has become a question in this case whether there may not be on a general policy on freight another kind of actual total loss—namely, by such damage to the ship as would justify notice of abandonment and make thereupon a constructive total loss of ship under policy on ship, although there be no loss of cargo, or an average loss of cargo without means of sending on the cargo. In such a state of things the ship may or may not be insured; if the ship be insured, due notice of abandonment of ship may or may not have been given. If the ship be not insured, what must happen upon the assumption? The assumption is that a prudent owner will not repair. Then the ship will not be repaired. If not repaired, she will remain a wreck, or he sold as a wreck. She cannot, therefore, sail on the voyage insured in the policy on freight. Then such freight is and must be in fact absolutely and totally lost. There is no freight, no chance of freight, to abandon to the underwriter on freight. It has never been suggested that the ship should be abandoned to the underwriter on freight. There is nothing, then, which can be abandoned to him of which he could take possession or from which he could derive profit. If the ship be insured, and due notice of abandonment be given to the underwriter on ship, the property in the ship passes to the underwriter on ship. In such cases the new owner of the ship will in almost every case sell her as a wreck. Again, there would be nothing and no chance of anything to abandon to the underwriter on freight. If from exceptional facilities the underwriter on ship should repair the ship and earn full freight on the voyage described in the policy on freight, such freight would belong to the new owner of the ship; none of it could go to the assured or underwriter on freight; but freight would have been earned on the voyage insured in the policy on

H. OF L.]

RANKIN AND OTHERS v. POTTER AND OTHERS.

[H. OF L.]

freight, and as the insuring of the ship is the voluntary act of the shipowner, and the abandonment is also his act, it has been decided in your Lordships' House that in such exceptional case there is no loss at all of freight for which the underwriter on freight is liable: (*Scottish Marine Insurance Company v. Turner*, 1 Macq. H. of L. Cas. 334.) If this had not been a decision in your Lordships' House, I should have ventured to think that a valid abandonment of ship was of the same effect as leaving her a wreck, and that the real total loss of freight suffered by the assured on freight was covered by the only policy which could cover it, namely, the policy on freight. But the exceptional case thus mentioned, which according to the decision causes no loss at all of freight on the policy on freight, need not be further noticed. It is the same case as if the shipowner, uninsured on ship but insured on freight, should unnecessarily and unreasonably repair the ship, sail her on the voyage insured in the freight policy, and earn full freight. In such case it is held that there is no loss at all on the freight policy. If the ship be insured, but due notice of abandonment of the ship be not given to the underwriter on ship, then the ship is left on the hands of the assured as if she were not insured. Does not this case become the same as that first put, namely, the case of the shipowner having insured freight but not ship? It seems impossible to maintain that upon a question of construction the rights of either the assured or underwriter on the freight policy can be altered by anything done or omitted to be done on the policy on ship. To hold otherwise is to mix up two independent contracts, and contracts between different parties. The excepted case above mentioned of the ship being repaired and earning freight on the voyage insured is made to depend not on what is done under or by virtue of another contract, but on what is done to and by the ship. If the ship earn freight by reason of repairs recklessly or imprudently made, the same result follows whether the ship was insured or not.

In determining, then, the construction of the policy on freight as to liabilities and rights under it, it must be immaterial whether the assured on a policy on the ship has lost or made perfect his right to recover on that policy for a constructive total loss of ship by failing to give or giving due notice of abandonment under that policy. The only question is whether there is any implied contract or condition in the policy on freight, under any of the states of circumstances above mentioned, where there is any loss of freight, imposing upon the assured under that policy the obligation of giving notice of abandonment to the underwriter of that policy. And it was to meet this question that the arguments were propounded as the bar with regard to the reason for giving notice of abandonment. On the one side it will be found that the arguments were founded on the assertion that notice of abandonment need not be given where there is nothing to abandon, where there is nothing and no chance of anything which can pass or be of value to the abandonee. On the other side, the real point of the argument was that if the thing insured could be said to exist in specie, notice of abandonment of it must be given, although it could not pass to the abandonee, and be could not derive any value from it. This argument took the form of asserting that the notice is

required in order to signify an election by the assured, or to give an opportunity for inquiry to the underwriter. The propositions thus enunciated on the two sides were treated by the appellant's counsel as so contradictory the one of the other, so inconsistent, that if the one prevailed the other must fail. It may, however, be that they are consistent, and that where there is anything to abandon, the caution of great merchants and lawyers has by usage engrafted upon contracts of marine insurance the implied condition that notice of abandonment must be given quickly, both in order to signify the election of the assured, and to give the underwriter opportunity for inquiry and action, but that where there is nothing to abandon notice of abandonment, being futile, is unnecessary. The end to be obtained by abandonment would seem to be the preservation of the cardinal principle of marine insurance, the principle of indemnity, and to that end to prevent the assured from having at the same time payment in full of the sum insured and the thing insured of value in his hands. It may be that it is as an incident of the rule, and in order to secure its application, that the assured, where he must abandon in order to recover the full sum insured, must give quick notice of his intention to abandon. But whatever be the reason of the rule as to the time of giving notice of abandonment, it is and must be inapplicable where no abandonment need be made. The question, therefore, really is whether there must be abandonment in order to enable an assured to recover as for a total loss when there is nothing to abandon. If there is such a necessity, it arises upon a condition to be implied. It seems to me to be a proposition without foundation of reason to say that there must be an abandonment where there is nothing to abandon. If the case of *Knight v. Faith* (15 Q. B. 649) decided the contrary, I with deference think it is a wrong decision. The view of the Court of Common Pleas in *Farnsworth v. Hyde* (3 Mar. Law Cas. O. S. 187, 429; 18 O. B. N. S., 835; 15 L. T. Rep. N. S. 375), not overruled as to this point in the court of error, seems to me to be correct. I venture to affirm that it is a correct proposition of insurance law to say that no abandonment is necessary and no notice of abandonment is required where there is nothing to abandon which can pass to or be of value to the underwriter. It follows that on a policy on freight in general terms there need be no abandonment of freight, and no notice of abandonment is required, where the ship is damaged to such an extent or under such circumstances as would authorise an abandonment of the ship on a policy on the ship, and where there is no cargo on board the ship, or if on board, where none is saved with the chance of an opportunity of its being forwarded in a substituted ship.

In the several states of circumstances above set forth and considered, the loss of freight on the policy on freight, would be an actual total loss. This conclusion does not, as it seems to me, go the length of determining that there never can be a constructive total loss of freight. If, for instance, the ship be damaged as described, but cargo which was on board be saved under circumstances which leave it doubtful whether such cargo might or might not be forwarded in a substituted ship, or if the cargo be lost and the ship may or may not probably earn some freight by carrying other goods on the voyage

[H. OF L.]

RANKIN AND OTHERS v. POTTER AND OTHERS.

[H. OF L.]

insured, it may be, and I think the rule is, that in order to make certain his right to recover as for a total loss on the policy on freight, the assured should give notice of abandonment of the chance of earning such substituted freight.

Another form of policy on freight, not unusual, but not so frequent as a policy on freight in general terms, is a policy insuring "chartered freight." In such policies the voyage insured commences usually at or from the port of sailing on the voyage described in the charter-party, or on or at the commencement of the voyage the ship must make to reach that port; but in both cases the voyage insured usually covers also the whole voyage to be sailed under the charter-party. Such a policy attaches earlier than a policy on freight in general terms; it attaches before any goods are on board the ship. If the ship be lost or damaged, or the cargo be lost after the goods are on board, the same circumstances must arise and the same considerations apply as have been related and treated of in the case of a policy on freight in general terms. Before any goods are shipped the loss can occur solely by reason of damage to the ship; but if the ship be then actually totally lost, or so damaged as to be possibly a constructive total loss, so much of the above reasoning as is applicable to a loss by damage to the ship seems to be equally if not more cogent to show that no part of the charter freight could possibly be earned by the assured, that there would be no freight or chance of freight to be abandoned, and therefore that no abandonment or notice of abandonment would be necessary; but that the loss of the chartered freight would be an actual total loss on the policy on freight.

These considerations and this inquiry into the rules applicable to ordinary policies on freight seem to me to determine what must be the decision on this unusual policy on freight under the circumstances which have arisen. The questions raised are, whether there is any loss of freight by a peril insured against, and if so, is that loss a total loss? The ship was damaged during the voyage insured. She was damaged by a peril insured against. Unless the damages to the ship should be wholly or sufficiently repaired, the insured freight could not be earned. If the damage to the ship could not be sufficiently repaired to enable the assured to earn the charter freight by carrying goods on board that ship, it seems to me that the damage to the ship caused by a peril insured against during the voyage insured is the cause of the loss of the earning the chartered freight by that ship. Loss of freight by reason of such damage to the ship caused by such a peril is a loss against which, according to the interpretation put upon the policy at the commencement of this opinion, the underwriter on this policy on freight has in terms agreed to indemnify the assured. The question therefore is, whether the ship could have been sufficiently repaired to enable the assured to earn the chartered freight. Physically or mechanically she could. But as matter of business carried on according to the dictates of sense she could not. The true meaning of the 24th paragraph (a) of the case is that a prudent owner of this ship, that is to say, an owner conducting himself according to the dictates of common sense in business, would not repair the

ship. In such case the law holds that within the meaning of such a policy as this, the ship could not be repaired so as to earn the freight or any part of it by the use of that ship. The assured not being able to tender that ship, and having none of the goods in his possession, had no claim to carry any goods under the charter-party in a substituted ship. Without therefore relying upon the obvious other impediment and prevention in the way of the plaintiff's earning the charter-party freight, namely, the certainty from the extent of damage that the ship could not be repaired so as to be seaworthy within any time during which the charterer would be bound to wait for her, it seems to me that the other facts which I have mentioned show conclusively that there was a loss of freight by reason of damage to the ship caused by sea perils happening during the voyage insured; and that such loss of freight is, upon the construction put upon the policy at the commencement of this opinion, a loss by a peril insured against; and that inasmuch as without repairing the ship, which the assured did not do, and was not bound to do, because in consideration of law it could not be done, no part of the chartered freight could be earned by anyone; and that there was therefore no part of the chartered freight, or any chance of earning any part of it, which by a pretended abandonment could pass to or be of value to the underwriter on freight; and that consequently the loss of freight was an actual total loss without notice of abandonment. If notice of abandonment were necessary, the question whether in this case it was given in due time seems to me to be more doubtful. There was no reason in this case to doubt the accuracy of the information forwarded to the assured. The question, therefore, as it seems to me, is, whether at any time before the surveys made at Calcutta were received, the assured had information of damage to the ship of such a nature and to such an extent as rendered the prospect of a total loss of the chartered freight imminent but not certain. If he had he was bound to give notice at once. If the case had been on trial before a jury I should say that they should have been asked to find whether at any time there was laid before the assured information so certain and of such a nature as would lead an assured of ordinary care and intelligence to conclude that there was great danger of a total loss of the chartered freight, but a chance of such loss being obviated, and that they should have been directed that, if such information was at any time conveyed to the assured, he was bound immediately to give notice of abandonment. As in this case the court was to draw inferences of fact, the question is, whether before the surveys made at Calcutta were received, the assured had information of damage to the ship of such a nature and to such an extent as I have described. The information upon these points which the assured had received were the surveys made at Binn Harbour and at Port Chalmers. As to the first, made on the 27th May 1863, I think it was of no importance. The survey of the 10th July 1863, made at Port Chalmers, does not seem to me to disclose formidable damage to the ship. If it had stood alone I should have been inclined to think that it disclosed such damage as ought to have so greatly alarmed the assured as that he ought to have acted upon it by giving immediate notice of abandonment. But it seems to me that the surveys of

(a) The 24th paragraph of the case is set out in the opinion of Martin, B., post, p. 81.—Ed.

[H. of L.]

RANKIN AND OTHERS v. POTTER AND OTHERS.

[H. of L.]

the 25th Aug. 1863, and of the 4th Sept. 1863, received about the same time, would modify the view to be derived from the former survey, and would lead the assured to believe that the ship could proceed to Calcutta, and be repaired to such an extent, and within such time, as would enable him to earn the chartered freight. I therefore come to the conclusion, though with some doubt, that there was no information before the arrival of the surveys made at Calcutta which made it incumbent on the assured to give notice of abandonment, assuming notice at some time to be necessary, and that upon the same assumption the notice given upon the receipt of the Calcutta surveys was given in due time.

If no notice was necessary, if there was an actual total loss, I cannot think that the right of the assured to payment of a total loss can be affected by a delay in demanding such payment. Delay in giving notice of a total loss seems to me to amount to no more than delay in asking for the settlement of it. I know of no obligation in insurance law to give immediate notice of an actual total loss. Immediate notice would not enable the underwriter to make the loss in any way less.

I therefore answer your Lordships' questions thus: As to the first, there was a loss by the perils insured against during the term of the policy. As to the second, no notice of abandonment either of ship or freight was necessary. As to the third, if notice of abandonment was necessary, it was given in time. As to the fourth, that in the case supposed want of due notice as to the ship would not affect the rights of the plaintiffs upon the policy on freight. As to the fifth, there was no such conduct on the part of the assured as discharged the underwriters from their liability upon the policy on freight. As to the sixth, that the judgment ought to be for the respondents.

Mellor, J.—My Lords: I answer all the questions proposed by your Lordships to the judges who attended during the argument in this case in favour of the plaintiffs below, the respondents in your Lordships' House. In answer to the first question, I am of opinion that there was a loss of the subject matter of insurance by the perils insured against during the term of the policy. In answer to the second question, I am of opinion that no notice of abandonment either of the ship or freight was necessary under the circumstances to enable the plaintiffs to recover for a total loss on the policy on freight. In answer to the third question, I am of opinion, although with some hesitation, that if notice of abandonment was necessary, it was under the circumstances given in time. To the fourth question, I answer that in my opinion if notice of abandonment of the ship was necessary in order to make a constructive total loss of the ship, and such notice was not given in time, the want of due notice as to the ship does not affect the right of the plaintiffs upon the policy on freight. To the fifth question, I answer that in my opinion there was no such conduct on the part of the assured, after the time of the alleged constructive loss of the ship, as discharged the underwriters from their liability upon the policy on freight. To the sixth question, I am of opinion that the judgment ought to be for the respondents.

In order to arrive at a right conclusion in this case, it is most essential accurately to ascertain the subject matter insured by the policy in

question, and against what perils it was agreed by the underwriters to insure; and to keep absolutely distinct the considerations which alone affect the policy on the contemplated homeward freight from those considerations which would apply to an ordinary case of insurance of the ship; and I cannot help saying with great respect, that the error into which the Court of Common Pleas appears to me to have fallen, has arisen from not keeping distinct the character of the plaintiffs as owners of the ship, from their character as insurers of an entirely distinct subject matter of insurance, viz., the freight contemplated to be earned on the homeward voyage.

The charter-party is [The learned Judge then stated the charter-party]. It is to be observed that the nature of the interest insured is not an interest in anything actually existing and of which possession can be had, such as a ship or cargo, or freight of cargo on board, but it is the interest only in the right to have a cargo provided by the charterer at Calcutta on the condition that the ship, when it arrived there, should be tight, staunch, and strong, and every way fitted for the voyage home, notwithstanding any perils of seas which might happen to the ship on her voyage to New Zealand, and for thirty days in port there after arrival. In other words, it is a warranty that no "peril of the seas" which might happen to the ship on her voyage to New Zealand, and for thirty days in port there after arrival, should prevent the ship from arriving at Calcutta, and from being there tight, staunch, and strong, and every way fitted for the voyage home, with the cargo there stipulated to be loaded by the agent of the charterer, and the right to have such cargo loaded, and to earn the stipulated freight on the voyage home, and the interest in such right is by the policy valued at the sum of 4000*l*. And the question really is, was the ship so damaged by the perils of the seas during the period covered by that policy as to be practically disabled from arriving and being at Calcutta in such condition of seaworthiness as to entitle her to require from the charterers' agent the loading of the stipulated cargo.

In the judgment of the Court of Common Pleas it is said that "the case of insurance of specific charter freight to be carried upon a future voyage against perils to be incurred in the present one, is, so far as we can learn, exceptional in practice, though not unprecedented." And I cannot forbear to add that I think it to be an eminently inconvenient and unsatisfactory course of insurance. The subject matter of the insurance under the policy in question appears to me to be accurately appreciated and stated by the Court of Common Pleas (3 Mar. Law Cas. O. S. 122; L. Rep. 3 C. P. 567, 568; 18 L. T. Rep. N. S. 715); but I think that the foundation of the error into which, as it appears to me, the court fell, is to be found in the following passage of the judgment: "The insurance of a subject thus dependent upon the possession of the ship, though not properly an accessory thereto, nor incident to the voyage insured, yet being insured by the ordinary form of policy, ought to be dealt with upon the same principles as an insurance of the ship itself, and as subject to the same conditions in respect of abandonment and otherwise, unless so far as the character of the subject matter rendered abandonment idle or inapplicable."

H. OF L.]

BANKIN AND OTHERS V. POTTER AND OTHERS.

[H. OF L.]

I have already stated that in my opinion the true effect of the policy under consideration was to insure the ability of the ship to earn the freight contemplated by the charter-party, upon the cargo to be loaded at Calcutta for the homeward voyage, against perils to be encountered by the ship on the voyage to New Zealand, and for thirty days in port there after arrival, so that she should not be prevented from getting to Calcutta in such a state of seaworthiness as to give the owners a right of action against De Mattos if he did not load the cargo pursuant to the charter-party. The condition of the ship when at New Zealand, as regarded the sea damage which she sustained there during the time covered by the policy, was such as it is admitted in the joint case would have justified an abandonment and claim for a constructive total loss.

The admitted facts as regards the condition of the ship at New Zealand being such as would have justified an abandonment of the ship as for a constructive total loss, it now becomes important to consider whether the right to earn the freight under the charter-party was, and to what extent, affected by the actual condition of the ship at New Zealand. Cleasby, B., is reported to have said in the Court of Exchequer Chamber that the thing insured "is the right to earn the freight, and this is neither destroyed nor irretrievably lost because the ship is damaged to the extent alleged. The condition of earning it, namely, repairing the vessel, is not made impossible but expensive, and therefore difficult of performance, but these expenses and the difficulty form the equivalent in such case to damage to the thing, where the thing exists in specie, and mere damage to any extent does not constitute total loss." With great respect this appears to me to confound the considerations which arise upon two distinct contracts, viz., that of an ordinary policy on the ship, and a policy confined to the right and ability of the ship to earn the stipulated freight. The ship was in fact in such condition from sea damage in New Zealand that no uninsured owner of ordinary prudence would have repaired her, and so far as he was concerned, had he known the actual facts, he would have been justified in at once abandoning her to the underwriters. So soon as the ship became so sea damaged that no prudent uninsured owner would repair her, I think that from that moment her capacity to earn the stipulated freight on the homeward voyage had become a practical impossibility, so that she could not be effectually tendered to the agent of the freighter at Calcutta as a ship "tight, staunch, and strong, and every way fitted for the voyage," that is the homeward voyage. It must be taken for granted that if the actual extent of the damage had been ascertained at New Zealand, the owner would then have done what he did at Calcutta, namely, abandon the ship to the underwriters; but the doing that, or the not doing it, either at New Zealand or Calcutta, could not and does not, as I think, assist in determining whether in fact by reason of perils of seas during the time covered by the policy the ship had become incapable of earning the contemplated freight, pursuant to the charter-party. I accept the dilemma proposed in the judgment of the Court of Common Pleas, that "the assured must answer that the total loss was complete, actual, and absolute, without abandon-

ment at Bluff Harbour, immediately upon the happening of the damage, to repair which would cost more than the value of the vessel, and if that were so, the subsequent proceedings of the owner were immaterial, inasmuch as no freight, properly so called, was in fact subsequently earned." I think that my Brother Lush was right in the opinion he expressed in the Court of Exchequer Chamber, namely, "That which in the language of maritime commerce constitutes a loss of a ship, is damage to an extent not worth repairing, followed by a determination not to repair. As respects her capacity to earn freight, a ship in such condition is as much lost to the owner as if she had sunk or broken up." It is true that the ship was taken to Calcutta under the charter-party as an existing ship, such as was supposed capable of being repaired at a cost which might reasonably be incurred in order to enable her to prosecute her voyage. But when the true condition of the ship was ascertained, and she was found to be damaged to an extent which justified the owners in abandoning her to the underwriters, as a constructive total loss, and they did abandon her, the inference arising from those facts is entirely rebutted. I do not feel it incumbent on me to do more than to say, that whatever was then done or omitted to be done with a view to abandonment by the plaintiffs as owners of the ship, has no real bearing upon the question to be determined in this case.

If I am right in assuming that by reason of damage from perils of the sea she had within the time covered by the policy become practically disabled from being tendered at Calcutta to the freighters' agent, as a ship answering the conditions of the charter-party, the subject-matter of insurance had become a total loss. There was nothing which the assured as insurers of the anticipated freight could do, or leave undone, which could affect the position or conduct of the underwriters in regard to the contract contained in the policy on freight. To say that the plaintiffs as insurers of the freight were in fact identified with the owners of the ship, and were therefore bound to act or not to act, to elect or not to elect, in conformity with the proceedings of the plaintiffs as owners of the ship, is to confound the rights and obligations of the parties under two separate and distinct contracts. It does not appear from the case whether there was an insurance on the ship, but I collect from the judgment in *Potter v. Campbell* (3 Mar. Law Cas. O. S. 28, note; 17 L. T. Rep. N. S. 474, note; 16 W. R. 429), that there was such a policy on the ship covering the voyage to New Zealand; but I am entitled, in considering the effect of the policy in question, to treat the ship as uninsured, and to deal singly with the loss of the anticipated freight. The right to call upon De Mattos to load a cargo at Calcutta had been rendered abortive by perils of seas, resulting in such damage to the ship at New Zealand as rendered it practically impossible to make an effectual tender of her to receive cargo at Calcutta. What was then in the power of the assured under this policy to do or say to the underwriters which would not have been an idle ceremony? The plaintiffs in their character of owners of the ship had a duty to elect and give notice of abandonment within a reasonable time after the discovery of the true state of the facts, and it may be that they were guilty of such lapses in delay in

the discovery as rendered their notice of abandonment when given inoperative; but I am at a loss to see how that affects the plaintiffs under the policy in question. Their election was made for them, when the condition of the ship owing to perils insured against became such as practically destroyed her capacity to earn the contemplated freight.

The ground upon which a notice of abandonment is held not to be necessary, where a ship founders at sea, and an actual total loss takes place, is, that there is nothing left which the assured can cede to the underwriters, or by which their position can be affected, and it appears to me that the reasoning of Lord Abinger in delivering the judgment of the Exchequer Chamber in *Roux v. Salsador* (3 Bing. N. S. 278), applies strictly to the circumstances of the present case. Had it not been for the respect which I feel for the opinions of the judges who, expressing the same view which I entertain of the subject matter of insurance under the policy in question, have come to a different conclusion, I should have been content to have stated my opinion to be in conformity with the judgments of Cockburn, C.J. and my brother Lush in the Court of Exchequer Chamber.

Entertaining a very strong opinion that no notice of abandonment was necessary, I feel some difficulty in dealing with the question whether if a notice of abandonment was necessary it was given in time. In considering this question as applicable to the policy on freight simply, it appears to me that questions of fact quite distinct from those which would affect the policy on the ship may arise, and it may well be that what is a reasonable notice in the one case, is not reasonable in the other; but I cannot fix any precise time, under the circumstances of the present case, from which if a notice was necessary to be given, it would be or not be in time, as a matter of reasonableness. If it is to depend upon the diligence with which the owner pursues the inquiry into the actual condition of the ship arising from sea peril, I do not discover in the facts stated any such laches or neglect, or any such conduct on the part of the master in his dealing with the ship until the extent of the damage was discovered, as would induce me to differ from the opinion expressed by the majority of the judges in the Exchequer Chamber.

Before concluding, I ought not to omit to notice a point that was made in the argument, and which I believe is adopted by one of my learned brothers for whose opinion I entertain the greatest respect—namely, that the insolvency of De Mattos, and not the perils of the sea, was the proximate cause of the loss of the anticipated freight, and further, that the delay in the ship's arrival at Calcutta had discharged De Mattos, even if solvent, from loading a cargo under the terms of the charter-party. I cannot help thinking that this view of the case arises from not keeping strictly in view the subject-matter of insurance under the policy. If the matter insured was the right and ability of the ship to earn the homeward freight by being at Calcutta, tight, staunch, and strong, and every way fitted for the voyage home, and that such state of the ship was a condition precedent to the right to require the loading of a cargo at Calcutta by the agent of De Mattos, the ship neither did nor could fulfil that condition, owing to the perils of the seas during

the time covered by the policy, and that I think was a loss insured against independently of the solvency or insolvency of De Mattos on her arrival. It was further said that the fact of the insolvency of De Mattos would have equally prevented his agent from providing a cargo, even if the ship had arrived at Calcutta in seaworthy condition. Had the policy not been a valued policy, the fact might have seriously affected the damages, but I do not see how it can afford an answer to the present action. Then with regard to De Mattos being discharged from the obligation to load a cargo in consequence of the delay which had taken place on the arrival of the ship, that can be no answer to the action, if I am right in attributing that delay to the effect of sea damage within the policy.

I have therefore come to the conclusion that all the questions propounded by your Lordships to the judges ought to be answered in favour of the plaintiffs below who are the respondents in your Lordships' House.

Blackburn, J.—My Lords: Your Lordships have in this case proposed six questions to the judges, all of which I answer in favour of the plaintiffs in the cause, who are the respondents in your Lordships' House. With your Lordships' permission I will first state generally my reasons for deciding in favour of the plaintiffs on the merits.

The plaintiffs being mortgagees in possession of the ship *Sir William Eyre*, then on a voyage to New Zealand from the Clyde, had entered into a charter-party with De Mattos, by which it was agreed that the ship should sail to New Zealand with a cargo for owners' benefit, and having arrived and discharged the same, and being made tight, staunch, and strong, and every way fitted for the voyage, should proceed to Calcutta, and there being tight, staunch, and strong, and every way fitted for the voyage, should load from De Mattos agents a cargo and convey it for freight to Liverpool or London. It is to be observed on this charter-party that it is a condition precedent to the earning of the freight, that the *Sir William Eyre* should be in due time at Calcutta, and there seaworthy for the voyage from Calcutta to Liverpool or London. The plaintiffs could not substitute any other vessel for her, and that being so, the plaintiffs might be prevented from earning that freight by any disaster which befel the *Sir William Eyre* on her voyage out to New Zealand, or during her stay there, or on the voyage from thence to Calcutta, or during her stay there, if the effect of that disaster was to render it impracticable to tender the *Sir William Eyre* at Calcutta in due time, and in a seaworthy condition for the voyage home round the Cape of Good Hope; but that they had a vested expectation of earning this freight, if no such disaster happened. They had therefore in respect of this freight an insurable interest during the whole of the outward voyage. This is not, as I understand, disputed, but if authority is required for it, I would refer your Lordships to *Burber v. Fleming* (L. Rep. 5, Q. B. 59), and *Poley v. United Fire and Marine Insurance Company of Sydney* (3 Mar. Law Cas. 352, L. Rep. 5 C. P. 155; 22 L. T. Rep. N. S. 108). Being so situated they entered into the policy. In my opinion the whole merits in this case depend upon the accurate understanding of the contract contained in this policy.

I must first observe on a matter which is perhaps not strictly before your Lordships. It is stated in the appendix to the case that

H. OF L.]

RANKIN AND OTHERS v. POTTER AND OTHERS.

[H. OF L.]

this insurance was for 4000*l.* on freight valued at 5000*l.*, and throughout the argument, and in the judgments below, the policy was treated as a valued policy, and consequently no question was discussed as to the amount to be recovered, nor whether the insolvency of De Mattos, and the consequent diminution in value of the freight insured, affected that amount. In the policy itself, however, as set out in the appendix to the case, the space which, if this was the case, ought to have been filled up with 5000*l.*, is left blank, and the policy is in form an open one. It is possible that the policy is miscopied, but I think it more probable that it was drawn up in this form by mistake, and that the underwriters, either from a sense of honour or from knowing that the contract could be reformed in equity, have been content to act on the contract as it ought to have been drawn up. I presume your Lordships would not like to put any obstacle in the way of such a fair proceeding. I shall therefore make no further remark on the amount to be recovered.

The insurance is, "lost or not lost at and from Clyde to Southland, while there, and thence to Otago, New Zealand, and for thirty days in port there," upon the *Sir William Eyre*. And the subject-matter is 4000*l.* on homeward chartered freight. I think that the meaning of this contract is that the underwriters are to indemnify the assured if by any of the perils insured against the *Sir William Eyre* is, during the voyage from the Clyde to New Zealand, or during thirty days after arrival there, so damaged that in consequence the homeward chartered freight cannot be earned. In the judgment in the Common Pleas in this case it is said, "The policy under consideration thus differs from an ordinary insurance upon freight. First, in that it could not be affected by loss of cargo, because the freight insured was not for cargo in existence or appropriated during the risk; next that it was not subject to general average either of ship or cargo, because the freight was not to be earned during the voyage insured, and as a consequence, that the underwriter was not in any case to contribute to repairs of the ship, not even in respect of general average. And lastly, that as the freight rested in contract for the future employment of the ship only, it would not pass by bare abandonment to the underwriters upon ship, but would simply come to nothing upon such abandonment if justifiable, because the abandonment would be in effect an election by the owner to treat the charter as at an end by reason of the usual exception of sea perils in the charter-party, and he would not be bound to incur in favour of the underwriters on ship any new responsibility not connected with the voyage on which the ship was insured." So far I completely agree, and instead of repeating this in other words I adopt this language as my own, but in what follows in that judgment I do not agree. I think that if there was damage to the ship, such that though it was physically possible to repair the ship, the expense would be so great that, according to the rule laid down in *Moss v. Smith* (9 C. B. 104), it was unreasonable so to do, the owner might, as between him and the charterer, elect not to repair the ship, but to treat the charter as at an end by reason of the exception of the sea perils, and if under such circumstances the owner did not in fact repair her, the freight was totally lost by the perils insured against, and not, as stated in the judgment in the

Common Pleas, by the owner's default, for the owner was not bound to repair the ship. There would be no loss from the perils insured against, if the owner did in fact repair the ship, which, though not bound to do so, he had a right to do if he pleased. If indeed there had been a partial loss or damage, such that the owner could reasonably repair the ship, he was bound to do so, and if in such a case he declined to do so, I should agree with the judgment in the Common Pleas in saying that he would lose the freight by his own choice or default, and not by any peril insured against. But I think that where the damage is so great that the owner is not bound to repair the ship, if he declines to do so he would lose his freight, not by his own default, but by the perils insured against. This seems an elementary proposition, but as much of what I consider the error in the judgment of the Common Pleas arises from not bearing it in mind, I will proceed to state some authorities for it. The principle is thus expressed in the judgment of the Queen's Bench in *Stringer v. English, &c., Insurance Company* (3 Mar. Law Cas. O. S. 440; L. Rep. 4 Q. B. 691): "The assured, if he, by any means such as he could reasonably be expected to use, could have prevented the loss" (which was in that case by a sale in the Prize Court) "was bound to use them, and if the sale was directly occasioned by his default, though remotely by the perils insured against" (in that case a seizure), "he cannot recover against the underwriters. But the assured are not bound to use unreasonable exertions in order to preserve the thing insured; and if the giving of a bond or deposit of money" (in the present case the repairing of the ship) "would have exposed them to expense or risk of expense beyond the value of the object, or as the same idea is often expressed, if the steps necessary to prevent the sale" (loss) "were such as a prudent uninsured owner would not have adopted, we think they were not in default, and the sale was then a total loss occasioned by the seizure." I do not cite this as conclusive, for it is for your Lordships to determine whether it is correct or not, but as expressing what I think the true principle. So far as regards the case of a ship, it is very concisely, and I think accurately expressed, by my brother Lush in his judgment in the court below when he says, "That which in the language of maritime commerce constitutes the loss of a ship is damage to an extent not worth repairing, followed by a determination not to repair."

I must here observe that in my opinion (which in this respect differs from that expressed in the judgment of the Court of Common Pleas below) there might well be a state of things in which the assured could recover on this policy for a total loss of the freight, though the assured could not, either with or without notice of abandonment, recover against the underwriters on ship for a total loss. The questions between the assured and the two sets of underwriters are not the same. The question between the assured and the underwriters of the ship is whether the damage sustained may be so far repaired as to keep her a ship, though not perhaps so good a ship as she was before, without expending more than she would be worth. The question between the assured and the underwriter on the chartered freight is whether the damage can be so far repaired that the ship can be at Calcutta,

[H. OF L.]

RANKIN AND OTHERS v. POTTER AND OTHERS.

[H. OF L.]

seaworthy for a voyage round the Cape of Good Hope, without expending more than she would be worth. I should have added a further term that the repairs could be done so promptly that she might arrive at Calcutta within a reasonable time, as between the shipowner and De Mattos, were it not for the case of *Hurst v. Osborne* (18 C.B. 144), which seems to me an authority against this position. And though I should not hesitate to advise your Lordships to reconsider that case if necessary, I think it is not necessary so to do in the present case.

My position therefore is that if the ship were so damaged that she could be brought to Calcutta and there made seaworthy for a voyage round the Cape, but not without expending say 10,000*l.*, and would then, all things considered, be worth only say 9000*l.*, but that she could by an expenditure of say 4000*l.* be made a ship quite fit for short voyages, though not for such a voyage as that round the Cape, and would then be worth say 5000*l.*, there would be a total loss of the freight, though no total loss of the ship. No notice of abandonment whatever given to the underwriters on ship could have converted that which on those figures was only a partial loss into a total one. This was decided by the Exchequer Chamber in *Kepp v. Halliday* (2 Mar. Law Cas. O. S. 271, 370; 6 B. & S. 723; 14 L. T. Rep. N. S. 762), a case which was not cited at your Lordships' bar, but to which I venture to refer your Lordships, as the passages contained in pages 749 to 754 of the report will show your Lordships that the opinions I now express are not formed for the first time.

I now proceed to consider the answer to your Lordships' first question. That in my opinion depends upon a question of fact, which I think is answered by the very important addition to the case made during the argument in the Exchequer Chamber, and now contained in the case: "It is admitted that the sea damage which the ship sustained at New Zealand during the time covered by the policy would have justified an abandonment and claim for a constructive total loss." This can only mean that the damage to the ship was so great that the ship could not be repaired without spending more than she was worth, and consequently that the shipowner might justifiably elect not to repair her. I think that under such circumstances the shipowner had a right as against his underwriters on ship to come upon them for a total loss. But if he does so, then on general principles of equity not at all peculiar to marine insurance, he who recovers on a contract of indemnity must and does, by taking satisfaction from the person indemnifying him, cede all his rights in respect of that for which he obtains indemnity. It was held in *Mason v. Sainsbury* (3 Doug. 61), that the Hand-in-Hand Insurance Company having paid the plaintiff for a loss under a fire policy, were entitled to recover in an action in his name against the hundred. This cession or abandonment is a very different thing from a notice of abandonment, though the ambiguous word "abandonment" often leads to confounding the two. There is no notice of abandonment in cases of fire insurance, but the salvage is transferred on the principle of equity expressed by Lord Hardwicke in *Randal v. Cochrane* (1 Ves. sen. 98), that "the person who originally sustains the loss was the owner, but after satisfaction made to him the in-

surer." In *Godsall v. Boldero* (9 East, 72), the same principle was acted upon in a case of life insurance. That case was overruled in *Dalbly v. The India and London Life Assurance Company* (15 C. B. 365), because the principle was misapplied to a life insurance, which is not a contract of indemnity; but the principle itself has never (that I know of) been questioned. When therefore the party indemnified has a right to indemnity, and has elected to enforce his claim, the chance of any benefit from an improvement in the value of what is in existence, and the risk of any loss from its deterioration, are transferred from the party indemnified to those who indemnify, and therefore if the state of things is such that steps may be taken to improve the value of what remains, or to preserve it from further deterioration, such steps from the moment of the election concern the party indemnifying, who therefore ought to be informed promptly of the election to come upon him, in order that he may if he pleases take steps for his own protection. And on general principles of law (still not confined to marine insurance) an election, once determined, is determined for ever, and such a determination is made by any act that shows it to be made. And therefore anything that indicates that the party indemnified has determined to take to himself the chance of benefit from an increased value in the part saved, and only claim for the partial loss, will determine his election so to do. I may refer for an exposition of this general principle to the judgment of the Exchequer Chamber in *Clough v. London and North Western Railway* (L. Rep. 7, Ex. 34, 35; 25 L. T. Rep. N. S. 708.) In cases of marine insurance the regular mercantile mode of letting the underwriters know that the assured mean to come upon them for a complete indemnity is by giving notice of abandonment, which is a very different thing from the abandonment or cession itself. This notice when given is conclusive that the assured, if still in a situation to determine his election, has determined to come upon the underwriters for a total loss, the consequence of which is that everything is ceded (to avoid the use of the ambiguous word "abandoned") to the underwriters. Abbott, C.J., in *Coltman v. London Assurance* (5 M. & S. 456), says: "I do not consider an abandonment as having the effect of converting a partial into a total loss." . . . The abandonment, however, excludes any presumption, which might have arisen from the silence of the assured, that they still meant to adhere to the adventure as their own." If before giving this notice the assured have already indicated by their acts, or if the circumstances are such that they indicate by their silence that they have elected to adhere to the adventure as their own, the notice of abandonment obviously comes too late. A very good example of such a case is afforded by *Mitchell v. Edie* (1 T. R. 608), as explained in *Ross v. Salvador* (3 Bing. N. C. 666). There a ship laden with sugar, and bound for London, was captured and finally taken into Charleston, where the sugar was sold and the proceeds lodged in the hands of a person resident in Charleston. From the state of political affairs at that time sugar was dear at Charleston, and as Lord Abinger conjectured, the sugar had come to a very good market and the assured was satisfied and took to the proceeds. A year afterwards the person in whose hands the money was became insolvent, and after that it was,

H. OF L.]

BANKIN AND OTHERS v. POTTER AND OTHERS.

[H. OF L.]

with obvious justice, held that it was too late to come upon the underwriters for a total loss. Thus explained, the case is a good example of the principle stated in *Stranger v. England, &c., Insurance Company* (L. Rep. 4 Q. B. 688), where it is said, "As is well pointed out in 2 Phillips' Insurance, sect. 1669, where the cargo still subsists in specie and may be recovered, the question depending on abandonment is, which party should be at the risk of the market and the solvency of agents, neither of which, independently of the direct effect of the perils insured against, concerns the insured. To allow the assured to change his election whilst the circumstances remain the same, would enable the assured to treat the property as his so long as there was a prospect of profit from the rise in the market, and as the property of the insurers, so soon as there was a certainty of loss, which would be inequitable: *qui commodum sentit sentire debet et onus*." I should apologise to your Lordships for dwelling so long on what seems to me the principle on which abandonment and the necessity of notice of abandonment, when required, depend, had it been argued at your Lordships' bar, on the authority of *Knight v. Faith* (15 Q. B. 649), that there is a technical rule of insurance law by which notice of abandonment must be given if the thing exist in specie at all, though the state of things is such that the underwriters could do nothing in consequence of the notice. I think it more convenient to postpone my remarks on that case till I answer your Lordships' last question. In the meanwhile, I proceed to say that I should be very sorry to throw any doubt on the principle expressed by Lord Abinger in the following passage in his judgment in *Boue v. Salvador* (2 Bing. N. C. 286), where, after stating the state of circumstances which give the insured a right to treat the case as one of total loss, he proceeds: "But if he elects to do this, as the thing insured, or a portion of it, still exists and is vested in him, the very principle of indemnity is that he should make a cession of all his rights to the recovery of it, and that too within a reasonable time after he receives intelligence of the accident, that the underwriter may be entitled to all the benefit of what may still be of any value, and that he may, if he pleases, take measures at his own cost for realising or increasing this value." But I think this is from the nature of things confined to cases where there are some steps which the underwriter could take, if he had notice. When they can do so, I think that the neglect to give a notice of abandonment may determine the owner's election. This is a matter that is now of much greater practical importance than it was when Lord Abinger delivered that judgment. For then the assured could not learn that his ship had got into difficulties at a distant place till long after the disaster, and the underwriters could only send out orders which would arrive later still. Under such circumstances, a notice of abandonment was often a very idle ceremony, and, in my opinion, unnecessary if the facts did amount to a total loss, inoperative if they did not. Now, when by means of the electric telegraph the underwriters' orders might promptly reach the spot where the ship was in peril, a notice of abandonment may be of great practical importance. What would be a reasonable time, and whether the neglect to give notice of abandonment does determine the election, must, I think, depend in each case on the circumstances, and principally

on what steps the underwriters might take if they had notice. If there was nothing they could do, no notice, I think, is required. This, I apprehend, is the principle of *Cambridge v. Auderton* (2 B. & C. 691), *Boue v. Salvador* (3 Bing. N. C. 286), and *Farnsworth v. Hyde* (2 Mar. Law Cas. O. S. 187, 429; 18 C. B. N. S., 835; 15 L. T. Rep. N. S. 395). For, as has often been observed, a sale by the master is not one of the underwriters' perils, and is only material as showing that there is no longer anything which can be done to save the thing already sold for whom it may concern. It conclusively determines that neither seamen nor assured can do anything, and consequently that a notice of abandonment would be but an idle form on which nothing could be done, and which therefore is unnecessary. If these which I have submitted to your Lordships are the true principles on which the law depends, it seems to me to be obvious that in this case there was a total loss of the freight in consequence of the damage by sea perils being so great that the shipowner was not bound to repair her. No doubt the shipowner might have repaired her if he pleased, and if, as in *Benson v. Chapman* (2 H. of L. Cas. 695), he had elected to repair her, and had done so, though at a ruinous expense, the freight would not have been lost. But the ship in this case never was repaired so as to make her capable of earning the freight, and the insured was under no obligation to repair her at a ruinous cost. This brings me to the second question. I cannot see how the contract between the plaintiff and the defendant, by which the latter undertakes to indemnify the former against loss on the freight, can be in any way affected by the fact that the plaintiff had made a contract with other persons by which they undertook to indemnify him against loss on the ship. If the facts are not such as to amount to a loss of freight from the perils insured against, no transaction between the plaintiff and third persons could make them amount to such a loss. If they were such as to amount to a loss of the freight, it can make no difference to the now defendant whether the plaintiff can or cannot recover for the damage to his ship from other persons. It is true that a transaction with third persons may, as evidence, prove that the plaintiff had elected not to repair the ship, as the sale of the wreck in *Cambridge v. Auderton* and in *Farnsworth v. Hyde*, did. And so if the plaintiff in the present case had given notice of abandonment at once to the underwriters on ship and recovered from them as for a total loss, it would have afforded conclusive evidence that he had elected not to repair the ship. As it was, he delayed so long that I think the fair conclusion of fact is that, as between him and the underwriters on ship, he had elected to take his chance of making a better thing of it by keeping her as a ship to himself and coming on the underwriters for a partial loss only. I do not go into the facts, as the question whether they could have recovered a total loss on the policy on ship or not is only collaterally raised in this case, but, in my opinion, they completely bring the case within the principle stated by Lord Chancellor Cottonham in *Fleming v. Smith* (1 H. of L. Cas. 530), where he says, "They were sufficiently informed of what had taken place to enable them, if they thought proper, to take upon themselves the chance of the benefit of retaining the ownership of the property, instead of taking the sum which was secured

H. OF L.]

RANKIN AND OTHERS v. POTTER AND OTHERS.

[H. OF L.]

to them by the policy effected with the underwriters on the vessel; and if they acted upon that opportunity of election, they surely cannot afterwards turn round and go against the underwriters as for a total loss." I should therefore, as at present advised, have concurred with the Court of Common Pleas in their decision in *Potter v. Campbell* (ubi sup.). But I think that this in no way affects the question between the plaintiffs and the underwriters on freight. I agree with what has been said by my brother Brett; the plaintiffs not having come upon the underwriters for ship leaves the case just as if the ship had never been insured at all.

This brings me to consider whether it was necessary for the plaintiffs to give notice of abandonment to the underwriters on freight. It was argued at your Lordships' bar that by the law of marine insurance a notice of abandonment was as imperatively necessary as a notice of dishonour is by the law merchant on bills of exchange. On this I shall submit some observations at the end of this opinion, but at present I will assume that the true principle is that notice of abandonment is only requisite when from the state of facts it may make a difference to the underwriters if the assured delays making his election whether he will adhere to the property, taking his chance of profit or loss from so doing, or come upon the underwriters for a total loss. If that be the principle, it seems to me to follow from it that inasmuch as there was nothing which the underwriters on freight could have done to alter their position in consequence of a notice of abandonment, and that it would have been an idle ceremony, no notice could ever be required, and, not being required at all, could not be too late. These are the reasons for which I answer to your Lordships' second question by saying that, in my opinion, no notice of abandonment, either of ship or freight, was necessary to enable the plaintiffs to recover for a total loss on the policy on freight.

To the third question, that, in my opinion, no notice at all being required, it never could be out of time.

To the fourth question, that, though I think that under the circumstances of this case the plaintiffs have precluded themselves from recovering for a total loss of the ship, that in no way affects the rights of the plaintiffs upon the policy on freight.

I now come to your Lordships' fifth question. From what I have already written, your Lordships will perceive that in my opinion the decision of the case really should depend on the answer to this question. I have already indicated that I think that the assured so conducted themselves as to discharge the underwriters on ship from the liability for a total loss, for the assured took to themselves the chance of benefit from retaining the ship as their own, and so made their election as to the ship. But as to the freight, I can see nothing which could have been done by the underwriters if the idle ceremony of a notice had been gone through. It was indeed suggested that the underwriters on freight might have made some arrangement with the underwriters on ship, by which they were to repair the ship, send her on, and, in the name of the owners, tender her to De Mattos. But in all cases, and especially in cases of insurance, we look to what is practically possible, and not to remote theoretical

imaginings. If it could be shown that the delay in this case, which was certainly considerable, had in any way altered the position of the underwriters, if there was anything which they could have done, if the claim had been made on them at the time when the disaster happened at New Zealand, or in the interval, which they cannot now do, or if any prejudice had been sustained by them in consequence of the delay, the case would be different. I should then have to consider whether the prejudice sustained was sufficient to give rise to a conclusion. But, as the facts are, there is nothing of the sort. I therefore answer your Lordships' fifth question by saying that, in my opinion, there was no such conduct as to discharge the underwriters from their liability upon the policy on freight.

The answers to those five questions would answer the sixth and last, were it not that I have reserved to this time the discussion of the proposition argued at your Lordships' bar, that there is a technical necessity for a notice of abandonment in a case of marine insurance, whether any use can be made of it or not, and whether the failure to give it works any prejudice or not. It was said it was required by the law merchant as to insurance, just as notice of dishonour is required by the law merchant on a bill of exchange. Such is the law in some foreign countries, but I will submit to your Lordships my reasons for thinking that it is not and never was the law of England. Emerigon in the first section of the 17th chapter of his celebrated *Treatise on Insurance* (vol. 2, p. 207, of the edition by Boulay Paty, 1827), states that by the general law merchant, or, as he calls it, "*le Droit des Nations*," there was no need for any notice of abandonment, the contract being one of indemnity only. I do not pretend to have made any research myself as to what was the ancient law merchant, but from Emerigon's high character for learning and research I assume that he is correct. He then proceeds to say that the law merchant did not prohibit persons from making a stipulation that under certain stipulated circumstances the subject matter of the assurance might be abandoned to the underwriters, who then should pay the whole sum assured, without having any option merely to indemnify the assured. And he observes that doubtless the usual clauses to that effect gave rise to established rules on the subject. He then cites from Casaregis three rules which Emerigon seems to consider as truly stating the law merchant on the subject. They are as follows:—1. That the abandonment is a form which is sufficiently complied with by the simple fact that the assured demands from the assurers payment of the whole sum insured. 2. That the assured may, without having recourse to abandonment, recover the salvage, and claim payment from the assurers of an average loss only. 3. That in case of total loss abandonment is an idle form, "*le délaquement est une formalité inutile*." The editor of Emerigon observes in a note that the first and third of those rules are not the law of France at this day. And Emerigon points out that all this was in France (and, in consequence, in those countries which have adopted the French law) altered by the positive enactments contained in the celebrated *Ordonnance de la Marine* of 1681, by the 46th article of which it was enacted that "No abandonment shall be made except in case of capture, 'shipwreck, *bris*'" (a

H. OF L.]

BANKIN AND OTHERS v. POTTER AND OTHERS.

[H. OF L.]

word for which I know of no English equivalent, "breakage" or "fracture" not being used in this technical sense), "stranding, arrest of princes, or total loss of the things assured, and that all other losses shall be deemed average losses only." On this Emerigon treats at great length in the following sections of the 17th chapter. There seems to have been at first much controversy and dispute as to the true effect of the enactment, but it seems to have been finally settled in France that the assured could never recover for a total loss without abandonment, even though the thing assured was totally destroyed. "Such," says Emerigon (c. 17, s. 6, vol. 2, p. 252), "is the enactment of our Ordinance, to which we must submit." And it was further established that when any of the events specified in the 46th article had happened, the assured might by giving notice of abandonment recover for a total loss, though the thing insured was quite safe and uninjured. This Emerigon justifies, or at least accounts for, by saying that the Ordinance created a presumption, which was *juris et de jure*, that where any of the first five cases had happened the thing was lost. This was carried so far that where a ship was stranded and got off without injury either to herself or cargo, the owners of the cargo were permitted to give notice of abandonment and recover as for a total loss. This highly artificial conclusion was corrected by a supplemental ordinance of 1779, but till then it remained the French law: (see Emerigon, c. 17, s. 2, vol. 2, p. 212.) Now the enactments of the French law, contained in the ordinance of the Marine, can have no force in England, except in so far as they have been adopted into our law. As far as regards the law that by giving notice of abandonment the assured can recover for a total loss, because by a presumption *juris et de jure* the property is to be taken as lost in law, though it is safe in fact, it certainly is not the law of England, and never was. In *Hamilton v. Mendes* (2 Bur. 1188) Lord Mansfield strongly laid down the doctrine that a policy of marine insurance is a contract of indemnity, and that "if the thing in truth was safe, no artificial reasoning shall be allowed to set up a 'total loss.'" No one would for a moment now venture to contend that a notice of abandonment could in England entitle an assured to recover as for a total loss on a policy on goods if the ship was captured, though set free, or wrecked but the cargo saved uninjured, or in a case of simple stranding. So far the law of the Ordinance is clearly not adopted in England. Even in the case where the loss is at the time of the notice of abandonment total, though capable of being reduced by a change of circumstances to a partial loss (*Dean v. Hornby*, 3 E. & B. 180), the assured (unless in the very uncommon case of the notice being accepted) cannot recover as for a total loss if that change of circumstances does occur before the trial. Nor can it be for a moment contended that a notice of abandonment is essential to the assured's right to recover for a total loss where the loss is in fact total. But though in no one of these cases has the French enactment been adopted in the English law, it is argued that it has been so adopted as, in the case of what is somewhat unhappily called a constructive total loss, to render a notice of abandonment a necessary technical preliminary to an action for the total loss, though it is not required for any useful purpose, though no prejudice has been

sustained for want of it, though the loss at the time of the trial still continues total, and though, according to Casaregis, as cited and approved of by Emerigon, the law merchant looked on the notice of abandonment in case of total loss as being *une formalité inutile*. It is unnecessary to refer to any English decisions prior to the great case of *Ross v. Salvador*. All the authorities bearing on the point were, I believe, cited and considered in the elaborate judgments delivered in that case; and the decision of the Court of Exchequer Chamber was that no notice of abandonment was necessary, because, as stated by Lord Abinger (3 Bing. N. C. 281), "Neither the assured nor the underwriters could at the time when the intelligence arrived exercise any control over the goods, or by any interference alter the consequences." It may be, however, convenient to refer your Lordships to the portion of Mr. Phillips' Treatise on Insurance in which he treats on this subject. I know of no text writer who treats the law of insurance with more learning, and certainly of none who treats it with as much sound sense and appreciation of the bearing of the doctrine laid down on practical business. It is, however, to be borne in mind that he writes in America, and that, as he clearly states in sect. 1536 (vol. 2, ed. 3, p. 271), "It is a general rule in the United States that if the ship or goods insured are damaged to more than half of the value by any peril insured against, or more than half the freight is lost, the assured may abandon and recover for a total loss." He adds in sect. 1536, "This rule of abandonment on account of loss over 50 per cent. of the value of the subject makes the most material difference between the American and English jurisprudence, relative to total loss and abandonment, and is to be kept in mind in examining the decisions of the tribunals of the two countries. This rule, and that rule in the United States whereby the validity of the abandonment is tested by the circumstances existing at the time of making it, instead of the time of bringing the suit, as in England, give a wider range to constructive total loss and abandonment in the United States." Bearing this distinction in mind, anyone who wishes to understand this subject will derive great assistance from perusing the whole of Mr. Phillips' 17th chapter on total loss and abandonment. I will only refer your Lordships to sect. 1491, where he says, "An abandonment being a transfer, it can be requisite only where there is some assignable transferable subject on which it can operate." "When nothing remains to be assigned or transferred, an abandonment is useless and unnecessary." And to sect. 1494, where he observes, "But the better rule in such case is that if the insured neglect to abandon, he shall recover only according to the state of things at the trial; since, as we shall see, under a declaration for a total loss he may recover for a partial loss, and the underwriter ought to have the advantage of whatever may occur to make the loss partial so long as the assured delays to elect a total loss. If he has judgment for a total loss, this is equivalent to an abandonment and gives the underwriter a right to salvage." And to sect. 1497, where he says, "The distinction mentioned above as to recovering a total loss without abandonment is to be observed, viz., that the assured is charged with the proceeds in the

H. OF L.]

RANKIN AND OTHERS v. POTTER AND OTHERS.

[H. OF L.]

adjustment of the loss as in a salvage loss, though the same may not have actually come to his hands. This circumstance being borne in mind will reconcile most of the decisions on this subject which otherwise would appear to be directly contradictory according to the language commonly used by the courts, which must, however, be construed in reference to one or the other description of case under consideration." Your Lordships will appreciate the shrewdness of the latter part of this remark if you examine the various dicta cited in *Rous v. Salvador* and *Knight v. Faith*. To return to the English authorities, the decision of the Court of Exchequer Chamber in *Rous v. Salvador* was, as far as I can learn, received with general approbation at the time. There was, however, one exception. Lord Campbell never could be brought to think it right. In the case of *Fleming v. Smith* (1 H. L. Ca. 513), the counsel for the appellants (the Attorney-General Jervis, afterwards Chief Justice, and Sir F. Thesiger, now Lord Chelmsford) argued, as I think logically, from the decision in *Rous v. Salvador*, that notice of abandonment could not be in any case required except where there is something which could be done by the underwriters in consequence; and then the failure to give notice of abandonment might be material as determining the election which the assured had, whether to treat the loss as total or not. This, as I have already stated to your Lordships, is what I consider to be the law. Lord Campbell was of a different opinion, and in his opinion says, "The law therefore requires that notice shall be given in order to convert a constructive into a total loss;" but though that was his opinion, it was not the judgment of the House of Lords. Lord Cottenham (and Lord Brougham concurred in his opinion), carefully puts the decision exclusively on the ground that the assured had in fact elected to treat the loss as a partial loss only. This studied silence on his part may prevent us from saying that he differed from Lord Campbell; but he certainly did not express any concurrence with him. After this in the Queen's Bench, when Lord Campbell was Chief Justice, there arose the case of *Knight v. Faith* (15 Q. B. 649). The manner in which that judgment came to be delivered was very peculiar. There was a very brief case stated for the opinion of the Court of Queen's Bench. On the statements in it the court came to the conclusion, as stated in the judgment, that "slight repairs might have been sufficient again to fit her, the ship, for navigation," and the court say that, though she was sold, "we are of opinion that as against the insurers the sale is not shown to be lawful." On such facts the assured could never have recovered for a total loss, even if he had delivered all possible notices of abandonment from the first to the last. Yet the court forced the counsel to amend the case by inserting a statement that no notice of abandonment was given, and pronounced an elaborate judgment on a point which it was wholly unnecessary to notice, except for the purpose of recording dissent from the decision of the Exchequer Chamber in *Rous v. Salvador*. It should in candour, however, be added that the other judges of the court joined Lord Campbell in this. Still I think that the fact that a judgment was not necessary for the decision of the case before the court always diminishes its authority. And I think that

on perusing the judgment in *Knight v. Faith* it will be found that no argument is produced which had not been used in *Rous v. Salvador*, and that no new authority is produced except Lord Campbell's own opinions in *Fleming v. Smith*, and a passage from the judgment of Cottenham, L. C., in *Stewart v. Greenock Marine Insurance Company* (2 Ho. L. Ca. 159). The question in that latter case was what passed to the underwriters on ship, who were liable for a total loss of ship. They raised the very question alluded to in the section 1497 of Phillips already cited. The ship having been destroyed just before she entered the docks, kept together as a ship so that she entered the docks, delivered her cargo, and so earned freight, and the underwriters on ship said they were entitled as salvage to the freight thus earned after the disaster. This House decided that they were entitled to this benefit, on the precise principle long before laid down in *Randal v. Cochran*, and the other cases I referred to in the beginning of this opinion, that the plaintiffs "claiming as upon a total loss must give up to the underwriters all the remains of the property recovered, together with all the benefit or advantage belonging or incident to it." But I cannot see how, or in what way, the assertion of the doctrine that recovering for a total loss operates as a cession of everything, can be said to amount to the assertion of that other doctrine that the handing in a notice of abandonment is a condition precedent to the right to claim for a total loss. And as it seems to me, every dictum cited in *Knight v. Faith* is capable of being reconciled with the judgment of the Exchequer Chamber in *Rous v. Salvador*, if it is only borne in mind that the abandonment or cession consequent on recovering for a total loss is one thing; the notice of abandonment supposed to be a condition precedent to claiming for a total loss is another.

I have dwelt on this point at perhaps unnecessary length, for all that it is necessary to decide in this case is that where there is nothing to abandon no notice is requisite. I have therefore to conclude by saying, in answer to your Lordships' last question, that in my opinion judgment ought to be for the plaintiffs in the case, the respondents in your Lordships' House.

Bramwell, B.—My Lords,—In this case I think it convenient to consider (though it has been already done in the judgments delivered), the precise effect of the contract the plaintiffs seek to enforce. The owners of the ship, *Sir William Eyre*, had entered into a charter-party with *De Mattos*, whereby the ship, then on a voyage to New Zealand, was to proceed to Calcutta and there load a cargo for Liverpool or London, to be provided by him. The contract in question is a policy of insurance by the owners (now represented by the plaintiffs), whereby the underwriters (the defendant being one), insured against certain perils of the seas, which might happen on the voyage then in progress to New Zealand, preventing the owners from earning or being entitled to earn the charter freight. And the policy is to be taken to be a valued policy, and 4000*l.* the value. The insurance did not extend to the voyage from New Zealand to Calcutta, the stay there, nor the voyage home. In effect, therefore, the insurance was against perils on the voyage to New Zealand which should prevent the ship getting to Calcutta in such a state as to give the owners a right of action

H. of L.]

RANKIN AND OTHERS v. POTTER AND OTHERS.

[H. of L.]

against De Mattos if he did not load the cargo, and in such a state as should enable the vessel to bring the cargo home loaded, and earn the freight. For if Du Mattos had loaded the cargo, and if owing to perils covered by the policy (perhaps undiscovered at Calcutta), the vessel had failed to bring the chartered cargo home, I apprehend the underwriters would have been liable.

It seems to me, therefore, with great respect, that on this policy there might have been a partial or total loss of the ship. I am not speaking of what is probable, but it is possible, I suppose, that the ship might have been so injured on the outward voyage as to be unseaworthy for a whole cargo; it is possible that the charterer, though having a right to refuse to load an unseaworthy ship or a partial cargo, might have elected to do so. In such case there might be a partial loss. And it is, I suppose, possible that a peril covered by the policy might have injured the ship in such a way that it became necessary to jettison a part of the cargo on the home voyage, and yet the rest might be carried home in the ship and freight earned. This, also, I conceive, would be a partial loss, and without a total loss of the ship. So also, if by perils insured against the ship had been disabled from reaching Calcutta by an agreed time in the charter, or not in time to make the voyage the same as the charter provided for. I do not know that it is necessary to enter into those speculations, but to my mind they help to clear the matter.

It seems, to me, then, that the insurance was that perils of the seas on the voyage to New Zealand should not destroy or prevent the right of action against Du Mattos to accrue on the ship's arrival at Calcutta, and his refusal to load, and should not prevent the earning of the freight, if he performed his contract to load. Whether such an insurance should be called an insurance on freight is only a question of words. But it is very important, in most cases, to use the right words. Certainly this insurance is practically more an insurance on ship in respect of freight than on the freight. For if the ship sustained no damage on the voyage to New Zealand from perils insured against, there could be no claim on the underwriters. This, perhaps, is true of all insurances on chartered freight till the cargo is loaded. For, till then, nothing that can happen to the cargo, or its carriage, can be in question. If Willes, J.'s expression is accurate in this respect, this is wholly an insurance on the ship. He says, "The policy was in its nature therefore against total loss of freight by total loss of ship." Of course I do not mean that all the incidents of an ordinary insurance on ship attach, nor that none of those on freight do.

It seems to me that the before statement of the case answers the first difficulty put on behalf of the defendant, viz. that Du Mattos' insolvency or the destruction of the ship by the cyclone was the cause of the plaintiffs' loss of the freight. This is not so. For the perils on the outward voyage had put the ship into such a condition that the plaintiffs had not the right of action against De Mattos for not loading. They thought they had when the vessel arrived at Calcutta, and so probably did De Mattos' agents. But they thought so because they did not know the true state of the facts. And they sued De Mattos who would have had an answer that the ship was not

seaworthy. Nor could they have said in reply that they were ready to make her so within a reasonable time. For her state was such that on its being known to them they would not have been ready to do so. One of the losses, therefore, insured against, viz., inability to enforce the charter against De Mattos, accrued by reason of perils insured against. The assured would indeed probably, as the charter freight was higher than the market rate, have lost the benefit of the charter by reason of De Mattos' refusal or inability to load, even though they had not lost it through perils of the sea. But the loss would have been different. They might have recovered damages from him, or proved against his estate. No doubt they would not in this way have got 4000*l.*, but they would have got something. I agree with the illustration of Willes, J. of the house left out of repair and subsequently burned down, and with that of Sir George Honyman, of an injury to a mare's leg which a subsequent injury made it necessary to cut off. I think, therefore, there was a loss of the chartered freight by perils insured against, loss which accrued, and gave a vested cause of action when the ship was damaged by taking the ground at New Zealand.

Another difficulty made for the defendants was, that as the ship remained in specie, and could have been repaired so as to carry the cargo and earn the freight, and the assured did not think fit to repair, but abandoned the ship to the underwriters on ship, therefore the freight was lost not by perils of the sea, but by the voluntary act of the plaintiffs. I think the answer to this is that it was not their voluntary act, but one to which they were practically compelled by the extent of the damage. If this argument is good, it must apply to every case of insurance on freight, where the ship remains in specie. But this is not pretended. I think, therefore, there was a loss of the thing, or one of the things, insured by perils insured against. But the great question is, was there a total loss?

I think this question ought to be and is unaffected by there having been an insurance on ship. For suppose there had been none, then the ship, or her materials, would have belonged to the assured, who would have broken her up or sold her to be broken up. In that case they would own the salvage of the ship, instead of the underwriters doing so. And indeed in this case the Court of Common Pleas held that the abandonment was ineffectual. There is no estoppel on that matter between the present parties, and this question there decided would have to be reconsidered in this case. But it seems to me immaterial whether the ship was insured or not, whether validly abandoned or not. In any case, if she was so damaged by the perils insured against that a prudent owner would not repair her, her owners were rendered practically unable to enforce the charter-party against De Mattos, and so there would be a total loss of the chartered freight, actual or constructive. Now there was a damage or loss to such an extent. But the ship though so injured remained a ship, and could have been repaired so as to earn the freight, though at a loss. The loss of the ship, therefore, though total, was what is called constructive, an unfortunate expression, but one for which I know no substitute. It was actually a total loss, the materials of the ship remaining in the form of a ship. In such a

H. OF L.]

RANKIN AND OTHERS v. POTTER AND OTHERS.

[H. OF L.]

case if the materials cannot be kept together as a ship at an expense less than their value as a ship when so kept, plus their value as materials not so kept together, the vessel is totally lost, or rather the loss of the vessel is total. One might put a case where the loss was greater where the vessel held together, than where it fell to pieces; as where a vessel went on shore and broke to pieces without damage to the materials, the ship breaker's labour would be less than if the materials remained together in the form of a ship. These are very trite and obvious remarks, but I hope as this case has been discussed as one almost depending on first principles, that they may be forgiven, as it is very desirable in such a discussion to keep elementary matters clearly in view. Whether this should be called an actual or constructive total loss seems to me very doubtful. I incline to think it was an actual total loss of the freight by a constructive total loss of the ship. The damage or loss to a ship may be absolutely or necessarily total, as where it is burned or sunk to a hopeless depth. It may be total where it remains in specie afloat or ashore. In that case it is so, or not, at the option of the assured. He may, if he thinks fit, treat the loss as partial, and repair her. It is obvious that except in cases of valued policies the question is comparatively unimportant. In the case of a valued policy the question may be much more important. But in both sorts of policies where the ship remains in specie afloat or ashore, though the loss is really total, though she is practically lost as a ship, and what remains is the materials of a ship fastened together in the form of a ship, the option is with the assured to keep his ship or his salvage, and claim for a partial loss, or to claim for a total loss, giving up his interest in the ship or its materials to the underwriters. This is abandonment. It always supposes there is something to abandon, something to cede. If the ship is burned, or sunk to a hopeless depth, there is nothing to abandon. So if she is dashed to pieces on the shore there is no ship to abandon; by the destruction of the ship the loss of the ship is total, and the pieces as a consequence belong to the underwriter. What would be the law in the supposable case of the ship being rebuilt of the old materials, to whom she would belong, and what consequences would follow as to other matters, it is not necessary to consider. It is enough to say that where the thing exists, as it is called, in specie, in such condition as to be capable of utilisation as the thing insured, the assured to claim for a total loss must abandon; where it does not so exist he need not. Surely this is equally true of goods and of every other subject of insurance. Now here there was absolutely nothing to abandon. To hold that it was necessary to abandon, or to give notice of abandonment, would be to hold, not that it was necessary to do, but to say, something. For let what might be said, nothing would thereby be done, no possible effect could follow. I cannot find the notice of abandonment in the case, and I can hardly think what words could be used. If they were that all right to the freight was abandoned they were idle words, for there was no such right, no right at all. It is suggested that the underwriters might have chartered a ship and proposed to De Mattos to let them bring home the cargo. But the power to do this, and the possibility of their doing it, would not be anything,

nor the consequence of anything abandoned to them. It would not be a right at all, much less a right acquired by abandonment. It might equally be done by them though there was no abandonment. But this is the utmost that can be suggested; as there was nothing to be done, as nothing could be abandoned, nothing, no right, I think it was not and could not be necessary for the assured to say they abandoned, nor consequently to give any notice thereof. I beg to refer to the judgments of Cockburn, C.J. and Lush, J. on this point, to which I cannot profitably add.

But it is argued that though no notice of abandonment may have been necessary, or possible, yet that the assured ought to have given notice that they elected to treat the loss as total. That is, that they elected not to repair the ship, and so qualify themselves to enforce the charter against De Mattos. I may observe in passing that I could not find as a fact, acting as jurymen, that they could have repaired the ship in time for it to be ready for the adventure for which De Mattos agreed to find the cargo, and indeed, as the case stands, I should think he might have refused on the ground that the ship was a year overdue. But on the question of giving notice of their election, if they were bound to do so, it must be by virtue of some general rule of law, or some rule of insurance law, some implied part of the contract of insurance. I know of no such rule, either of the general or particular law. I know of no rule which compels a person, having an option, to give notice which way he exercises it, where the position of the other party would not be affected by the giving or withholding of notice, when his conduct would not be regulated thereby. On this point I refer to the judgment of Lush, J.

The opinions in favour of the defendants seem to me to be influenced by a fallacy, which may be thus expressed. The plaintiffs, it is argued, are prosecuting the voyage or adventure till they give notice of abandonment of the ship; therefore they are prosecuting what would give them a right to the freight; therefore there could not be a total loss of freight at that time; and that time was long after the damage, and therefore the total loss was not then actual. In a sense this is true. But as soon as the ship is abandoned there is a total loss of freight, or rather that which was doubtful when the damage happened is by the abandonment of the ship ascertained to be a total loss of the freight. Suppose instead of abandonment, and instead of destruction by the cyclone, the assured had themselves broken up the ship at Calcutta, would not the loss of freight then have been total? No doubt the cause of action would have accrued when the damage happened at New Zealand, and from that date the statute of limitations would run; but the character of the loss would be doubtful till the owners of the ship elected to treat the loss of ship as total. Suppose this had been a case of a sub-charter, viz., that the owner had chartered to the assured, who had sub-chartered to De Mattos. Whether in such case there would be a total loss of the sub-chartered freight would depend on whether the shipowner elected to treat the loss of the ship as total. So here, though the owners and the persons with whom De Mattos made his charter are the same, yet it is on their election as owners to treat the ship as totally lost or not that

[H. of L.]

RANKIN AND OTHERS v. POTTER AND OTHERS.

[H. of L.]

their total loss of freight as letters of the ship to charter depends. They fill two characters, owners and parties to the charter; on their election in the former character depends their loss in the latter. With great respect, this seems to me the answer to the argument in the judgment of the Common Pleas. I think their judgment for the defendants arises from not advertent to this consideration. No doubt had the owner repaired the ship the loss of freight would not have been total, supposing the repairs in time for the voyage for which De Mattos undertook to find a cargo, which, if it were in controversy, I could not find in the plaintiff's favour. True it is also that for a long time the plaintiffs thought they could and would repair, but when they found out they practically could not, and so would not, the loss of the freight, till then in doubt, became certain and fixed. On these grounds I think no notice of abandoning of the freight was necessary.

On the question of whether if notice of abandonment was necessary it was given in time, I feel this difficulty. Thinking none necessary, I am yet to say when it ought to have been given—whether the assured used due diligence in the performance of a duty which did not exist? I come to the conclusion that if it was necessary to give it, it was not given in time. I agree with the reasoning of Willes, J., on this. It is a rule that where a man is put on informing himself, he is in the same position as though he had notice. I think that what had happened was enough to make the assured bound to inform themselves as to the extent of the damage. I think their delay in doing so was unreasonable, bearing in mind that the stay in New Zealand was attributable, in part at least, to their own misconduct in breaking the law.

Further, I incline to think the question raised by Willes, J., should be answered unfavourably to the assured. I think that (as a matter of fact, not as a matter of law) the vessel should have been taken to Sydney to be examined: (See *Gernon v. Royal Exchange Assurance Company*, 6 Taunt. 383.) On this part of the case I feel great doubt, arising from the complication of the facts and the conflict of opinions. Dealing generally with the case, I cannot but think that much of the difficulty has arisen from the unusual nature of the policy and the peculiar circumstances of the loss, the delay, the insolvency of the charterer, and the subsequent destruction by the cyclone. For suppose the ship safe and arrived at Calcutta, the charterer ready to load, a policy on the freight extending to perils at and from Calcutta, and the day before the loading began the ship driven ashore by a storm, and so damaged as certainly and obviously not worth repair, in short, a constructive total loss, would abandonment then have been necessary, and of what? There would have been, could have been, nothing to abandon. But that case does not in substance differ from the present. Suppose that instead of the vessel proceeding to Calcutta her state had been known in New Zealand, and that she was not worth repair, and suppose there had been no insurance on ship, but her owners had kept her there existing in form as a ship, but used as a coal hulk only, would there not have been a total loss of this freight, and would notice of abandonment have been necessary? It seems to me clearly not.

I answer your Lordships' questions as follows: To the first, yes; the second, no; the third, no; the fourth, no; the fifth, no; the sixth, for the respondents.

Martin, B.—My Lords,—I assure your Lordships if I had merely consulted my own feeling I would rather not have delivered my opinion upon this case; but having read very carefully the judgments delivered in the Court of Common Pleas and in the Exchequer Chamber, and having arrived at the conclusion that the judgment of the Court of Common Pleas and that of my brother Cleasby in the Exchequer Chamber are right, I think it my duty to state the reasons which have led me to that conclusion, especially as your Lordships will find yourselves obliged in determining this case to decide what is the effect of a constructive total loss of ship upon an insurance on freight. Under these circumstances your Lordships will excuse me for bringing before you my view, and the more so as it is not exactly that either of my brother Cleasby or of the Court of Common Pleas.

This is an action upon a policy of insurance on freight, and the main question arises upon a novel state of facts. Nothing similar, so far as I know, has been the subject of decision in a court of law. A ship called the *Sir William Eyre* had sailed from the Clyde on a voyage to New Zealand, to deliver cargo and passengers at two places, viz., Southland and Otago. After she had sailed a charter-party was executed on behalf of the plaintiffs, who were mortgagees in possession, and a Mr. De Mattos, whereby it was agreed that this ship after having discharged her cargo at New Zealand should proceed to Calcutta, and there load from the agents of De Mattos a full cargo of merchandise for England for freight, 4*l.* per ton. It was also provided that the ship should be consigned to De Mattos' agents at Calcutta. On the 16th Feb. 1863, a few days after the date of the charter-party, the policy now sued upon was effected. It is in the common printed form. The risk was "lost or not lost, at and from the Clyde to Southland, whilst there, and thence to Otago, and for thirty days in port there after arrival." The subject insured was "4000*l.* homeward chartered freight." The freight was to be earned on the voyage from Calcutta to England. The perils insured against were to be incurred on the voyage from the Clyde to Otago, and thirty days after arrival. The plaintiffs to succeed must therefore establish that the freight from Calcutta to England was lost by a peril which occurred on or before the 5th Aug. 1863, when the last of the thirty days expired, and their contention is that the facts stated in the special case do so. The material ones are these: The ship arrived at Southland on the 23rd April 1863, and remained there until the 1st July. Whilst there she sustained very considerable damage. Upon the 4th July she arrived at Otago, and there discharged the remainder of her cargo. Whilst there she was annoyed, but there was no dry dock, and the extent of damage could not be ascertained. And I think it must be taken that the master acted *bona fide*, and believed that with some temporary repairs the ship would be capable of proceeding in ballast to Calcutta, and there made fit to carry the chartered cargo to England and earn the freight. The temporary repairs were not commenced until Feb.

H. OF L.]

RANKIN AND OTHERS v. POTTER AND OTHERS.

[H. OF L.]

1864, and the ship remained at Otago (Port Chalmers) until the 14th April. The cause of the delay is thus stated in the 14th paragraph of the case: "The *Sir William Eyre* remained at Port Chalmers until 14th April 1864, being prevented solely by want of funds from making the necessary preparation to proceed to Calcutta; the master had not sufficient funds to defray the ship's charges and disbursements, and the liabilities which she had incurred in New Zealand, and not being able to raise such funds in New Zealand, nor Messrs. Dalgetty, to whom the ship was consigned at Otago, being willing to advance him the money he required for the purposes aforesaid, he was obliged to wait until he had obtained a sufficient remittance from the plaintiffs." Whilst the ship was there the master, in order that she might not be wholly unproductive, used her to store coal, and earned upwards of 700*l.* for storage rent. On the 14th April she sailed for Calcutta, and arrived there on the 7th June. The master immediately went to the agents of De Mattos, and applied to them to carry out the charter. A copy of it had several months before been forwarded to them, but De Mattos had become insolvent in the December previous, and they had provided no cargo, and absolutely refused to provide any, or to have anything to do with the ship. The ship was afterwards put into a dry dock and surveyed. On the 2nd Aug., upon the receipt in the United Kingdom of the survey, dated 8th June, the plaintiffs gave notice of abandonment of the ship to the underwriters on ship, and of freight to the defendants, the underwriters on the freight. Neither were accepted. The ship in her damaged state was of the value of 3000*l.* On 8th Oct. the ship was stranded in a cyclone and became a wreck. Paragraph 24 of the case is as follows:—"It is admitted that the sea damage which the ship sustained at New Zealand during the time covered by the policy was such as would have justified an abandonment, and claim for a constructive total loss." There are some other statements in the case, but the above are the material ones.

Upon these facts it was contended, first, that there was a loss of the freight insured by perils of the sea at New Zealand, by reason of the damage sustained at Southland before the expiration of the thirty days. This contention I think cannot be sustained. The loss of the ship no doubt causes a loss of freight, but there are two kinds of losses of ship, actual and constructive, and so long as a ship exists in specie, and retains the character of a ship, and is dealt with as such, and is capable of being repaired, there is no actual loss; there may be the elements of an incchoate constructive total loss, but to make such a loss of ship there must be an abandonment: *Knights v. Faith* (*ubi sup.*). The only case referred to in the judgment of the Exchequer Chamber upon this point was *Roux v. Salvador* (*ubi sup.*). But it seems to me to have no bearing upon it. It was an insurance on hides from Valparaiso to Bordeaux. The ship sprung a leak, and put into Rio; the hides were found there to be in an incipient state of putrefaction, and it was certain that if they had been sent on to Bordeaux they would have lost the character of hides and become a mass of putrefaction before their arrival. The master of the ship sold them at Rio, and it was held to be not an average but a total loss, with

benefit of salvage. I do not see how this case bears upon the present. The ship after the expiration of the thirty days existed in specie, was treated and dealt with as a ship, performed a two months' voyage from New Zealand to Calcutta without apparently exhibiting any symptom of weakness or damage, and was tendered by the master to De Mattos' agents there as a ship capable of being repaired and earning the insured freight, and was of the value of 3000*l.* Under such circumstances I think there could not be a loss of freight by perils of the sea until the plaintiffs had elected not to repair the ship, and not prosecute the voyage from Calcutta.

Secondly, it was contended that there was a constructive total loss of the ship by the abandonment to the underwriters of the ship on the 2nd August. The Court of Common Pleas, in *Potter v. Campbell* (*ubi sup.*), and which was an action upon a policy on the ship, adjudged that the abandonment was not in time, and that there was not a constructive total loss of ship. I think this judgment right, and I understand all my learned brethren are of the same opinion. I also agree with them that the constructive total loss of ship and the validity of the abandonment is not the test of the defendant's liability, and that the question is the same as if there had been no insurance on the ship at all. The main and substantial question is, was the freight from Calcutta lost to the plaintiffs by perils of the sea? In my opinion this is to be determined by the state of facts existing at the time the plaintiffs elected not to repair and prosecute the voyage from Calcutta to England, and is in a great measure, if not entirely, a question of fact. When the policy was effected the subject insured was freight expected to be earned, and if the ship had been sunk or wrecked before the expiration of the thirty days (the 5th Aug. 1863), the defendants would have been liable, for the expected freight would have been lost proximately, indeed directly, by a peril of the sea. But the ship arrived at Calcutta, and assuming the liability of the defendants to be then continuing, it seems to me that the ordinary rule as to insurance on freight applies, viz., there must have been cargo at Calcutta in order to earn it; if there were no cargo, it might be that the plaintiffs might have had a cause of action against De Mattos for not providing it; but unless there were cargo the freight insured was lost to the plaintiffs, not by the peril of the sea, but by default of De Mattos. The ship arrived at Calcutta on the 7th June, and was immediately tendered to De Mattos' agent, under the provision in the charter-party; but De Mattos had become insolvent in December previous, and the agent declared that he had no cargo for the ship, and would provide none, and did provide none. Therefore before the extent of damage was ascertained, and the election not to repair made, the earning of the freight had become hopeless, indeed impossible, and was in reality and truth lost to the plaintiffs by a cause wholly beside, and independent of, the perils of the sea. It seems to me a crucial test that if the ship had sustained no damage, and had arrived at Calcutta perfectly sound and seaworthy, the freight would have been equally lost to the plaintiffs. In my opinion the utmost that can be said is, that if De Mattos had been willing to provide the cargo, and had had it to provide, there would have been a loss of the freight by reason of the damage to the ship at New Zealand. But this hypothetical loss

H. OF L.]

RANKIN AND OTHERS v. POTTER AND OTHERS.

[H. OF L.]

is not a loss by perils of the sea for which underwriters are liable. It is a well-established and settled rule that the underwriter is liable for no loss which is not proximately caused by the perils insured against. The maxim, "*Causa proxima non remota spectatur*," is a fundamental principle of insurance law. The rule laid down by Lord Ellenborough in *Forbes v. Aspinall* (13 East. 324) is, "that it is incumbent upon the assured, in order to recover on a policy on freight, to prove that unless the perils insured against had intervened the freight would have been earned." The facts stated in the special case disprove this, indeed prove the contrary. It has hitherto been assumed that De Mattos was bound to supply a cargo at Calcutta; but it is quite clear that he was not, and that he was discharged from this obligation by the delay at New Zealand. In any action brought against him it would have been a material and traversable averment, that the ship had sailed and proceeded from New Zealand to Calcutta in a reasonable time, and this the delay at New Zealand would have disproved. De Mattos was in no way responsible for or concerned with this delay, and its existence would have been an answer to the action against him. In my opinion, therefore, the freight was not lost by perils of the sea; the proximate and direct cause of its loss was the non-existence of cargo, and to bring the perils of the sea to bear upon it, two things must have existed which do not: one that De Mattos was willing to provide cargo, although he was under no legal obligation to do so; the other, that he had had it to provide. For these reasons I think the underwriters are not liable.

But a much more important question remains behind, viz., the application of the principle of constructive total loss of ship to insurance on freight. No case has been cited, and I believe none exists, in which this has hitherto been done. The doctrine as regards ship was conclusively established by this House in 1847, in the case *Irving v. Manning* (1 H. of L. Cas. 287). But it must be admitted by its warmest admirers, that its application coupled with valued policies has in many instances enabled shipowners to obtain, and compelled underwriters to pay, double the value of ships which the owners were desirous to get rid of. For the purpose of this question, it may be assumed that De Mattos had provided a cargo, and was ready and willing to load it. There are several definitions of constructive total loss, but that given by Tindal, J. in *Roux v. Salvador* is generally adopted, "that where the damage to the ship is so great from the perils insured against, that the owner cannot put her in a state of repair necessary for pursuing the voyage insured, except at an expense greater than the value of the ship (when repaired), he is not bound to incur the expense, but is at liberty to abandon and treat the loss as a total loss, and recover the whole amount." A constructive total loss of ship can therefore only be upon condition that the assured abandon the ship. Abandonment is of the essence of it, it is a different thing altogether from total loss with benefit of salvage, of which *Roux v. Salvador* is an instance. The word "abandoned" is one in ordinary and common use, and in its natural sense well understood; but there is not a word in the English language used in a more highly artificial and technical sense than the word "abandon" in reference to constructive

total loss; it is defined to be a cession or transfer of the ship from the owner to the underwriter, and of all his property and interest in it, with all the claims that may arise from its ownership, and all the profits that may arise from it, including the freight then being earned. Its operation is as effectually to transfer the property of the ship to the underwriter as a sale for valuable consideration, so that of necessity it vests in the underwriter a chattel of more or less value, as the case may be. In the numerous discussions which preceded the final establishment of the doctrine of constructive total loss, nothing was more strenuously urged in favour of it than that by abandonment the underwriter became the absolute owner of the ship, a thing of value, capable of being repaired and earning freight, if the abandonment thought fit. A constructive total loss is grounded upon a calculation. In the present case the calculation would be: present value of the ship 3000*l.*, expense of repairs 7500*l.*, total 10,500; against value of ship when repaired 5264*l.*, freight, which if repaired she would have earned, say 3500*l.*, total 8764*l.* The valued freight was 4000*l.* It would, therefore, be for the pecuniary interest of an uninsured owner of ship not to repair, and if insured to abandon the ship and claim for a total loss; but against this the underwriter would have the ship of the value of 3000*l.*

The present question is, in such case can the freight be truly said to be lost by perils of the sea? The assured has made a calculation upon certain items, one of which is this very freight, and satisfied himself that it is for his pecuniary interest to sacrifice it and make no attempt to earn it, and has by his own voluntary act transferred the ship, by which alone it could be earned, to a third person, and thus deprived himself of the possibility of earning it. The freight is lost, remotely it may be, in consequence of sea damage, or in other words the perils of the sea, but directly and proximately by the voluntary act of the assured himself. The perils of the sea may be the "*sine quâ non*," but certainly they are not the "*causa causans*." Suppose the underwriter thought fit to repair the ship and earn the freight, as he had a right to do, the underwriter on freight would be free, the event would have happened the not happening of which by reason of certain perils creates his liability. And can it be that the right of the assured and the liability of the underwriter on freight depend upon the conduct of a third person, a stranger to both, and over whom neither of them has any control? But the point seems to me decided by the cases of *McCarthy v. Abel* (5 East, 383) and *The Scottish Insurance Company v. Turner*, in this House (*ubi sup.*). In *McCarthy v. Abel* an insurance had been effected on homeward freight from Riga. The greater part of the cargo had been loaded, but on the 7th Nov. 1800, the ship was seized under a Russian embargo. On receipt of the intelligence, the assured gave notice of abandonment to the underwriters on ship and on freight, he having effected separate insurances with different sets of underwriters. The embargo was taken off in May 1801, and the ship arrived safely and earned her freight. This freight belonged to the underwriter on ship by reason of the abandonment, and the assured brought an action against the underwriter on freight as for a total loss. The court held it could not be recovered. Lord Ellenborough said it could not, for two reasons. First, that there had been no loss of

H. OF L.]

RANKIN AND OTHERS v. POTTER AND OTHERS.

[H. OF L.]

freight at all, as in the event the freight had been earned; second, that if it could be considered in any other sense lost to the assured, it had become so by his own act in abandoning the ship to the underwriter thereon, with which, and its consequences, the underwriter on freight had nothing to do. The principle of the second reason of this judgment seems to me directly against the plaintiffs' contention in the present case. I will hereafter refer to *The Scottish Insurance Company v. Turner*; for my own part I am at a loss to see why, if the contract of insurance of freights in the present case was of any value, it did not pass to the underwriter on ship by the abandonment, so that the plaintiffs' interest in it was at an end before action brought; and it is not alleged that the action was brought or is now maintained for the benefit of the underwriter on ship.

But, secondly, suppose the ship was not insured upon the above calculation, it would have been for the pecuniary interest of the plaintiffs not to repair and to abandon the charter-party and the voyage to England. He would then have the ship of the value of 3000*l.* Can it be that he can realise this and at the same time compel the defendants to pay him the freight as if the ship had become an actual wreck at New Zealand? There would be no obligation upon the plaintiffs to sell the ship or break her up, and if after they had received the sum claimed (4000*l.*) they thought fit to repair her, there would then be a ship sailing the sea, and earning freight, which had by construction of law been totally lost. Nor is there any reason why, by application of the same principle, she might not be totally lost half a dozen times over with the same result.

But it is said the plaintiffs have abandoned the freight. It is true that in one sense they have abandoned it, they have thrown up the adventure, and if there was anything to earn have, so far as in them lay, deprived the defendants of the possibility of its being earned. But they have made no abandonment in the sense of transferring to the defendants a thing of value, anything which might go in part to indemnify them against the payment of the loss. The abandonment was a mockery, there was nothing to abandon, not even a right of action against De Mattos for not loading the ship. It is an abuse of language to call this an abandonment of freight in the sense and meaning of the word in reference to a constructive total loss.

In the case *The Scottish Insurance Company v. Turner*, there were separate insurances on ship and freight. The ship sustained such damage as to justify an abandonment, but it was not known until the arrival of the ship with her cargo at the port of discharge. The plaintiff then abandoned to both sets of underwriters. The underwriters on ship seem to have accepted the abandonment, and became entitled to the freight. The plaintiff then brought an action against the underwriters on freight, and claimed a total loss. He contended (the precise contention of the plaintiffs here) that the real cause of the loss to him was the perils insured against, that the abandonment of the ship was a legal and proper act superinduced by these perils; that it made no difference to him that the freight was earned by the master of the ship, who became agent to the underwriters on ship by the abandonment, as it was lost to him. The Court of Session in Scotland held him entitled

to recover, but your Lordships reversed the judgment, and held that the freight was lost to the plaintiff by his own election in abandoning to the underwriters on the ship, and not by the perils which caused or led to that election. This appears to strike at the root of the argument on behalf of the plaintiff, that the freight was lost by the damage sustained at New Zealand. It was said this case did not govern the present, because the abandonment was after the freight was earned. I do not see how this affects the principle of the judgment. But in the case of *McCarthy v. Abel* the abandonment was before the freight was earned.

I think these cases have a distinct bearing upon the present question. The plaintiffs could have repaired the ship, but for their own pecuniary interest elected not to do so, and abandoned her. The present question is, did they thereby secure to themselves the sum insured on freight as if the ship had gone to the bottom at New Zealand, or did they discharge the underwriters on freight. There is a further subordinate point, viz., that the defendants were discharged by the delay at Otago. I have already said that in my opinion De Mattos was thereby discharged from the obligation to load the ship. He was entitled to have the ship dispatched from New Zealand in a reasonable time, and he was neither directly nor indirectly concerned with the want of funds wherewith to repair her between July 1863 and February 1864. She was used for a very considerable time as a store ship, a purpose quite beside and foreign to, indeed inconsistent with, the due prosecution of the voyage contemplated by the charter and the policy of insurance. The time is not stated, but it must have been considerable, as the storage rent amounted to between seven and eight hundred pounds. Looking at the time actually occupied by the repairs and by the voyage to Calcutta, the ship ought to have been there in October or November 1863, and no one can tell what would have been the consequence if she had arrived before De Mattos's failure, and had found a cargo awaiting her by the carriage of which she would have earned a good freight. It might have materially affected the judgment of the plaintiffs as to repairing. It may be said that the occasion of the delay was the perils insured against, and had there been no damage there would have been no delay. But the underwriters on freight were under no obligation to make these repairs, or provide funds for the purpose. The delay for the time necessary to make them was excusable; but the delay from July to February consequent upon the misunderstanding between the plaintiffs and their agents at Otago as to advances seems to me to be the misfortune of the plaintiffs, and one with which the defendants are in no way connected. I agree with the judgment of the Court of Common Pleas, that great and substantial delay is attributable to the plaintiffs in keeping the ship at Otago, and is traceable to causes for which they and the master were alone answerable, and not to sea perils. The question is, does this delay discharge the defendants? The case of *Mount v. Larkin* (8 Bing. 822) and the judgment of Chief Justice Tindal were much relied on. He says, "The voyage in the commencement or prosecution of which any unreasonable delay takes place becomes a voyage at a different period of the year, at a more advanced age of the ship, and in

short a different voyage from that prosecuted with reasonable and ordinary diligence; the risk is altered from that which was intended when the policy was effected." Besides this, it seems to me that persons who carry on the business of underwriting have a right to have the voyage insured prosecuted with due and reasonable dispatch, in order that their risk may be determined within a reasonable time. There can be no doubt as to the delay. The question is, do the facts stated in the 14th paragraph of the special case excuse it as between the plaintiffs and the underwriters on freight? I think they do not. The law and all the cases on the subject will be found in Mr. Arnould's book, p. 383.

The result is that in my opinion there are only two ways by which the plaintiffs below can establish a case against the defendants. One is, that the sea damage at New Zealand, being such as would have justified an abandonment and a claim for a constructive total loss of ship, was a loss of the freight by perils of the sea at New Zealand, and entitled the plaintiffs to maintain an action upon a writ sued out immediately after this damage occurred. This I think not sustainable, and that until the plaintiffs elected not to repair and not to prosecute the voyage from Calcutta, there was not a loss of the freight by perils of the sea in any sense. The other is, that all the circumstances of the case, including the election not to repair and the abandonment of the ship and freight in August 1864, constituted a loss of the freight by perils of the sea. I have already stated at length why I think they do not. It may suffice to state here that one of these circumstances, viz., that no cargo ever existed whereby freight could be earned, created the real and actual loss of freight before the election not to repair and the abandonment were made, and that this, and not a peril of the sea, was the direct and proximate cause of the loss of freight to the plaintiffs. The liability of the underwriters is upon a written contract; if the contract be that they shall pay 4000*l.* if the ship should sustain damage from the perils insured against on the voyage from the Clyde to New Zealand and the thirty days there, to such an extent that a prudent uninsured owner would not have repaired her, or in other words be a wager policy that such damage should not occur, the underwriters are liable. On the other hand, if the contract be one of indemnity, and if it be essential for the plaintiffs to show that the freight insured was lost to them by reason of such damage, the underwriters are not liable, for as a matter of fact it is established beyond doubt or controversy that the freight, and all remedy in respect to it, was lost to the plaintiffs by the insolvency of De Mattos and its consequences, and the unjustifiable detention and delay of the ship at New Zealand. The facts stand in the following order: First, policy on freight; secondly, damage to ship capable of being repaired, but to such an extent as to make repair not prudent for shipowner; thirdly, failure of charterer to provide cargo wherewith to earn the freight; fourthly, election not to repair. The question is, are the underwriters on the freight liable under these circumstances? I think they are not.

I answer your Lordships' first question, that there was not a loss by the perils insured against during the term of the policy. I answer the second, that notice of abandonment either of

ship or freight was not necessary in one sense of the word "abandonment;" but notice of the election of the assured not to repair, and to give up and abandon the voyage, was, under the circumstances, necessary to enable the assured to maintain an action against the underwriters. I answer the third question, that if notice of abandonment was necessary it was not given in time. I answer the fourth question, that the notice of abandonment of ship does not, as such, affect the right of the plaintiffs upon the policy on freight. I answer the fifth question, that there was such conduct on the part of the assured as discharged the underwriters from their liability upon the policy on freight. I answer the sixth question, that judgment ought to be given for the appellants.

May 5.—Lord CHELMSFORD.—My Lords, this is a case of some novelty, and from the difference of opinion which has existed upon it amongst the judges, must be regarded as not entirely free from difficulty. [His Lordship stated the facts and history of the case.] Upon this appeal from the Court of Exchequer Chamber, the questions raised were, first, whether there was an actual total loss of the chartered freight by perils insured against during the term of the policy? Secondly, whether notice of abandonment, either of ship or freight, or both, was necessary to enable the plaintiffs to recover for a total loss on the policy on freight? Thirdly, if notice of abandonment was necessary, whether the notice was given in time? And, fourthly, whether the conduct of the plaintiffs, the owners of the ship, after the time of the injury sustained by her in New Zealand, was such as to discharge the underwriters from their liability upon the policy on freight?

First, upon the question as to the loss of freight, it is necessary to bear in mind the exact nature of the insurance. The freight insured is chartered freight upon a cargo to be loaded on board the *Sir William Eyre* at Calcutta and to be conveyed to Liverpool or London. The voyage insured is a voyage "at and from Clyde to Southland, while there, and thence to Otago, New Zealand, and for thirty days in port there after arrival." In other words, it is an insurance that the assured shall not be prevented earning the freight under the charter-party by any perils of the sea which might happen on the voyage from Clyde to Otago, and for thirty days afterwards. As this onward voyage is entirely distinct from that on which the freight was to be earned, and as no right to such freight could possibly accrue until the arrival of the *Sir William Eyre* at Calcutta, the loss of freight could only happen by such damage to the ship by the perils of the sea during the time covered by the policy, as would prevent the assured from earning the chartered freight on the voyage from Calcutta to England. It is admitted that the sea damage which the ship sustained at New Zealand during the time covered by the policy, was such as would have justified an abandonment, and a claim for constructive total loss. The owners might, if they pleased, have repaired the ship, and she might have been sent to Calcutta in a fit state for a voyage from thence to England. But they merely effected temporary repairs sufficient to enable the ship to reach Calcutta, and on her arrival there a survey disclosed the extensive nature of the injuries

H. OF L.]

RANKIN AND OTHERS v. POTTER AND OTHERS.

[H. OF L.]

which she had sustained in New Zealand, and the consequent impossibility of her performing the homeward voyage without such an amount of repairs as would have cost more than what her value would have been when repaired. Upon this fact being ascertained, notice of abandonment was given to the underwriters, which, if sufficient, would have entitled the shipowners to recover for a total loss.

Upon these facts and circumstances the first question arises: was there a total loss of freight during the period covered by the policy? In determining this question, I think it right to leave out of consideration the fact of the insolvency of De Mattos before the arrival of the ship at Calcutta, because, although one of the learned judges, whose assistance your Lordships had upon the hearing of the appeal, delivered an opinion that "the freight was not lost by perils of the sea, but that the proximate and direct cause of the loss, was the non-existence of the cargo," it appears to me that this is not a correct view of the case. Between the underwriters and the assured on freight the question is, whether the ship had sustained such damage in New Zealand as to prevent her arriving at Calcutta in such a state of seaworthiness as would enable her to be tendered to the charterer as being "tight, staunch, and strong, and every way fitted for the voyage" to England. Upon this question it is obviously immaterial whether a cargo would have been provided at Calcutta or not. The loss for which the underwriters are liable, if at all, cannot depend upon such a contingency, and if it could, it must be observed that their liability attached long before the insolvency of De Mattos, which happened in Dec. 1863, months after the ship had sustained the sea-damage for which the claim upon the underwriters is made. In the arguments the counsel for the appellants complicated the question by introducing the consideration of the conduct of the plaintiffs with reference to the policy on the ship as bearing upon their rights under the policy on freight. It appears to me that this cannot properly be done in this case, where the injury to the ship was practically not repairable. The contracts are entirely independent of each other, and between different parties. The rights and liabilities ought to be determined without reference to what may have been done, or omitted to be done, by the assured on a policy on the ship upon which his rights under that policy may depend. A plain and clear view upon the facts and circumstances of the case can only be obtained by removing the policy on the ship out of the way, and looking at the case as if there were no other policy in existence but that upon freight. Under this policy it seems to me that the only question is whether by the perils of the sea the ship was so damaged at New Zealand during the term of the policy as to be rendered incapable, unless sufficiently repaired, of performing the voyage from Calcutta to England, for which she was chartered. Upon that subject, it appears from the admission, to which I have already adverted, that the sea damage was such as would have justified an abandonment and claim for a constructive total loss. By this, I understand that the amount of damage was such that a prudent uninsured owner would not have incurred the expense of repairing the ship. And this appears clearly from a further admission, stated in

the report of this case in the Court of Common Pleas, viz., that the cost of repairing the vessel at Calcutta so as to make her seaworthy for carrying a cargo to England, would have exceeded the value of the ship when repaired, plus the difference between the chartered freight and the current freight, which would amount to about 450*l*. No prudent man would in such a state of things incur the expense of repairing the ship, and the shipowners, electing not to repair, were entitled to consider the charter at an end, and the chartered freight as totally lost by a peril of the sea.

Secondly: The next question to be considered is, whether the assured can recover against the underwriters without a notice of abandonment. The counsel for the appellants argued that by the law of marine insurance a notice of abandonment is in every case required, just as by the law merchant notice of dishonour is upon bills of exchange. The rule as to abandonment appears to be that which is referred to by Mr. Justice Blackburn, as contained in Mr. Phillips's Book on Insurance, sect. 1491, where he says, "an abandonment being a transfer, it can be requisite only where there is some assignable transferable subject on which it can operate. Where nothing remains to be assigned or transferred, an abandonment is useless and unnecessary." It must be observed that "abandonment" and "notice of abandonment" are two distinct and separate things, though they are frequently confounded together in expression. Where a notice of abandonment is given it is conclusive proof that the assured intends to claim from the underwriters for a total loss, and then the assured must, as Lord Cottenham said in *Stewart v. Greenock Marine Insurance Company* (2 H. of L. Cas. 183), "give up to the underwriters all the remains of the property recovered, together with all the benefit and advantage belonging to or incidental to it, or rather (he adds) such property belongs to the underwriters." But although an abandonment or cession must be the necessary result of every claim for a total loss, it does not follow that notice of this abandonment must always be given to the underwriters before a total loss can be claimed. It was argued at the bar, on the authority of *Knight v. Faith* (15 Q. B. 649), that in every case where the subject-matter insured exists in specie, though in a damaged state, a notice of abandonment is necessary to entitle the assured to make a claim as if it had been actually destroyed. This was the opinion expressed by Lord Campbell in delivering the judgment of the court in that case. The necessity for notice of abandonment was not considered upon the first argument, but the court desired to hear the case further argued on the question, whether, under the circumstances of the case, the plaintiffs could claim for a total loss without giving notice of abandonment. It seems to have been quite unnecessary for the determination of the case to introduce this question, because the circumstances were such that the assured could not have been entitled to recover for a total loss if he had given the most timely and sufficient notice of abandonment. Lord Campbell had before this, in the case of *Fleming v. Smith* (1 H. of L. Cas. 535), stated the rule as to notice of abandonment in the same unqualified terms, saying, "According to all the old authorities a constructive total loss can only entitle the owners to recover as for an actual total loss by a notice of abandonment." It had

[H. OF L.]

RANKIN AND OTHERS v. PUTTICK AND OTHERS.

[H. OF L.]

previously been decided by the Court of Exchequer Chamber in the case of *Ross v. Salvador* (3 Bing. N. C. 266), that notice of abandonment was unnecessary where it could be of no use to the underwriters, who, in that case, if they had received notice of the loss, could not have exercised any control over the goods insured, nor by any interference have altered the consequences. The case was an action upon a policy of insurance of hides from Valparaiso to Bordeaux. On the voyage the hides were found to be in a state of putridity occasioned by a leak in the ship and they were sold for a fourth of their value at Rio Janeiro. The assured received the news of the damage to the hides and of their sale at the same time. The Court of Common Pleas (1 Bing. N. C. 526) gave judgment for the defendant, the underwriter, on the ground that the assured could not recover as for a total loss without a notice of abandonment. But this judgment was reversed in the Court of Exchequer Chamber, and Lord Abinger, in a very elaborate and carefully considered judgment, laid down the principle, as to notice of abandonment when an assured claims for a total loss and part of the subject insured exists *in specie*, that notice is only necessary where upon receiving it the underwriters could do something in the exercise of their rights over the salvage. In that case, the assured receiving the news of the damage to the hides and of the sale of them at the same time, notice of abandonment to the underwriters would have been altogether idle and useless. In *Farnmouth v. Hyde* (2 Mar. Law Cas. O. S. 187, 429; 15 L. T. Rep. N. S. 895; L. Rep. 2 C. P. 204), under similar circumstances of the loss of the ship insured and of her sale having reached the assured at the same time, it was held that the underwriters were liable for a total loss without notice of abandonment. This seems to place the rule as to notice of abandonment on a reasonable foundation. No prejudice can possibly arise to the underwriters from withholding a notice where it is wholly out of their power to take any steps to improve or alter their position. Upon this ground, therefore, I am of opinion that there was no necessity for the assured in this case to give a notice of abandonment of the chartered freight to the underwriters. Willes, J., in delivering judgment in the Court of Common Pleas, apparently adopting the rule as laid down in *Keight v. Faith* (*ubi sup.*), said (3 Mar. Law Cas. O. S. 126; L. Rep. 3 C. P. 573; 18 L. T. Rep. N. S. 712): "The general rule of insurance law applies—that where the thing insured subsists *in specie* (and here the thing insured, viz., the chance of earning the freight, did survive the risk), and can be restored, though at an improvident expense, in order to make a total loss there must be an abandonment." But I am at a loss to understand what chance of earning the freight can be said to have existed after the ship *Sir William Eyre* mentioned in the charter-party, had sustained such sea damage as would render her incapable of performing the voyage by which the freight was to be earned, and had become at the election of the owners a total loss. The underwriters could not have substituted any other ship and tendered her to the charterer in performance of the charter-party on the owners' part. It was suggested in argument that the underwriters on freight, if they had had timely notice of abandonment, might

have arranged with the underwriters on ship to repair the ship at their joint expense and have sent her on to Calcutta and tendered her to De Mattos in fulfillment of the owners' contract. But this is the suggestion of a mere possibility and contains in it nothing practical, nor can it reasonably be taken into account in judging of the rights and liabilities of the parties. I have no difficulty in coming to the conclusion that there was no necessity for any notice of abandonment of the chartered freight to the underwriters on freight.

Thirdly, this being my opinion, it appears to me to be wholly unnecessary to consider whether the notice of abandonment that was given, was given in time. The rule is, that where notice of abandonment is necessary it must be given within a reasonable time after information of the damage which has occurred to the subject of insurance. Whether sufficient notice was given depends upon the facts of each particular case, and the decision of one case, therefore, can be no guide or authority upon any other. I must, therefore, decline to express any opinion with which of the learned judges I should be disposed to agree upon this question.

Fourthly, there only remains to consider the question whether the conduct of the owners of the ship after the damage she sustained was such as to discharge the underwriters on freight. Upon this I have already incidentally made some observations. It is unnecessary to examine in detail the various acts by which it was contended that the owners had elected to retain the ship, and to come upon the underwriters merely for a partial loss. I think that they had precluded themselves by dealing as they did with the ship, and also by delaying so long their claim for a total loss. But I do not see how the conduct of the shipowners, however it may affect their rights under one contract, can have any influence on their rights, and the liability of another party upon a separate and independent contract. If the sea damage which the ship sustained in New Zealand was such as to reduce her to a state which rendered her utterly incapable of performing the voyage to England without an expense which no prudent uninsured owner would incur, then the freight was totally lost from that moment, and how the owners chose to deal with the disabled ship afterwards was wholly immaterial. If the damage to the ship had been such that it might have been repaired at a reasonable expense, and put into a condition to earn the freight, and the shipowners had declined to take that course, they would have lost the freight, not by the perils of the sea, but by their election. But the damage being such as to render the repair of the ship practically impossible, the question between the assured and the underwriters on freight, must be regarded as if there were no policy on the ship; and then it becomes the simple consideration whether the freight was not totally lost by perils of the sea, by what must be regarded in relation to it, as the total destruction of the ship by which it was to be earned.

I think that the judgment of the Court of Exchequer Chamber ought to be affirmed.

Lord COLONNAI.—My Lords, this case appears to be attended with a great deal of nicety. It is novel, too, in its circumstances. Indeed, the

H. OF L.]

RANKIN AND OTHERS v. POTTER AND OTHERS.

[H. OF L.]

policy here is peculiar, and the consequence has been that there has been a great deal of difference of opinion among the judges, and a great expenditure of ability and ingenuity in discussing the question. It appears to me that a good deal of that has been expended in consequence of mixing up things which are substantially separate. I think that there are two questions, or rather perhaps only one, namely, whether the freight was lost by the perils of the sea insured against, and I think that that question must be considered altogether separate from the question of an insurance by other parties upon the ship.

Now, notwithstanding that one of the learned judges, of whose assistance we have had the benefit, and for whose opinion I entertain the highest respect, has expressed the opinion that the loss was not caused by the perils insured against, but by the inability of De Mattos to furnish a cargo, I am compelled to differ from him. It appears to me that upon the admission contained in the case before us, we are bound to hold that the condition of things, within the period to which the insurance applied was such that the vessel was in a condition in which an abandonment might have been made as for what is called a constructive total loss, that is to say, that she was in such a condition as not to be worth repairing. If that be so, I think that the liability then attached, and that the risk having been incurred, and the peril having been sustained, and the vessel having been rendered incapable of earning the freight by reason of the damage done at sea, or in port, within the period insured against, that terminated the question. No doubt it was not then ascertained what the damage was, but it was afterwards ascertained that that damage was sustained within that period, and that must be treated as an admission in the case. Now I do not see how the matter of De Mattos having failed in the month of December, and having been unable to supply a cargo, or having declined to supply a cargo, is a matter which can be said to be the cause of the loss of freight. Something was said about remote and proximate causes, and these are matters which are very apt to lead us into philosophical mazes, but I think it is very clear that before De Mattos failed, the ability to earn the freight was gone by reason of the perils insured against having happened, and that appears to me to be sufficient. De Mattos was under no obligation, it is said, to furnish a cargo, because of the delay of the owners of the vessel to tender the vessel. I think De Mattos was under no obligation to furnish a cargo, unless there was presented to him a vessel fit and sufficient to carry that cargo to England, and that was the failure that occurred. There was no vessel fit and sufficient to carry the cargo to Britain presented to De Mattos, and that was a state of matters that occurred before the vessel arrived at Calcutta.

The only other question is the question as to the notice of abandonment. I think that throughout this matter we must consider this case as if there had been no insurance on the ship. If there had been no insurance upon the ship, what would have been the object of the notice of abandonment, or what was to be gained by such notice being given? I do not see, after what had occurred, what the underwriters on the freight could have done. The vessel was not fit to be repaired. They could not have com-

polled the owners to repair her when she was not worth it. What was to be gained, then, by the notice of abandonment being given? It is true that there was a puzzle raised by some of the judges as to who would have been the party entitled to the freight and, therefore, the party entitled to the insurance on the freight, if the vessel had been timeously abandoned, and had been repaired, and freight had been earned. But, my Lords, I do not think there is any real puzzle in the case at all. At all events, it is clear that if the freight had been earned, there would have been no loss of freight, and a different condition of affairs would have arisen. The question as to the right to demand the insurance if the vessel had been lost is a different question altogether. The only party who had a right to demand the insurance is the party who effected it, and, if there had been no insurance upon the vessel, that right would equally have existed with regard to the freight. I therefore think that there is really no substantial ground for this question as to the notice of abandonment, and, until there is more decided authority adduced upon the subject, I am not prepared to receive the doctrine that notice of abandonment in a matter of this kind stands upon the same mercantile footing as a notice of dishonour of bills of exchange. The reason of the thing in my apprehension, is against that doctrine being applied. I think the reason of the thing tells me that, where there is nothing substantially to abandon to the party to whom the notice of abandonment is given, and he could gain nothing by it, it is not necessary to give that notice. Therefore, I think that all that puzzle, which has arisen from the circumstance of there being an insurance upon the vessel, is quite out of the question when you come to consider purely the liability of the underwriters upon the freight. In this case it appears that there was no timeous notice of abandonment, or no notice of abandonment at all according to a judgment elsewhere, and therefore in that view also the question would not arise. But I think that the real question is, whether the right to freight was lost by the perils of the sea during the period embraced in the policy of insurance. I think it was, and I think the liability attached, and I see nothing afterwards to relieve the parties from that liability.

LORD HATHERLEY.—My Lords, the case is really now brought simply to this. The owner of a ship under a certain charter-party arranges that his vessel, being about to proceed to New Zealand, shall, after her voyage thither, and after a certain delay there, proceed to Calcutta and take on board a cargo from one De Mattos, he having in the first instance entered into that undertaking with him. When she arrives at Calcutta she is to be tendered to De Mattos for the purpose of receiving the cargo to be so provided, and she must then be in a condition sufficiently staunch, tight, and strong for the purpose of her voyage from Calcutta to England, or rather Great Britain, in order to earn the freight that will then be due from De Mattos in respect of his having so conveyed his goods. This being the entire course of the vessel's proceeding, the owner is minded to insure himself against the perils of the sea in two respects, first, as regards the vessel, and secondly, as regards the freight to be carried between Calcutta and England. I mention this because there can be no reasonable doubt (indeed the learned

[H. OF L.]

RANKIN AND OTHERS v. POTTER AND OTHERS.

[H. OF L.]

judges said they hardly thought it right to consider the question as it was not raised) that however peculiar the form of this policy may be (and it is of a somewhat unusual form), there is nothing to prevent any person, during the whole course of the voyage, insuring the freight against the perils of the sea during any part of that voyage, whether the perils of the sea may occur during that part of the voyage as to which the ship is insured, or whether the chance of loss against which insurance is effected may be the chance of her being so damaged in the anterior part of the voyage as not to be able to fulfil the subsequent part of her voyage (in respect of which part of the voyage itself she is not insured), and in consequence of being unable to fulfil the subsequent part of the voyage, she cannot earn the freight which is insured. I think one of the learned judges, who has given a very valuable and able judgment in this case, though I do not agree with him, Baron Martin, seems to have thrown out some slight doubt as to whether or not the mode of effecting this policy was one that could be sustained. But he dwelt but lightly upon that point, and I need say no more upon it, because no authority was cited for saying that the insurance which was effected was in any way contrary to the law of insurance.

The insurance effected was simply this. The vessel is to proceed to New Zealand. During the whole period of her voyage thither and of her stay there for thirty days, she is not, says the policy, to be injured or damaged by perils of the sea to such an extent as to prevent her from being staunch, tight, and strong enough on her arrival at Calcutta to take the expected cargo to England. That is the undertaking which is given by the policy, and that is the risk which is insured against. It is clear and plain from the admissions in this case and the evidence that has been given, that she was injured during the period insured against—that is to say, she was injured just about the time of her arrival in New Zealand, and while she was in the neighbourhood of Bluff Harbour. She was injured to such an extent that, although at Bluff Harbour it could not be ascertained what the extent of the injury was, and although at Dunedin a certain amount of repair was effected which enabled the vessel to proceed to Calcutta, she was not staunch, tight, and strong enough for the voyage to England when she arrived at Calcutta, and her being in that condition was wholly due to the injuries she had sustained during the insured period. It is further admitted in the case that the injury was of such a character that no prudent owner would have repaired her for the benefit of the contract which had been entered into as to freight, because, in order to make these repairs, it would have been necessary to expend more than the whole value of the ship; in other words, when it was ascertained what the extent of the injury was, it was found that she was in such a condition that, had the owners been minded to abandon her at the time when the injuries were sustained to those who had taken the policy on the ship (and who must be distinguished from those who had taken the policy on the freight which is now before us), they would have been justified in so doing.

As between the owners and those who insured the ship itself there must arise a question, and indeed there did arise a question, which was determined, I think, in the action against Campbell, as to whether

or not they had given timely notice of the abandonment of the vessel to those who had insured her, or whether by their conduct in delaying her voyage to Calcutta for a very considerable time, by their employing the ship in the mean time to a certain extent as a store-house for coals, and by taking other steps which occasioned great and possibly unnecessary delays in New Zealand, before giving notice of abandonment, they had put themselves into such a position as respected those who had insured the vessel as to have lost their right of abandonment. But that appears to me, I confess, as it seems to have done to your Lordships who have preceded me, to be entirely immaterial as regards the question before us in respect to the insurance on the freight. When the vessel arrived at Calcutta it appears to me that there was (and this was somewhat relied on), in the first instance, an actual tender of the vessel to De Mattos and those who represented him, but it was found that De Mattos had become insolvent, and those who represented him, viz., the assignees of De Mattos, declined to furnish any cargo. All this took place before there had been a thorough examination of the amount of injury in Calcutta. When a thorough examination took place afterwards the result was, what I have described, that no prudent owner would have thought of putting her into a condition to continue her voyage to Great Britain. That being so, it appears that every element of the contract with the underwriters on the freight is brought out in a clear and distinct light, showing that the liability of the underwriters on the freight had actually accrued, unless indeed the question that has been raised with respect to the notice of abandonment as applying to the insurance of the freight should prevail with your Lordships. The ship was undoubtedly insured during the period when the injury was sustained. The ship undoubtedly, in consequence of that injury, was unable to perform the voyage, and could not, therefore, be tendered in the condition in which she ought to have been tendered to De Mattos, and therefore the freight was lost in consequence of that injury. I will postpone for the moment the consideration of the question of De Mattos' insolvency. Putting the question aside as to how far De Mattos' insolvency may be regarded as the proximate cause of the loss of freight rather than the damage sustained by the ship in the anterior part of the voyage, there comes the question, was it, or was it not, necessary to give notice of abandonment in this case, and, if necessary, was the notice given in time?

As regards the necessity for giving notice of abandonment, I think that is the point that was most vigorously pressed upon us by the counsel for the appellant, who relied upon some *dicta* of Lord Campbell on the subject, and contended strongly that it was necessary in all cases whatsoever of claims upon underwriters as for a total loss upon a policy for the owners to give notice to the underwriters of abandonment of the thing insured, and whether in truth any advantage could possibly be made of that notice of abandonment or not. It was put upon this ground, that it was rather for the underwriters to say in their judgment what advantage they might be able to derive from that notice of abandonment so given in regard to their position in their policy. I apprehend, my Lords, that certainly no authority has

H. of L.]

RANKIN AND OTHERS v. POTTER AND OTHERS.

[H. of L.]

been cited to show that this notice of abandonment is to be considered necessary in a case where no such advantage could possibly accrue to the underwriters. If the vessel be not really wholly lost, if it be only a constructive total loss, as it is termed (though that is perhaps not a very happy phrase), occasioned by the impossibility of effecting repairs, the cost of which will not exceed the whole value of the ship when repaired, then, there being something in *esse* to be handed over to the underwriters, it is necessary that they should be informed of this, in order that they may have an opportunity of making the best use they can of what remains, of that which the owners give up, in electing to make a total loss of that which in fact is not a total loss, there being something in the nature of salvage, or fragments, or wreck, or something of that kind, which may be of value to the underwriters, although not of any to the owners. But in this case there is nothing suggested, and nothing can be suggested (except one single point which I will notice in a moment), as to any advantage that could have been derived by the underwriters from any such notice of a constructive total loss being given to them on the part of those who had insured. The only exception is that it is suggested that they might have said, "True it is we insured that this freight should be earned, and certainly that earning depended upon the arrival of the ship at Calcutta in a condition to earn it; she did not arrive at Calcutta in a condition to earn it, and it would have been folly to have expended money in repairing the ship, which would have exceeded the value of the ship when repaired; but if you had told us that you were about to claim as for a total loss in respect of this freight, we should have been in this position—we should have found that you had insured the vessel, and the underwriters on the vessel would have been in an equally disadvantageous plight with ourselves, having a heavy demand upon them in respect of their insurance, and we two together might have been minded to make such an arrangement each with the other, that, regard being had to what we each should have had to pay on our respective insurances, it might have been worth our while to put the vessel into a state to earn the freight." Those who had insured the freight could not tender any other vessel; so that that question does not arise in the peculiar insurance before us, because it was an insurance of freight to be earned by the *Sir William Eyre*, and by no other vessel. De Mattos, of course, might have refused any other vessel than that. It could not, therefore, be earned by tendering any other vessel. It is supposed that if the underwriters on the freight had had timely notice, they might have made such an arrangement with the underwriters on the hull of the vessel herself as would have saved a total loss accruing. I apprehend, my Lords, that that is much too remote a contingency to render it necessary for the insured to give the insurers notice of abandonment upon the principle which I have before referred to, viz., of their being able to save something out of the wreck. It is not necessary to illustrate that, but it might be shown in a variety of ways how such a doctrine as that would carry the necessity of notice to the remotest extent in respect of bargains which might be made by persons who might or might not be interested at the moment in the ship, such as persons who might purchase the damaged vessel, or the wreck,

or the like. Numerous arrangements might be made of that kind which would create, I apprehend, far too remote an interest to be considered upon a question as to the law requiring notice of abandonment to be given. The whole principle of the notice of abandonment is that you are to place the underwriters in such a position that they shall have all the advantages you now possess in respect of the vessel, supposing that they can make those advantages available for the purpose of effectuating a salvage of some portion of that which has been lost in consequence of the perils which they have insured you against.

Now, my Lords, with regard to the observations made by Martin B., that the loss really was not a loss by perils of the sea, but was due to the insolvency of De Mattos, I think there is a clear fallacy in that view in two points, the first of which has been noticed by my noble and learned friend who first stated his views upon this appeal; it is, that the loss accrued before the insolvency of De Mattos occurred. The loss accrued when the accident happened in which the damage occurred at Bluff Harbour, and that was some time before the insolvency of De Mattos took place. But I do not think it necessary to rest upon that. I apprehend that it is not a thing which would absolve the underwriters from the liability for the loss, which undoubtedly accrued on account of the ship not being fit for the voyage. There is nothing to absolve them from the liability to pay the insurance in the circumstance of the insolvency of De Mattos, who in the chapter of accidents might have become solvent and won wealth again before the necessity arose for the vessel completing her voyage. But the point that has to be looked at is this. Were the owners in a position to enforce their rights against De Mattos, whatever they may have been; were they in a position, by tendering the vessel to him, either to insist upon his paying the freight then and there, or to insist upon such rights as might accrue to them by action in respect of his non-performance of the contract; or were they disabled from occupying that position by the consequences resulting from the perils of the sea which arose at Bluff Harbour, preventing them from fulfilling their part of the contract with De Mattos, by tendering to him a ship staunch, tight, and strong, for carrying his goods to Great Britain? If that be the case, of course it is clearly and distinctly within the terms of the policy, and, that being so, it seems to me clear that the underwriters must be liable unless this one point, which was strongly insisted on, of want of timely notice of abandonment, precluded their liability. I think your Lordships are all agreed that such notice was unnecessary, and therefore it is not necessary to consider the question as to the time at which such notice was given.

Therefore, my Lords, upon all the points, I think that the appellants have failed, and consequently the appeal must be dismissed with costs.

Judgment affirmed.

Attorneys for appellants, *Field, Roscoe, Field, and Francis*; respondents, *Thomas and Hollams*.

COURT OF COMMON PLEAS.

Reported by H. F. FOULST and JOHN ROSE, Messrs.
Barristers-at-Law.

Jan. 22 and July 7, 1873.

CATOR V. THE GREAT WESTERN INSURANCE
COMPANY.

Marine insurance—Chests of tea—Damage to some by sea water—Injury to others by suspicion of buyers that the whole cargo was affected—Divisibility of damage.

By a marine policy on 1711 packages of tea, valued at a certain sum, and part of a general cargo, they were insured against the usual risks, "and all other losses and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandise, or any part thereof, occasioned by sea perils." . . . "Warranted by the assured free from damage or injury from dampness, change of flavour, or being spotted, discoloured, musty or mouldy, except caused by actual contact of sea water with the articles damaged occasioned by sea perils. In case of partial loss by sea damage to dry goods, cutlery, or other hardware, the loss shall be ascertained by a separation and sale of the portion only of the contents of the packages so damaged, and not otherwise, and the same practice shall obtain as to all other merchandise as far as practicable." The vessel carrying the tea met with bad weather, and shipped much sea water, by which 449 packages of this tea, which were stowed in different parts of the ship, were greatly damaged by contact with sea water; the remainder, viz., 1262, arrived in perfectly sound condition, and unharmed, but, from the injury to their reputation from having formed part of a shipment of which 449 packages had been damaged by sea water, sold for a less sum than they would otherwise have realised.

Held, that for the purpose of assessing the damage the packages were divisible; that the underwriters were only liable for the deterioration in value of such of the chests, viz., 449, as had been in fact harmed by sea water; and that the injury to the reputation of the others from the suspicion of buyers was not a loss covered by the policy.

This was an action upon a marine policy tried before Bovill, C.J., at Guildhall, 7th July, 1873, when his Lordship directed a verdict for the defendants, with leave to the plaintiff to move to enter the verdict for such sum as the court might direct, and a rule was afterwards obtained pursuant to the leave reserved.

The material clauses of the policy, and the pleadings and facts, were stated in the written judgment of the court as follows:—

"The policy in this case was expressed to be 'on 1711 packages of tea,' by the *Eurydice*, at and from New York to London, valued at the sum insured, viz., 31,000dols., and after enumerating the usual perils covered by the insurance, contained the words 'and all other losses and misfortunes that have or shall come to the hurt, detriment, or damage, of the said goods and merchandises, or any part thereof, occasioned by sea perils.' There was a special warranty in the following terms: 'Warranted by the assured free from damage or injury from dampness, change of flavour, or being spotted, discoloured, musty, or mouldy, except caused by actual contact of sea water with

the articles damaged occasioned by sea perils. In case of partial loss by sea damage to dry goods, cutlery, or other hardware, the loss shall be ascertained by a separation and sale of the portion only of the contents of the packages so damaged, and not otherwise, and the same practice shall obtain as to all other merchandise as far as practicable.' The term 'dry goods,' it was agreed in the argument, would not include or apply to tea. There were also special warranties against partial loss or particular average under 5 per cent., and other special warranties against average as to different goods, unless general or over a certain rate per cent., and then came the following clause: 'On risks from China each ten packages of silk or other dry goods in the order of invoice subject to separate averages. Each interest of 5000dols. insured value or less, subject to separate average. If over 8000dols. value, each of the following kinds of teas, Imperial gunpowder, Hyson, Hyson skin, young Hyson, and black teas, and each 5000dols. value thereof, in the order of invoice, subject to separate average, and the different excoases over 5000dols. subject to average, if the damage amount to 250dols.' The declaration averred that the goods were damaged, and injured, and lost by the perils insured against. This tea formed a portion only of the cargo of the *Eurydice*, which loaded as a general ship. In the course of the voyage the vessel met with bad weather and shipped large quantities of sea water by which various portions of the cargo were damaged, and amongst others 449 packages of this tea which were stowed in different parts of the ship were greatly injured by contact with the sea water; the remainder of the teas, viz., 1262 packages, arrived in a perfectly sound and good condition, and uninjured except by the injury to their reputation from having formed part of a shipment of which 449 packages had been damaged by sea water. The full amount of the damage to the 449 packages was paid into court. The shipment consisted of several different kinds of tea, each of which was distinguished as a chop of a certain name and mark, and all the chests were numbered consecutively. There were altogether ten different chops, and which at the sale were divided into thirty-five breaks. The 449 packages that were damaged by sea water were portions of different chops and formed parts of the series of consecutive numbers on the chests. When teas are sold they are usually sold in the order of the consecutive numbers marked on the packages, and if the numbers be broken by some being omitted, or if some of the chests are marked as damaged, a suspicion is created that the other packages may be affected, and those other packages, though perfectly sound and uninjured, do not realize so high prices as they would have done if none of the packages had been damaged. In the present instance the teas were sold in the usual way, but in consequence of the suspicion created by the damage to so large a number as 449 packages, and the prejudice arising from that circumstance to the rest of the teas, the 1262 sound chests did not fetch so much as they would have done if the 449 had not been damaged by sea water, and the difference in price upon the 1262 chests from this cause amounted to a very considerable sum, which was to be settled by an arbitrator if necessary. The plaintiffs sought to recover the same as a loss which was caused

C. P.]

CATOR v. THE GREAT WESTERN INSURANCE COMPANY.

[O. P.]

by the perils insured against, and contended that the whole shipment was to be considered and treated as one entire subject matter. The defendants, on the other hand, contended that they were liable only for such of the packages, viz., the 440, as were, in fact, damaged by sea perils; that for the purpose of ascertaining such damage the packages must be considered as divisible, and that injury to the reputation of the teas from suspicion only, when the teas were in fact sound and had not been injured, was not a matter covered by the policy.

There were other questions raised at the trial, which are embodied in the above statement, but which, from the findings of the jury became now immaterial. The court were to draw such inferences of fact as the jury should have drawn.

C. Russell, Q.C., Benjamin, Q.C., and Cohen, for the defendants, showed cause.—The insurance was certainly of the whole 1711 packages, valued at the sum insured, and not on each chest, but the damage must be taken separately. First, on the construction of the policy it excludes the damage for which the plaintiff now seeks to make the underwriters liable, and restricts the claim to loss occasioned by sea perils in consequence of the direct contact of sea water with the goods insured. If damage to fifty chests were damage to the whole, there would be no sense in the warranty clause which relates to "actual contact of sea water with the articles damaged." That the damage must be that occasioned by the contact of sea water with the article so damaged is evident on the face of the clause, but if the history of the clause is considered, there can be no doubt as to the meaning. It does not appear in policies earlier than the case of *Montoya v. The London Assurance Company* (6 Ex. 451), where a vessel laden with hides and tobacco, in the course of her voyage, shipped large quantities of sea water. On the termination of the voyage it was discovered that the sea water had rendered the hides putrid, and that the putrefaction of the hides had imparted an ill flavour to the tobacco, and had thereby injured it. Held, that the damage thus occasioned to the tobacco was a loss by perils of the sea. The clause now in question does not appear in policies prior to that case, and was probably framed to meet it. The statement of average was drawn up as on an ordinary Lloyd's policy without this clause, for the stater had not then seen the policy. "If goods are damaged by actual contact with sea water, the underwriters are certainly liable, and it has been held that if part of the cargo is damaged by sea water, and the vapour and gases arising from it injure another portion of the cargo which is insured, the underwriters on this latter portion are liable, although it was not immediately in contact with the sea water"—1 *Parsons on Insurance*, 346, citing *Montoya v. London Assurance Company* (6 Ex. 451); but the learned author adds in a note "In *Baker v. Manufacturing Insurance Company* (Sup. Ct. Mass., March 1, 1851; 14 *Law Reporter* 203), it was held that the underwriters were only liable for the damage done to those goods with which the sea water came into actual contact, although the plaintiff offered to prove that the injury was not caused by the usual dampness in a vessel's hold, but by the steam and moisture arising from goods damaged by an

unusual quantity of water entering the hold in consequence of a peril of the sea. We have examined the policy in this case, and find that it did not contain the clause, now common in Boston policies, which exempts the underwriters from loss of this kind." The authorities in America uniformly show that if this clause is inserted there can be no such claim as the present. [Brett, J.—But if this tea is one article it is damaged by sea water.] It consisted of a number of chests capable of separation, not like a machine composed of parts belonging to each other. [Brett, J.—What would you say of grain in bulk?] That it was one article. The fact of the amount insured being one lump sum does not make it an insurance on each package, but it is an insurance on so much tea divided into individual packages. No case on insurance law can be cited in which it has been contended that a number of distinct packages must be taken as an indivisible whole like a machine, which, if damaged in part, the whole is impaired; for some chests of tea may be utterly destroyed and the rest left good. Can anybody say that the destruction of some is damage to the whole? [Brett, J.—Yes. *Botill, C.J.*—I take an insurance on twenty horses, is damage to one damage to the whole lot?] Arnold on Marine Insurance (4th edit.), p. 830, writes: "But where several articles are insured together in the same policy, and each suffers a particular average loss by sea damage, the loss must be adjusted separately on each, even though the clause 'to pay average on each species as if separately insured' be not inserted in the policy; for otherwise the underwriters would be involved in the rise and fall of the markets, except in the very improbable case when the state of the markets at the port of arrival is alike as to all the articles; i.e., when all the articles, had they arrived sound, would have realised in the port of arrival exactly the same percentage of profit and loss upon their first cost or valuation in the policy;" and in a note the learned author adds, "This is most ingeniously and incontestably proved both by Mr. Benecke and by Mr. Stevens; by the former algebraically, and by the latter arithmetically;" and the reader is referred to Benecke *Pr. of Indem.* 441, note, and Stevens on Average, 153—155. Mr. Arnold then proceeds in the text, "When out of whole packages or bales of manufactured goods only a few articles or pieces in each arrive sea-damaged, it is a frequent practice to sell the sound and damaged goods together at the same auction. The practice does not appear objectionable, but it must be carefully borne in mind that in adjusting the average on such a sale the diminished value at which the sound part of the package may sell, owing to the assortment being broken, is not a loss for which the underwriter is liable; for, as Mr. Stevens observed, 'he is accountable only for the actual damage done to the thing insured, and engages to guarantee the assured against the direct operation of sea damage, but not against the consequential results;' " (pp. 830—831.) [KEATING, J.—If that be law it much aids your argument.] Stevens and Benecke are referred to in support of the proposition. [Brett, J.—But see *Ralli v. Janson* (6 E. & B. p. 441).] "Where different articles are damaged, the loss ought to be adjusted on each separately; since otherwise the adjustment will be erroneous, unless the rate of increase or diminution of the market value at the place of adjust-

C. P.]

CATOR v. THE GREAT WESTERN INSURANCE COMPANY.

[C. P.]

ment is the same on all, or which would almost never happen, unless the different rates of increase and diminution of the value of different articles exactly counterbalance each other in the computation." [BRETT, J.—In the United States the law, after much discussion, is the same as that laid down by the Exchequer Chamber: (see 2 Arnould, p. 906, citing *Wadsworth v. Pacific Insurance Company*, 4 Wendell, N. Y. R. 33.) The whole question depends on whether the insurance is on all articles as one, or on each separate package; and the conclusion seems to be that both in England and America that is the test.] That applies to the case of memorandum articles only. This system of insuring in series is for the purpose of aiding the assured. [BRETT, J.—Suppose the policy had been "on tea valued at so much," and it was packed in packages—or grain?] Grain can be shipped either in bulk or in sacks, and if the shipper chooses to send it in bulk, and it is therefore not divisible, he has himself only to blame. [BRETT, J.—Do you lay so much stress on the mere mention of the 1700 packages?] The bargain here between the assured and underwriters, is that the subject matter shall be in packages. Even a package would be divisible. If any part could have been carried to the port of destination, there would have been no total loss (*Rosetto v. Gurney*, 11 C. B. 178.). Then if the subject matter be divisible, the proper mode of ascertaining the damage is not by selling the thing insured, but the damaged part. [BRETT, J.—How ought the damage to have been ascertained?] As if they had separated what was damaged from what was not, had sold the damaged part, had ascertained the actual loss on that part, and, having done so, they would have ascertained the loss for which the underwriters are liable, and then the per centage on the insured value of the whole. The real question is whether there is any principle which makes the subject matter of insurance indivisible for the purpose of estimating the damage. Secondly, the first branch of the warranty clause has no application, and the second clause has no direct application, and therefore the whole has no direct application. But it has a most important indirect application as tending to show whether the thing insured is, in a mercantile consideration, divisible or not. The clause says, that although damage by dampness may occur, if that dampness is not caused by sea water the underwriters are not liable—a *fortiori* not liable for such remote injury as damage to the reputation of the sound tea. [BRETT, J.—You say the words in the warranty alter the effect of other parts of the policy.] Yes. [BRETT, J.—Then you say that if this was a loss by perils of the sea within an ordinary policy, it is not a loss under this policy, because of the warranty in the policy, although the damage may not be within the warranty.] We do not contend that it has direct application. [BRETT, J.—A bale of cotton or chest of tea are not *ejusdem generis* with hardware, cutlery, &c.] In the case of a cargo of wood, if any part could be carried to the port of destination at a cost less than its value, then there would not be a total loss. But one could not cut out a particular log, and say "here take the sound part."

Sir John Karslake, Q.C. and Watkin Williams, supported the rule.—First, it is broadly said by defendants that this is practically an insurance on

different packages of tea, because of the words of the policy. But whether for the purpose of estimating loss one package can be severed from another is a very different question from the question whether each is a separate subject matter of insurance. Suppose the insurance had been on 70,000lb. of tea contained in packages. As to whether this is a single subject matter of insurance, in *Ralli v. Janson* (6 E. & B. 423) it was held by the Exchequer Chamber that where memorandum goods of the same species shipped in packages are insured, and it is not expressed by distinct valuation or otherwise in the policy that the packages are separately insured, the ordinary memorandum exempts the underwriters from liability for a total loss or destruction of part only (not being general average), if there be no stranding, though one or more entire package or packages be entirely destroyed, or otherwise totally lost, by the specified perils. Any buyer acquainted with the tea trade would say in the present case, "I take 1711, the whole of this number of packages; I find a certain number damaged, and you have practically damaged the value of the whole shipment by a half." The defendants say it is more prejudice to the rest. But a valuer would treat it as real depreciation amounting to the value of one-third, by a part meeting with perils of the sea (Benecke and Stevens on Average, by Phillips, 338, par. 2). It is by reason of the damage to the subject matter of insurance that the whole parcel insured has become of less value. The defendants contend that the subject-matter is divisible. No doubt it is so physically, but not commercially. This was an insurance on a parcel of tea contained in 1700 packages. Suppose an insurance on 400 clocks shipped in pieces—all the wheels in one package, all the faces in another, and so on. Could it be contended, if the package containing all the escapements was destroyed by perils of the sea, that inasmuch as the faces, &c., have a particular commercial value, the whole shipment of clocks was not damaged by perils insured against? The history of the clause in question favours the plaintiff; in *Montoya's case* (sup.) the hides and tobacco were included in one parcel, which is conclusive. [BRETT, J.—And were of different species; the accident happened to one, causing indirect damage to the other. The decision is in your favour.] Yes; the insertion of the word "damaged" is relied on *contra*, but of course that was rendered necessary by the last-mentioned case. The question is not settled in America as Mr. Benjamin contended. (See per Jervis, C.J., in *Ralli v. Janson* (sup.), as to the law of that country. Secondly, it is a strong proposition to say that where the things insured are not dry goods, a part of the policy which refers to dry goods may be regarded. The "mouldy" clause applies only where dry goods are actually harmed in part, and separation is possible. But here it is not practicable to sever one portion from another without injury to the selling value. The tea fell in value from the time of arrival until sale. The underwriters are not, however, liable for the fall of the market, but to arrive at the sum payable the difference must be ascertained between the sound value on arrival, and the damaged value on sale, for delay in sale was directly consequent on the damage.

Cur. adv. vult.

July 7.—The judgment of the court (Bovill, C.J.,

C. P.]

CATOR v. THE GREAT WESTERN INSURANCE COMPANY.

[C. P.]

Keating and Brett, JJ.) was delivered by BOVILL, C.J., who, after stating the facts and points as above, proceeded thus:—The case was argued very elaborately, and with considerable ability, but the plaintiff failed to produce any authority to show that goods which arrived perfectly sound and uninjured could be deemed to be damaged or injured by sea perils. The strongest case in his favour was *Montoya v. The Royal Exchange Insurance Company* (6 Ex. 451), where hides and tobacco having been insured, and shipped in the same vessel, which sustained damage, the sea water had affected the hides and caused them to ferment and decompose, and the stench which was thus created had affected the flavour, and consequently the value, of the tobacco. In that case the tobacco itself was actually injured, and the only question was whether the injury arose proximately from the sea water, and it was held that it did, and that the underwriters were therefore liable for the actual damage to the tobacco; but the present case seems to us to be distinguishable on the ground that here there was no damage whatever to the 1282 packages of tea, which arrived perfectly sound and untouched, and altogether unaffected by the sea water. The insurance is against damage to the goods, and not against loss to the assured otherwise than by reason of damage to the goods themselves. The plaintiffs, however, contended that the whole 1711 packages must be treated as one indivisible and entire subject matter, so that damage by the perils insured against to any part of them would be an injury to the whole, if it effected the value of the whole. It seems to us that this contention is not made out.

A shipment of the kind is not like an entire article, such as a machine, where one part being injured or destroyed by sea perils the machine itself becomes changed in character and value, and comparatively useless. The underwriters insure against damage to the goods by the perils insured against, but they do not, in our opinion, insure against damage by prejudice or suspicion, though such damage or suspicion be reasonable, and be general in fact in business, when there is no damage in fact to the goods themselves; and if this policy were to be so construed it would make them insurers not only against direct damage to the goods insured, but against damage to other goods in the same ship, affecting the credit and thereby the value, of the goods insured, and would create indirect and collateral and consequential liabilities from suspicion and prejudice, which it would be almost impossible for the underwriters to estimate in fixing a premium proportionate to the risk.

In *Duff v. Mackenzie* (3 C. B., N. S., 16), it was held that, under a policy "on master's effects, valued at 100*l.*, free from all average," the insurance must be treated as divisible, and that the master might recover for a total loss of part of his effects, although the whole were included under the general term "effects." So in *Wilkinson v. Hyde* (3 C. B., N. S., 30), where the insurance was for 240*l.*, on goods, so valued "against total loss only," the goods were considered as divisible, and the assured was held entitled to recover for a total loss of part of the goods. The case of *Ralli v. Janson* (6 E. & B. 446), was much relied upon by the defendants; but the decision there turned entirely upon the terms and effect of

the warranty in the memorandum against average, unless general, and it was held that the memorandum was intended to include the whole of the particular species of goods, viz., seed, whether shipped in bulk or in packages, and the decision in that case does not in our opinion, govern the present case.

The insurance here is on 1711 packages, valued at one sum, and if each package had been separately enumerated, it would scarcely have made them more distinct. Even if they had been insured simply as "tea" or as "goods," if they were in fact contained in separate packages, we should still have thought that for the purposes of calculating or ascertaining the extent of the sea damage they would be divisible, and that the plaintiffs could have recovered only in respect of the damage done to those packages which were actually damaged by sea perils. The special terms of the present policy, however, seem to us to be still more favourable for the underwriters than the terms of an ordinary policy. It expressly excludes direct actual damage or injury from dampness or change of flavour, &c., unless caused by actual contact of sea water with the article damaged, occasioned by sea perils, and it could scarcely, therefore, have been intended that the underwriters should be liable for what was not actual damage but mere suspicion, and so indirectly an injury, not to the goods but, to the pecuniary interests of the assured. After providing that in case of partial loss by sea damage to dry goods (which does not include tea), cutlery, or other hardware, the loss shall be ascertained by a separation and sale of the portion only of the contents of the packages so damaged, and not otherwise, the policy goes on to provide that the same practice shall obtain as to all other merchandise *so far as practicable*. These last terms would, in our opinion, include the tea in question, and tend strongly to show that the intention was that the subject matter of the insurance was not to be treated as entire and indivisible. It might well be contended that the language of the policy would seem to indicate that not only each package was to be treated separately, but that even the contents of each package might be separated, so as to confine the loss to the exact portions of tea that were actually damaged by sea perils. The defendants, however, have not relied upon this last construction of the warranty, but have paid into court the full loss upon the 448 packages without attempting to separate the contents of each of these packages.

The special average warranties at different rates on different kinds of goods, the differences of classification and average in this policy, seem also to show that it was never intended that the 1711 packages should be treated as one entire and indivisible subject matter of insurance, and, if not, then there is no practicable division of the packages, except by treating each package as a separate article. The whole shipment consisted of several different kinds or chops of tea, and could it have been successfully contended that if only half the chests in any particular chop had been damaged or lost, and the consecutive numbers of the chests in that chop thereby interfered with, that each chop could be considered as a separate subject matter of insurance, and that the plaintiffs could have recovered for the injury to the reputation, and consequent loss in price, of the rest of the chests in that chop? Or suppose

C. P.]

THE C. M. PALMER; THE LARNAX.

[PRIV. CO.]

the policy had been on 1711 packages of tea at one valuation "by ship or ships," and part had come in one vessel and part in another, could it have been said that sea damage to the packages in one ship, whereby the continuity of the numbers was destroyed, was an injury to the packages in another ship which sustained no damage, and yet there would be an injury by suspicion, to the reputation of the teas, by the numbers not being consecutive, and caused remotely by sea perils?

If such a claim as this could be supported, it might next be contended that the underwriters would be responsible if the reputation and value of sound teas were affected by serious damage to the ship, or to other persons' goods in the same ship which were damaged by sea-water, or for the loss of markets by delay through the perils of navigation. It appears to us that the underwriters insure against actual damage, and do not in any sense guarantee that the goods shall arrive free from suspicion of damage. In like manner a shipowner was held to guarantee only the fitness of his vessel for a cargo of tea, but not that the ship should be free from a suspicion of unfitness for such a cargo: (see *Touss v. Henderson*, 4 Ex. 896.)

Each package of this shipment was separate from the others as if it had contained a different article. Each might and would be subjected to different risks, according to its position and stowage in the vessel, and where the packages are severable they ought to be covered. As far as we are aware, the practice in such cases has been to separate the sound packages of goods from those which are damaged, and to allow the claim for damage upon those only which are actually damaged by the sea perils. That practice is supported by the passages that were cited from Mr. Arnould's valuable work, 3rd edit. 836, and the authorities to which he refers, and Mr. Stevens, in his book upon Average at pp. 157 and 158, clearly considered that a consequential loss upon goods which arrived sound by reason of the breaking of an assortment, was not a loss for which underwriters were responsible, there being no actual damage done to the goods themselves. In our opinion, that is the correct view of the law.

A further point was raised by Mr. Williams at the close of the case as to the fall in the market price after the arrival of the vessel, and the valuation of the damaged teas, and before the actual sale of them, but underwriters have nothing to do with the mode or time of sale, and are not responsible for a fall in the market price; their liability depends on the value of the goods upon arrival, and the defendants have paid into court the full amount for which they are liable upon that footing.

Upon the true construction of the policy, we think the plaintiffs are entitled to recover only in respect of the 449 packages which were actually damaged, and as the amount of that damage has been paid into court, our judgment is in favour of the defendants.

Judgment for defendants.

Attorneys for the plaintiffs, Thomas and Hollans.

Attorneys for the defendants, Field and Roscoe.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Reported by J. F. ANSELL, Esq., Barrister-at-Law.

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

April 30 and May 20, 1873.

(Present: The Right Hons. Sir J. W. COLVILLE, Sir BARNES PEACOCK, Sir MONTAGUE SMITH, and Sir R. P. COLLIER.)

THE C. M. PALMER; THE LARNAX.

Collision—Principal question not decided—Court of appeal—Practice—Riding light.

Where the High Court of Admiralty has given no opinion on a question, which in the opinion of the court of appeal is a vital one in the cause, the court of appeal will decide that question on the evidence before them.

It being the duty of a vessel at anchor to carry a riding light always visible, no such vessel as that of taking the lamp down to be trimmed can be admitted, if the absence of the light brings about a collision.

THIS was an appeal from an interlocutory decree of the High Court of Admiralty in cross causes of damage instituted on behalf of the owners of the barque *Larnax* against the screw steamer *C. M. Palmer* and her owners intervening, and on behalf of the owners of the *C. M. Palmer* against the *Larnax* and her owners intervening.

The *Larnax* was lying at anchor about 9.30 p.m. on 19th Feb. 1873 in the river Thames, about two miles below Gravesend, and, according to the statement made on her behalf, carried a good riding light for some time before, and at the time of the collision.

The *C. M. Palmer* was coming down the river with her lights duly burning, but, the night being dark and hazy, her master determined to come to an anchor, and was rounding to for that purpose, and whilst doing so came into collision with the *Larnax*. According to the evidence produced on behalf of the *C. M. Palmer*, the *Larnax* had no lights exhibited, whilst the *C. M. Palmer* was approaching her, but immediately before the collision a light was seen going up the rigging of the *Larnax*. The engines of the *C. M. Palmer* were stopped and reversed, and the *Larnax* was made out, but it was then too late to prevent the collision.

The learned judge of the Admiralty Court, acting on the advice of the Trinity Masters, by whom he was assisted, pronounced the *C. M. Palmer* alone to blame, on the ground that the master of the *C. M. Palmer* might and ought to have dropped her anchor as soon as he descried the *Larnax*, and gave no decision on the question of lights. No evidence had been given, nor cross-examination taken place; no argument addressed to the court on the question of the duty of the master to drop his anchor under the circumstances; but the main question to which evidence and arguments had been addressed was whether the *Larnax* carried her riding light.

From this decree the owners of the *C. M. Palmer* appealed, on the ground that the main question had not been decided, viz., whether the *Larnax* carried her riding light when the *C. M. Palmer* was rounding to in order to anchor; that the evidence proved that the light was not up; that the omission to let go the anchor of the *C.*

[Priv. Co.]

THE C. M. PALMER; THE LARNAZ.

[Priv. Co.]

M. Palmer was not raised in any way in the court below, nor suggested until the delivery of the judgment in that court; that the letting go of an anchor was in the circumstances impossible, and that the omission to do so did not amount to legal negligence.

The facts are sufficiently set out in the judgment of the Judicial Committee.

Bull, Q.C. and *Clarkson*, for the appellants, submitted that the appellants were entitled to a decision on the main question at issue, and that the evidence clearly showed that there was no riding light on the *Larnaz* till immediately before the collision, when it was too late to take any effectual steps to avoid it; that the absence of the light was the cause of the collision, and the appellants having shown that none was visible, the onus of proof that there was a light was thrown upon the respondents; that anchoring was an impossibility under the circumstances, and that to give a decision on that ground was an error on the part of the Court of Admiralty, as the point had never been so raised as to give an opportunity of discussing the evidence with respect to it.

Mitford, Q.C. and *H. A. Pritchard*, for the respondents.—A steamship is bound to take all means to avoid a vessel at anchor, and if the court finds on the facts that such steps have not been taken, it is justified in coming to a conclusion adverse to the wrongdoer without considering other points. The *C. M. Palmer* could and ought to have cast anchor.

The Girolamo, 5 Hag. Adm. Rep. 173;

The Salvator, 2 W. Rob. 407;

The Bothnia, Lush. 52.

The evidence as it stands, however, clearly shows that the *Larnaz* carried her riding light. Even supposing the light to have been taken down previous to the collision for the purpose of being cleaned, that is a necessary operation, and if a collision occurs in consequence, it is to be treated as an inevitable accident.

Clarkson, in reply.

Cur. adv. vult.

May 20.—Judgment was delivered by SIR MONTAGUE SMITH.—This was a case of a very disastrous collision between a steamer and a sailing vessel, whereby three lives were lost. Cross suits were instituted in the Admiralty Court. The barque *Larnaz*, of 380 tons, was at anchor in the lower part of Gravesend Reach on the night of the 19th Feb. in this year. The screw steamer *C. M. Palmer*, of 628 tons, left London that evening for Newcastleton-Tyne with a cargo of merchandise and a number of passengers. On reaching Gravesend her pilot left her; the night being so unusually dark that her captain thought it unsafe to proceed on her voyage, he determined to come to anchor in Gravesend Reach; and, after passing several vessels at no more speed than was necessary to keep steerage way, was in the act of turning towards the southern shore, with a view to anchoring in what he deemed a vacant place, when he struck the *Larnaz* on the starboard side with the stem of his vessel, whereupon she sank in a few minutes.

The principal controversy in the case was whether or not the *Larnaz* carried a riding light which could not have been seen by an approaching vessel in sufficient time before the collision to enable such vessel to get out of her way; the contention on the part of the *Larnaz* being that she had a bright light from the

time of its becoming dusk, with the exception of two or three minutes, when it had been taken down for the purpose of being trimmed, and that this was half-an-hour before the collision; that on the part of the *Palmer* being that the *Larnaz* had no visible light until one was affixed to her rigging almost immediately before the collision, when the collision had become inevitable. The result of the evidence on the part of the *Palmer* is, in their Lordships' view, this:—That the *Larnaz* herself was seen for the first time at a very short distance, and that when so seen no light was visible in her, and that almost immediately after a light was seen going up into her rigging. That the captain of the steamer upon a vessel ahead being reported gave the order to "stop," and almost immediately afterwards the order "to reverse;" that, although the orders were obeyed, and the engines made many reverse motions, the way of the steamer could not be altogether stopped in time, and the *Larnaz* was cut down by her sharp stem.

The learned judge has given no opinion on the question of light or no light on board the *Larnaz*, but has decided (as their Lordships understand) that, assuming the evidence on this subject on the part of the steamer to be true, nevertheless that she was solely to blame, because her captain, in addition to the precautions of stopping and reversing, did not take the further precaution of immediately dropping his anchor on a vessel ahead being reported. Their Lordships have to observe that this point was not raised during the course of the case, no suggestion being made on the part of the *Larnaz*, either by evidence or cross-examination, or by the speeches of counsel, that such a proceeding would have been proper on the part of the steamer. The suggestion appears to have been made for the first time by the Elder Brethren of the Trinity House, when both cases had been concluded, when the steamer had no opportunity of adducing evidence of facts, or the evidence of experts, or of offering any explanation, or of being heard by counsel on the subject. To dispose of a case on such a ground appears to their Lordships unsatisfactory, and not unattended with hardship.

Their Lordships are advised by their nautical assessors that for the steamer to have dropped her anchor under the circumstance, though it might possibly have averted the collision, was a proceeding of a very doubtful and speculative character, not unattended with risk. Their Lordships are of opinion that on the assumption that the *Larnaz* had no light when first seen, and that the captain of the steamer lost no time on her being seen in giving orders to stop and reverse, he is not proved to have been negligent, because it did not at the instant occur to him to let go his anchor. Their Lordships have further to observe that, even assuming the negligence imputed by the judgment to the captain of the steamer, the barque would in their judgment have been guilty of contributory negligence in not showing a light. It is true that the duty of vessels in motion to keep out of the way of vessels at anchor has been strongly insisted on in many cases, but these cases assume that the vessel at anchor could be seen; if the *Larnaz* could not be seen until closely approached, through her own fault in not exhibiting a light in a night unusually dark, it is difficult to acquit her of negligence, if she is run down by a vessel unaware of her position.

For these reasons their Lordships are of

[PRIV. CO.]

THE AIMO; THE AXELIA.

[PRIV. CO.]

opinion that, assuming the truth of the case on the part of the *Palmer* on the subject of the light, the judgment of the court below is incorrect. If, on the other hand, the case of the *Larnaz* be true, it would undoubtedly be correct; the determination of this question is therefore necessary. Their Lordships are aware of the disadvantages under which their labour in determining matters of fact without an opportunity of seeing and hearing the witnesses, and they regret that they have not the assistance of the finding of the learned judge of the Admiralty Court on this question, which, in their Lordships' view, is a vital one in the case; but they feel called upon to decide it according to the best of their ability in the somewhat unusual character of a court of first instance.

Their Lordships, not without some hesitation, have come to the conclusion that the case of the *Palmer* is the true one. She acted with proper caution in determining to anchor in so dark a night instead of to proceed. She was on the look-out, and (in their Lordships' judgment) keeping a proper look-out, for a safe anchoring-ground; and it appears almost incredible that she should have selected for her anchoring-place almost the spot where the *Larnaz* was lying, if the light of the *Larnaz* had been visible. Her evidence that the *Larnaz* carried no light is not merely of a negative character. It is positive that just before the collision the light of the *Larnaz* was carried or hoisted up. The evidence of the captain is that in rounding towards the Kentish shore in order to anchor, a vessel was reported by the second mate from the top-gallant forecabin in these words, "Vessel nearly ahead with no light;" that he (the captain) saw her at the same time; that he asked the mate, "Can you make out how she is going?" whereupon the mate reported, "There is a riding light just being hoisted up." The captain says that at the same time he saw a "gleam of light" in what he took to be the barque's foredeck, which dipped once above the rail, and appeared to him to be hoisted or carried up above the rail, and a voice sang out, "Steamer ahoy, where are you coming to?" that, on first seeing the ship, he ordered the engines to stop, and almost immediately after to be reversed, in which statement he is confirmed by the engineer. The same account substantially of what happened, and of the words spoken, is given by the first and second mates, and by two able seamen. Unless the inquiries of the captain and the replies to them are a sheer invention, it is proved that a light was being carried or hoisted up into the rigging of the *Larnaz* almost immediately before the collision. But it is almost impossible to suppose the conversation reported a sheer invention, inasmuch as evidence was given by a passenger on board the steamer—a witness apparently unimpeachable—that he heard this very conversation, though he was not in a position to see the light. On board the *Larnaz* two persons only were on deck; an able seaman and a boy of fourteen. They depose that, although the light had been taken down to be trimmed about half an hour before the collision, from that time until the collision it was attached to the fore-rigging, burning brightly; and they are confirmed as to the time when it was taken down by a man named McGregor, who was, however, below at the time of the collision. The evidence of the boy is, indeed, a good deal impeached, he

having admitted on cross-examination that the light had been taken down "just before the collision," although he afterwards explained "just" to mean about half an hour; and it being further proved that he said that the "light was taken down to be cleaned, and was in the act of being put up when the steamer came on to them." Evidence was also given of the captain having said "If it had not been for the boy, it (the accident) never would have occurred." The evidence of the witnesses on board the ship was confirmed by that of a pilot on board the *Europa*, a vessel lying at anchor about a quarter of a mile higher up the river than the *Larnaz*, and which had been passed by the *Palmer*. The pilot says that he had watched the light of the *Larnaz* from 10 minutes before 9 to the time of the collision, and that it was burning all the time. This is undoubtedly cogent evidence; it is subject, however, to the observation that, if the pilot had been watching the light as closely as he represents, he must have noticed its absence for at least two or three minutes when it was admittedly taken down to be cleaned. Evidence is also given of a pilot on board another vessel called the *Hjalmar*, anchored about a cable's length from the *Larnaz*, of his having seen the *Larnaz*'s light a quarter of an hour before the collision; but, inasmuch as he then went below, and did not return on deck till after the collision, his evidence is of little value.

On the whole, their Lordships have come to the conclusion that the evidence preponderates on the side of the *Palmer*. They adopt the conclusion that the light of the *Larnaz* was taken down to be trimmed, that it probably remained down for a longer time than is admitted by the seamen and boy who had charge of it, and that the time of its being taken down has been shifted by them from almost immediately before the collision to half an hour before it.

It is unnecessary to say that it was the bounden duty of a ship lying at anchor where the *Larnaz* was, on so dark a night, to keep a light always visible, and that no such excuse as that of taking down the lamp to be trimmed can be admitted. They are of opinion that the *Palmer*, seeing no light, had reason to suppose that the ground in which she was about to anchor was unoccupied, and that the collision was caused solely by the negligence of the *Larnaz*.

Under these circumstances they will humbly advise Her Majesty that the decrees appealed from be reversed, and the *Larnaz* condemned in the whole of the damages, together with the costs, both in this court and in the court below.

Appeal allowed.

Solicitors for the appellants, Gellatly, Son, and Warton.

Solicitors for the respondent, Pritchard and Sons.

April 24 and 25 and May 20, 1873.

(Present: The Right Hons. Sir J. W. COLVILLE, Sir MONTAGUE E. SMITH, and Sir R. P. COLLIER.)

THE AIMO; THE AXELIA.

Collision—Crossing ships—Close hauled ship—Leaving—Deviation from course—Disabled ship—Inevitable accident—Regulations for preventing collisions at sea, Articles 12, 13, and 19.

When a ship close hauled is bound to keep her

[Priv. Co.]

THE AIMO; THE AMELIA.

[Priv. Co.]

course, luffing as close to the wind as she can without boring head way, is not a deviation within Article 18 of the Regulations for Preventing Collisions at Sea, such as will render her liable for a collision with another vessel, whose duty it is to keep out of her way.

When it is the duty of a ship to keep out of the way of another, but she is unable to do so by reason of being disabled in a former collision, and the other ship, being unaware of her disabled condition, continues her course, under Article 18, a collision ensuing is the result of inevitable accident (c).

These were appeals from a decree of the judge of the High Court of Admiralty in cross causes of damage, instituted on behalf of the owners of the American barque *Amelia*, against the Russian ship *Aimo*, and on behalf of the owners of the *Aimo* against the *Amelia*.

The collision occurred at about a quarter before ten on the night of the 7th Oct. 1872, in the English Channel, about 22 miles S.E. of the Lizard. The wind, at the time of the collision, was S.W. and the weather hazy, with a little rain.

The *Aimo* was sailing close hauled by the wind, on the starboard tack, under all plain sail, heading about S.S.E., and making about five knots an hour. She had a green light exhibited on her starboard side, and a red light on her port side, and both lights were burning brightly, and a good look-out was being kept.

The case on behalf of the appellants was, that whilst the *Aimo* was proceeding under the foregoing circumstances, the red light of the *Amelia*, which vessel was on the port tack, was seen at the distance of about half a mile, bearing about a point on the port bow, that the *Aimo* kept her course on the starboard tack, expecting the *Amelia* to keep out of her way, but that the *Amelia*, instead of doing so, came into collision with the *Aimo*, the starboard side of the *Amelia*, between her main and mizen rigging, coming into contact with the stem of the *Aimo*.

The appellants attributed the collision to the neglect of those on board the *Amelia* to keep the *Amelia* out of the way of the *Aimo*.

The case on behalf of the *Amelia* was, that about an hour and a quarter before the collision with the *Aimo*, she (the *Amelia*) had come into collision with a brig, about 25 miles S.E. of the Lizard, and in consequence of this collision she had lost her bowsprit, jibboom, and stem, and some of her head sails, and had received other serious injuries. She was now heading into land and looking out for the vessel with which she had been in collision, and was proceeding under foresail, lower foretop-sail, and maintop-sail, maintopgallant-sail, and spanker, close hauled on the port tack, and making

from one to two knots an hour headway, and some considerable leeway. Her lights were duly exhibited and burning brightly, and a good look-out was being kept on board her.

In these circumstances, those on board the *Amelia* saw the green light of the Russian ship *Aimo* bearing at first from three to four points on their starboard bow, and about three quarters of a mile off. The *Amelia* kept her course, those on board her watching the light. The light drew nearer, and the two vessels got within about three ships' lengths of each other, and were about to pass, when those on board the *Amelia* observed that the *Aimo* had ported her helm and was coming towards them. They therefore loudly rang their ship's bell and hailed, and put their helm hard a starboard. Notwithstanding, the *Aimo* came with considerable force into collision with the *Amelia*, striking her with the stem on her starboard quarter, between the main and mizen rigging, and doing her considerable damage.

At the hearing in the Admiralty Court, the *Aimo* was charged with improperly changing her course by porting and improperly luffing. The question of fact mainly in dispute was, whether the vessels were green light to green light, or red light to red light, the *Amelia* alleging the former, the *Aimo* the latter. The judgment of the Admiralty Court, after reviewing the facts, was as follows:—

"Sir R. Phillimore.—The court upon the evidence has arrived at a clear conviction that the story told by the *Amelia* is the true story, and that the vessels were mutually visible in the first instance, green light to green light. The court is confirmed in that opinion, derived from perusal of and deliberation upon the evidence, by the strong and decided opinion of the Elder Brethren of the Trinity House. Indeed, the collision, looking to the admitted facts of the case, could have happened in no other way. It was the duty, no doubt, of the port tacked vessel, under the Regulations for the Prevention of Collisions at Sea, to keep out of the way of the starboard tacked vessel, and I have to consider, therefore, having arrived at the conclusion that the vessels were mutually visible, green light to green light, and that the wind was as stated, whether the *Amelia* did obey the regulations in keeping on her course as near as possible to the wind. The Elder Brethren of the Trinity House assure me that she did so, that that was a practical obedience to the rule, and that without any reference to her disabled condition, or any reference to the distance at which the vessels were seen, if they were, as they agree with me in thinking they were, mutually visible green light to green light, it was her duty to keep on as she did. The question is, what caused the collision in this case? and the Trinity Masters are of opinion, and with that opinion I am inclined to agree, that it was caused by the luffing of the starboard tacked vessel. It is very true that the amount of that luffing is very doubtful—whether it was half a point or two points, or something between the two; but they are of opinion that half a point would have sufficed, considering the relative positions of those vessels, to have caused the collision. That being their opinion, I shall find the *Aimo* to blame; but it is not to be omitted, among the reasons which the court think it right to state, that the 12th article, which orders the port tacked vessel to keep out of the way, is mitigated and tempered (other-

(a) The point whether a ship disabled by her own default in a prior collision could set up the defence of inevitable accident was not here raised. It has been raised in a subsequent case, but not decided. It would appear to be a reasonable view that, if the second collision were directly the result of the previous collision, then the prior negligence would prevent the plea of inevitable accident; but if the second collision occurs a sufficient time after the first to have enabled the vessel to have got again to some extent under command, any collision then ensuing through inability to manoeuvre properly would only be indirectly the result of the previous negligence. It is a question of some importance, and is now frequently arising in cases in the Admiralty Court.—ED.

[Priv. Co.]

HENDERSON AND ANOTHER v. THE COMPTON D'ESCOMPTE DE PARIS.

[Priv. Co.]

wise it would be fraught, in the opinion of the Elder Brethren of the Trinity House, and I agree with them, with great danger to navigation) by the 19th article, which provides that 'in obeying and construing these rules, due regard must be had to all dangers of navigation, and due regard must also be had to any special circumstances which may exist in any particular case, rendering a departure from the above rules necessary in order to avoid immediate danger;' and I am of opinion, independently of what I have stated, that the luffing caused this collision; that it was, having regard to the special circumstances of the case, the duty of the starboard tacked vessel to have payed off a little, which would certainly, in the opinion of the Elder Brethren, have prevented the collision altogether. I have, therefore, for the reasons which I have briefly stated, arrived at the conclusion that the port tacked vessel, the *Amelia*, has made out her case, and that the *Aimo*, the starboard tacked vessel, must be pronounced to be alone to blame for this collision."

From this judgment the owners of the *Aimo* appealed, on the ground that there was no such improper luffing on her part as to amount to a deviation from her course, and that the *Amelia* was bound to have taken measures to keep out of the way.

Milward, Q.C. and Clarke, for the appellant.—A vessel has a right to keep close-hauled, and may come as near to the wind as she can get without deviating from her course, so long as she does not lose control: (*The Marmion*, ante, vol. 1, p. 412; 27 L. T. Rep. N. S. 225). The vessel with the wind free is bound to take some means to get out of the way, and if she cannot the collision is at most the result of inevitable accident. If a ship departs from a rule, she takes upon herself the obligation of showing that the course she adopts is calculated to avoid danger of collision: (*The Agra* and *The Elizabeth Jenkins*, 4 Moore P. C. C. N. S. 435; 16 L. T. Rep. N. S. 755, and 2 Mar. Law Cas. O. S. 532.) If the *Aimo* had altered her course to avoid this ship, she would have taken upon herself an improper responsibility.

Butt, Q.C. and W. G. F. Phillimore, for the respondents.—The *Amelia* adopted the best means in her power to keep out of the way, namely, keeping her course. Her disabled condition prevented her doing otherwise. It would have been impossible for her to hear up.

Milward, Q.C. in reply.

Cur. adv. vult.

May 20.—The judgment of the court was delivered by Sir R. P. COLLIER.—This was a case of collision between two sailing vessels, the *Amelia*, an American vessel, and the *Aimo*, a Russian, there being cross suits. The collision took place about twenty miles south of the Lizard, at between ten and eleven at night, in October. The wind was south-west; the *Amelia* was heading NW. by W. or perhaps a point or two more to the north; the *Aimo* SSE. The *Amelia* was on the port tack; the *Aimo* on the starboard tack, close hauled. Under these circumstances, the 12th and 18th articles of the regulations applied. It was the duty of the *Amelia* to keep out of the way of the *Aimo*, of the *Aimo* to keep her course, subject to the qualifications of the 19th article. It appeared that the *Amelia* had shortly before come into collision with another vessel, whereby she had

become in some measure disabled. The *Amelia* kept her course, starboarding her helm when the collision became imminent. The *Aimo* continued on her starboard tack, slightly luffing, and struck the *Amelia* on her starboard side, between the main mast and the stem. The learned judge held that the *Amelia*, by keeping her course, was taking the best means in her power to keep out of the way of the *Aimo*, and that the *Aimo* caused the collision by luffing, and was solely to blame. Having regard to the disabled condition of the *Amelia*, which, as their Lordships are advised by their Nautical Assessors, would have had great difficulty in paying off so as to pass to leeward of the *Aimo*, their Lordships are not prepared to differ from the finding of the learned judge that want of ordinary care and skill is not proved against her.

The question remains whether want of ordinary care and skill is proved against the *Aimo*. She could not know that the *Amelia* was disabled, and had reason to expect that the *Amelia* would keep out of her way; she was, according to uncontradicted evidence, close hauled to the wind; the extent to which she luffed the learned judge treats as doubtful, not appearing to consider it proved that she luffed more than half a point. It is clear that she did not luff so much as to lose her headway, for one of the witnesses for the *Amelia* says that, immediately before the collision her sails were full. This being so, their Lordships are of opinion that she did not deviate from her course, but that she substantially kept it, as she was required to do by the 18th rule, and their view is in accordance with that expressed in the *Marmion*: (1 Asp. Mar. Law Cas. 412.) The learned judge, however, further finds that having regard to special circumstances, such as are contemplated by article 19, it was the duty of the *Aimo* not to have kept her course, strictly speaking, but to have somewhat changed it by paying-off a little. Considering, however, that the *Aimo* could not be aware that the *Amelia* was in a disabled condition, their Lordships are unable to find that any such special circumstances were brought to her knowledge as to fix her with negligence in not adopting this latter manœuvre, and are, therefore, on the whole of opinion that no want of ordinary care and skill is proved against her.

Under these circumstances, they are of opinion that neither vessel has made out its case against the other, and they will humbly advise Her Majesty that the decrees appealed against be reversed, and that both suits be dismissed. Neither party should have his costs, either here or in the court below.

Appeal allowed.

Solicitor for the appellants, Thomas Cooper.
Solicitors for respondents, Pritchard and Sons.

Wednesday, July 16, 1873.

(Present: the Right Hon. Sir JAMES W. COLVILLE, Sir BARNES PEACOCK, Sir MONTAGUE E. SMITH, and Sir ROBERT P. COLLIER.)

HENDERSON AND ANOTHER v. THE COMPTON D'ESCOMPTE DE PARIS.

Bills of lading—Omission of words "or order, or assigns"—Negotiability—Constructive notice—Delivery.

The appellants, a firm in Manchester, purchased goods, shipped from London to Hong Kong,

[Priv. Co.]

HENDERSON AND ANOTHER v. THE COMPTOIR D'ESCOMPTE DE PARIS.

[Priv. Co.]

pledging their own credit, on behalf of L. S. and Co., a firm in London, having a branch at Hong Kong. By the invoice for these goods, L. S. and Co., of Hong Kong, were to realise the goods and to transmit the proceeds to L. S. and Co., in London, for the purpose of meeting their acceptances to the appellants. The bill of lading for the goods was in the usual form, except that the words "or order, or assigns," were omitted. L. S. and Co., at Hong Kong, having received the invoice and bill of lading, indorsed the latter to the respondents, bankers at Hong Kong, as a security for payment of a loan due on a promissory note. On the arrival of the goods they were delivered to the respondents, who then gave up the bill of lading to L. S. and Co., who gave a receipt for it, engaging to pay the proceeds of the goods as collected on account of the promissory note, it being understood that the goods belonged to the respondents until such proceeds were paid. In accordance with the terms of the receipt, L. S. and Co. sold the goods, and remitted the proceeds to the respondents in part payment of the promissory note.

Held (affirming the judgment of the Supreme Court, Hong Kong), that the respondents had, under the circumstances stated, an equitable title to the goods by the indorsement and delivery to them of the bill of lading, and a legal title to the goods, the transaction amounting to an actual delivery of the goods to them.

Held further, that the mere omission of the words "or order, or assigns," in the bill of lading, did not affect the respondents with constructive notice of the trust existing under the arrangements between the appellants and L. S. and Co., and was not such an omission as ought to have excited the suspicion of the respondents, and put them on inquiry as to the said arrangements.

Seem, that in order to make bills of lading negotiable, some such words as "or order, or assigns," ought to be in them.

THIS was an appeal from the Supreme Court, Hong Kong. The facts fully appear in the judgment.

Sir R. Baggallay, Q.C. and Gardiner for the appellants.

Jackson, Q.C. and Everett for the respondents.

Judgment was delivered by Sir ROBERT P. COLLIER.—The facts of this case, about which there is no dispute, may be very shortly stated. A firm in Manchester, Messrs. Henderson and Co., purchased a quantity of goods, pledging their own credit, on behalf of Messrs. Lyall, Still, and Co., who were a firm in London, having a branch at Hong Kong. An arrangement was entered into by the parties, which is embodied in an invoice of these goods, which is as follows: "Invoice of fifty bales, T. cloths, shipped by C. P. Henderson and Co., per Ariel, from London to Hong Kong, and consigned to Messrs. Lyall, Still, and Co., there for realisation, the proceeds to be remitted to Messrs. George Lyall and C. F. Still, London, in first class bank bills, specially to meet their acceptance of C. P. Henderson and Co.'s draft (or any renewal thereof) against the shipment, and bought for account and risk of Messrs. George Lyall and C. F. Still, London." Now, that was the arrangement entered into between the parties, and, as between the parties, their Lordships are of opinion that Messrs. Lyall, Still and Co., of Hong Kong, were under the obligation so to deal with the goods as to realise the proceeds from their sale, and to

transmit those proceeds to Lyall, Still, and Co., in London, for the purpose indicated in this invoice, namely, of meeting their acceptances to Messrs. Henderson. It appears that a bill of lading was made out, which is in the usual form, with this difference, that the words "or order, or assigns" are omitted. It has been argued that, notwithstanding the omission of these words, this bill of lading was a negotiable instrument, and there is some authority at Nisi Prius for that proposition; but, undoubtedly, the general view of the mercantile world has been for some time that, in order to make bills of lading negotiable, some such words as "or order, or assigns" ought to be in them. For the purposes of this case, in the view their Lordships take, it may be assumed that this bill of lading was not a negotiable instrument. The bill of lading and the invoice were received by Messrs. Lyall, Still, and Co. at Hong Kong on the 13th Nov. 1866, and soon after, it does not precisely appear when, this bill of lading was endorsed to the defendants, who are bankers at Hong Kong. It was endorsed for this purpose: it was in order to enable Messrs. Lyall, Still and Co., of Hong Kong, to obtain back from the defendants certain silk documents, as they are described, which were deposited with them to meet two acceptances, one for 22,000 dols. and the other for 22,500 dols. It appears that Lyall, Still, and Co. met the first bill; but when the second bill became due they borrowed a sum of money sufficient to pay it of the bankers, the defendants, on giving their promissory note dated 31st Dec. 1866, and from that time this bill of lading remained with the bankers as a security for their repayment of that loan upon their promissory note. What next occurred, which is material, is stated very fairly in the case of the appellants. They state that the ship *Ariel*, that is the ship carrying these goods, "arrived at Hong Kong early in January 1867, and the said fifty bales were delivered to the respondents on the 7th January 1867; the respondents handed to the said firm of Lyall, Still, and Co. the said bill of lading endorsed to the respondents as aforesaid, receiving from them a receipt as follows:—"Hong Kong, 7th Jan. 1867. Received of the Comptoir d'Escompte de Paris (Hong Kong agency) bill of lading for E. S. C. P. H. 51,100 dols., 50 bales merchandise per *Ariel*, valued at 7625 dols., proceeds of which we hereby engage to pay to the said bank as soon as collected on account of our promissory note for 22,500 dols., dated 21st Dec. (it should be 31st Dec.) 1866, and interest 209 dols. 59 cents. It is at the same time understood that the goods in question are stored for account and belong to the said bank until such proceeds have been paid Lyall, Still, & Co." The case further states that in accordance with the terms of the said receipt, the said firm of Lyall, Still, and Co. sold the said 50 bales for 6837 dols. 50 cents, and remitted the proceeds of the sales of the said bales, amounting to 6837 dols. 50 cents, to the respondents, who applied the same in part satisfaction of the said promissory note for 22,500 dols."

The view of their Lordships is this, that assuming as they do, that the bill of lading was not a negotiable instrument, its endorsement and delivery to the bank gave them only an equitable right to the goods. But in their Lordships' view the transaction, which took place subsequently, amounted to a delivery of these goods to the bank

after the goods had been landed and delivered in pursuance of the bill of lading, and when the bill of lading was *functus officio*. It appears to their Lordships that Lyall, Still, and Co. having received these goods at Hong Kong did deliver the possession of them to the bank. It is true that the bank did not take them to their own warehouses, probably because they had not warehouses convenient to hold them; and the bank did not sell them themselves, probably because it would not be in the way of their business to sell them. They employed Lyall, Still, and Co. to sell them for the bank; but, in their Lordships' opinion, in so selling them Lyall, Still, and Co. acted not as brokers to the bank; and possession was in fact delivered to the bank of the goods by Lyall, Still, and Co., after Lyall, Still, and Co. at Hong Kong had the goods in their possession, and were able so to deliver them. That being so, in their Lordships' opinion, the bank after that delivery notified in themselves a legal and equitable title to the goods. If that be so, the only question which remains is, whether they had actual or constructive notice of the trust which, as between the original parties, Henderson and Co., and Lyall, Still, and Co., in their Lordships' opinion existed? It is conceded that there was no actual notice. The question remains whether there was constructive notice, and it should be—in order to make out the case of the plaintiff—constructive notice at the time of the endorsement of the bill of lading. That constructive notice is attempted to be inferred in this way, and in this way only: It is said that the bill of lading was in an unusual form, omitting the words, "or order, or assigns," that the bank ought to have taken notice of the bill of lading being in that unusual form, that they ought hence to have inferred that it was probable that some such equitable arrangement existed as that which is now proved, and that they ought to have made inquiries on the subject. It does not appear why the words "or order, or assigns" were omitted. There is no evidence whatever that they were omitted intentionally with a view in any way to carry into effect the arrangement between the parties. It is admitted as a fact that Lyall, Still, and Co., at Hong Kong, when they endorsed the bill of lading to the bank, were not aware of this omission. And their Lordships think that it may be assumed, from the conduct of the bank and from other circumstances, that they did not notice it. Their Lordships are further of opinion that the omission of these words, if noticed, was not a circumstance from which the peculiar arrangements subsisting between the appellants and Lyall, Still, and Co., were necessarily to be inferred; nor even one which would necessarily excite the suspicions of a man of business of ordinary prudence, and put him on inquiry into the nature of those arrangements. They cannot, therefore, impute to the respondents, either from their failure, if they did fail, to observe the omission, or from their failure, if they did observe it, to make further inquiry into the title of Lyall, Still, and Co., what in the decided cases is sometimes called "wilful blindness," and sometimes "gross negligence." And they are of opinion that, to hold that the mere absence of these words from the bill of lading, without more, was constructive notice to the bank, would be carrying the doctrine of constructive notice further than it has ever been

carried—certainly much further than it has been the tendency of the courts in recent cases to carry it. Their Lordships are, therefore, of opinion that the decision of the court below was right, and they will humbly advise Her Majesty that that decision be affirmed, and that this appeal be dismissed with costs.

Judgment affirmed.

Solicitors for the appellants: Travers, Smith, and Co.

Solicitors for the respondents: Lyne and Holman.

EXCHEQUER CHAMBER.

Reported by JOHN ROSE, Esq., Barrister-at-Law.

Friday, June 20, 1873.

APPEAL FROM THE COURT OF COMMON PLEAS.

PEARSON v. THE COMMERCIAL UNION ASSURANCE COMPANY.

Policy of insurance against fire—Construction—Vessel lying in docks, with liberty to go into dry dock.

Plaintiff's vessel was insured against fire by the defendants under a policy of insurance expressed to be "on the hull of the steamship Indian Empire, with her tackle, furniture, and stores on board belonging, lying in the Victoria Docks, London, with liberty to go into dry dock and light the boiler fires once or twice during the currency of the policy." There was no dry dock attached to the Victoria Docks, but there was a pontoon dock, called the Thames Graving Dock, attached to the Victoria Docks, in which repairs ordinarily executed in a dry dock could be done, but the vessel was too large to go into it. Preventive measures against fire and appliances for extinguishing it existed both in the Victoria Docks and the Thames Graving Docks. The vessel was towed from the Victoria Docks to the nearest convenient dry dock, her paddle wheels having been taken off in the Victoria Docks in order to enable her to go into the dry dock. After completing her repairs in the dry dock and coming out of it, she was taken up the river Thames to a buoy some few hundred yards above the dry dock, and there moored for ten days in order that her paddle wheels might be replaced. This was according to the ordinary course pursued by ship-builders; but the vessel might have been towed at once to the Victoria Docks, and have had her paddle wheels replaced there, though at a far greater expense. The vessel was burnt at her moorings, during the currency of the policy, and the defendants disputed their liability.

The Court of Common Pleas having given judgment for the defendants:

On appeal, held (affirming the decision below), that the ship was covered by the policy while in the dry dock, and while going to and returning therefrom, but not during the time she was moored in the river for a purpose unconnected with the transit.

APPEAL from a judgment of the Court of Common Pleas for the defendants in an action upon a policy of insurance against fire. The policy was expressed to be "on the hull of the steamship *Indian Empire*, with her tackle, furniture, and stores belonging, lying in the Victoria Docks, London, with liberty to go into dry dock and light boiler fires once or twice during the currency of this policy;" and the currency of the policy was from

[Ex. Ch.]

PEARSON v. THE COMMERCIAL UNION ASSURANCE COMPANY.

[Ex. Ch.]

14th May 1862 to 14th Aug. 1862. The ship was lying in the Victoria Dock, to which there was no dry dock attached; there was a graving dock adjoining, in which ships were lifted by pontoons, so as to be dry, but the ship was too wide to allow her to go into the pontoons. Langley's dry dock, about two miles distant, was the nearest dry dock that could receive the ship conveniently, and for the purpose of entering there, the lower half of her paddle wheels had to be removed. This was done in the Victoria Dock, and the ship was towed to Langley's dock, and she was there repaired. After the repairs were completed the ship was taken to the Government huys on the Thames off Deptford, and moored there for the purpose of replacing her paddle-wheels. The ship lay at the huys for this purpose for ten days, and then whilst still there, was burnt at her moorings. It appeared that it was usual for shipbuilders to replace paddle-wheels in the river, but that it might have been done in the Victoria Dock, although at a much greater expense. It also appeared that the appliances for extinguishing fires were much greater in the Victoria Dock than in the river.

The Court of Common Pleas held that the defendants were not liable under the policy, as it covered the risk of fire only during the time that the ship was in Victoria Dock, the dry dock, and going and returning between the two, and a delay in the river for the above purpose. The case will be found reported below, 15 C. B., N. S., 304; 1 Mar. Law Cas. O. S. 401.

Watkins Williams, Q. C. and *Lanyon* for the plaintiff.—The policy covered the ship in the Victoria Dock, in dry dock, and in going to and returning from the dry dock according to the usual courses. It is found to be usual to replace the paddles of large steamers in the river, therefore any delay or deviation from the direct course for that purpose was not deviation. [BLACKBURN, J.—Do the same principles apply to a fire as to a voyage policy? Suppose, in returning, this vessel had been obstructed by some pagent on the river attracting a crowd of ships, and that she had anchored for a few hours to allow them to disperse, she would surely have still been covered by the policy. KELLY, C.B.—No doubt, if *redeundo*, but to stop ten days for repairs at a buoy is a different case.] Suppose she had waited outside the dock gates for a tug, the period of her stay would have been covered. The question for the jury ought to have been whether the course adopted was the usual customary one. [BLACKBURN, J.—This is not a case of deviation as in a voyage policy. If my goods are insured in a warehouse, and I take them out, they are uncovered while out; but if I bring them back again, the risk is again covered. Not so in a voyage policy, where, if the vessel is once off the voyage, the policy is at an end.] The leave to go to a dry dock covered all necessary incidents of the journey thereto. [KELLY, C.B.—Yes; but not necessarily what is usual. Many things may be usual which were never contemplated by the policy.] He cited *Boulton v. Lupton* (15 C. B., N. S., 113), per Willes, J., p. 144. [BLACKBURN, J.—But that does not apply to this fire policy.]

Benjamin and Cohen for the defendants were not heard.

KELLY, C.B.—No doubt the judgment below must be affirmed. This is an insurance of a

peculiar character. It is not an insurance on a voyage at all; but is against fire for a certain period of time, and while the ship shall be in a proper place or places. The insurance has reference to the place itself. It has been rightly said, nor is it denied by Mr. Watkins Williams, that there are peculiar facilities and safeguards against fire in the Victoria Docks. This is an insurance against fire in the Victoria Dock; and if the policy had stopped there, and the vessel had, for even an hour, and for a lawful purpose, and usual purposes, passed into the Thames, the insurance could not have been effective. But the policy goes further, viz., to insure the vessel against fire, not only in the Victoria Dock, but in dry dock, to which it was known she was about to go in order to make considerable repairs. If it rested there without more, it might be said that the insurance attached only while the vessel was in the Victoria Dock or dry dock; but, inasmuch as common sense and reason tell us that a vessel which is to be insured in the Victoria Dock must necessarily proceed out of it into dry dock, for considerable repairs, it is no great latitude of construction to say that the insurance for three months is to extend to the very short period of time necessary in going from one dock to another, and in returning. But there the insurance ends. Although there is no express insurance against fire while in the Thames, yet, inasmuch as it must have been contemplated by the parties that the vessel should proceed from the Victoria Dock to dry dock, then, in conformity with reason and the intention of the parties, we must say that while the vessel was going from one to the other the insurance would attach, and the underwriter be liable in case of fire under these circumstances. But here the vessel, instead of returning direct and without any unnecessary deviation from dry dock to the Victoria dock, not only went further up the river (to which I do not attach much importance, for there might have been a temporary obstruction to the navigation, as by a crowd of other vessels for instance, rendering it necessary to get out of the way) but, instead of proceeding at once to return—the insurance being *quando, morando et redeundo*,—the persons in charge go further up the river, and moor the vessel for ten days in order to reinstate the paddle-wheels. Therefore they have remained for ten days in the river Thames; and if the parties had contemplated an insurance in the river Thames, they would have expressly insured her “in the Victoria Dock and dry dock, and in the river Thames,” during the period over which the policy extended. There is, however, no such insurance. There are facilities to extinguish fire in the Victoria Dock and all docks, and no such facilities existing for ships lying in the Thames. So it would be to increase the risk and insure the ship while in a place not within the policy, if we said that this insurance would attach to the vessel when moored as she was. It is said that it is usual in cases like this to act as those in charge of this ship have done. It might have been usual to effect a considerable portion of the repairs in the river Thames; but if so, the owners ought to have insured their vessel in the river just as much as in the Victoria and dry dock. A point, too, has been made about the adjoining dock but nothing turns on that. I think the parties must have intended a practicable dry dock, and I do not think they

[ADM.]

THE CITY OF BRUSSELS.

[ADM.]

should be at liberty to go to Portsmouth or other distant locality, but that they were not necessarily limited to the immediately adjoining one. I think this was an insurance against fire in the Victoria Dock, or in any practicable dry dock to which the ship might resort to effect repairs, and in course of passage from the Victoria to the dry dock and back.

MARTIN, B.—I am quite of the same opinion. In my judgment, the doctrine of deviation has nothing to do with the case. This insurance is for a limited time on a vessel being in a certain place. Probably what happened was not in the contemplation of either party at the time of the policy being made, but we must have regard to the policy itself. [His Lordship read the clause in question.] It is a policy on the vessel being in the Victoria Dock and dry dock, and whilst going and returning to and fro.

BLACKBURN, J.—I am of the same opinion. I think probably the only doubt would be as to whether the policy covered the ship during her passage from one dock to another; but I agree with this court even on that point. This, however, is really not a voyage policy at all. The vessel is covered in the Victoria dock and dry dock, and going and returning. When hurt she was lying in the river to do repairs more cheaply than in the Victoria dock; but she was not in a place covered by the policy, and the parties should have insured her there also.

CLEASBY, B.—I am of the same opinion. If we were to give judgment upon what the parties probably contemplated, then the plaintiff might have had good ground for succeeding but for the statement of the fact which seem to show that the difficulty respecting the paddle-wheels did not become apparent until after the execution of the policy.

QUAIN and ARCHIBALD, JJ. concurred.

Judgment affirmed.

Attorney for the plaintiff, Colclough.

Attorneys for the defendant, Thomas and Hollans.

COURT OF ADMIRALTY.

Reported by J. P. ASPIXALL, Esq., Barrister-at-Law.

July 30 and Aug. 2, 1873.

THE CITY OF BRUSSELS.

Taxation of costs—Outport charges—Agent not attorney or proctor—Revision—Separate bills of costs.

The practice, which has hitherto obtained in the High Court of Admiralty, of presenting separate bills of costs for the London proctor's own charges and for the outport or country agency charges, is now objectionable and must be discontinued for the future.

Although a proctor may employ an agent, who is not an attorney or solicitor, to act as clerk pro hac vice for the purpose of collecting evidence in a cause, &c., in the outports, and may lawfully charge for the expenses incurred in respect of such agent as agency charges made by such an agent for doing work which is essentially the work of a proctor, attorney, or solicitor, such as "taking instructions for brief and drawing the same," &c., will not be allowed upon taxation.

THIS was a motion to the court to direct the registrar to review his taxation of the plaintiff's costs in a salvage suit against the *City of Brussels* "by disallowing the outport charges and such portion of the town bill as relates to the work done at the outport."

A cause of salvage was instituted in the name of Henry Charles Coote, a proctor, on behalf of eighty-one of the crew of the steamship *City of Paris* against the steamship *City of Brussels*; both vessels formed part of the Inman Line, and belonged to the port of Liverpool. From affidavits filed in support of the motion it appeared that, although Mr. Coote was acting as proctor in the cause, the greater portion of the work had been actually done by a Mr. Cowl, a notary, but not a proctor, attorney, or solicitor, practising in Liverpool. Mr. Cowl had in the first instance obtained the authority of the crew of the *City of Paris* to institute the suit, had throughout obtained instructions from them, drawn all the necessary documents, and in fact done everything that an attorney or proctor would do in preparing a case for trial, except those things which the practice of the court required should be done by or in the name of Mr. Coote, the proctor. Mr. Cowl was not a clerk of Mr. Coote, nor expressly employed by the latter. The suit resulted in a salvage award of 600*l.* being made by the court to the plaintiffs, and subsequently the plaintiffs' proctor presented in his own name the bills of costs for taxation by the registrar.

By the practice of the Court of Admiralty it is usual in cases which originate in an outport, that is a port other than the port of London, for two bills of costs to be filed by the plaintiffs' proctor; one of his own charges for the conduct of the suit in London; the other of the charges of his agent who has conducted the suit in the outport; these two bills are separately taxed. It has been the practice of some proctors to receive instructions to institute suits from persons, not attorneys, solicitors, or proctors, at different outports, and on the suits being concluded, the proctors have brought in on taxation the charges of those persons for the work done by them in the country; and these charges have been allowed by the registrars, because they have considered the proctors as the only persons whom they could recognize, and the work done at the outport as done by a person acting as the proctor's clerk; if the proctor were compelled to proceed to the outport himself, the costs would be considerably increased. In the bills of costs presented by Mr. Coote, it did not appear that Mr. Cowl acted as clerk to Mr. Coote or as his agent. The outport bill of costs contained charges made by Mr. Cowl for attendances on the plaintiffs before action, attendances on various plaintiffs to obtain their instructions to institute the suit, preparing documents, &c., for counsel's opinion, affidavits to lead warrant, letters to the proctor and to various plaintiffs, for perusing the answers thereto, instructions for preparing petition, for settling the same, obtaining value of the salvaged ship and the names of the plaintiffs, instructions for briefs for the examination of defendants' witnesses, and for the hearing, attendances on various plaintiffs to inform them of progress of the suit, perusing prints of defendants' proofs, various affidavits, and taking copies; these charges were however disallowed by the registrar on taxation, and the amounts claimed

ADM.]

THE CITY OF BRUSSELS.

[ADM.]

and allowed as outport costs by the registrar were as follows :—(a)

	Claimed.	Allowed.
	£ s. d.	£ s. d.
*Drawing brief for examination of defendants' witnesses, forty-five folios	2 5 0	2 0 0
*Two fair copies for counsel	2 2 0	1 6 8
*Two fair copies captain's deposition to accompany	0 5 0	0 5 0
*Attending twelve of plaintiffs, taking instructions for affidavit, engaged a very long time	2 2 0	1 11 0
*Drawing same, sixty-eight folios ..	3 8 0	3 8 0
*Engrossing affidavit	1 14 0	1 14 0
*Attending twelve plaintiffs at various times reading over affidavit and before commissioner to be sworn to affidavit, engaged four hours	1 6 8	1 6 8
*Instructions for affidavit of plaintiffs Loop and Galloway	0 6 8	0 6 8
*Drawing same	0 5 0	0 5 0
*Engrossing five folios	0 2 6	0 2 6
*Attending plaintiffs and reading over affidavit of J. Readhead, and explaining same; reading over their own affidavits, and attending before commissioner with them to be sworn at different times; engaged nearly two hours ..	0 13 4	0 13 4
Two oaths	0 5 0	0 2 6
*Instructions for affidavit of plaintiff Brayton	0 6 8	0 6 8
*Drawing same	0 5 0	0 5 0
*Engrossing	0 2 0	0 2 0
*Attending deponent and reading over, and before commissioner to be sworn	0 6 8	0 6 8
Oath	0 2 6	0 2 6
*Instructions for affidavit to be made by plaintiffs Lewis and Clarke ..	0 6 8	0 6 8
*Drawing same	0 5 0	0 5 0
*Engrossing	0 2 6	0 2 6
*Attending deponent Lewis, reading same over and with him before commissioner to be sworn	0 6 8	0 6 8
Oath	0 2 6	0 2 6
*Subsequently attending deponent Clarke, reading over his affidavit before commissioner to be sworn ..	0 6 8	0 6 8
Oath	0 2 6	0 2 6
*Drawing brief for the hearing, 256 folios	12 16 0	7 10 0
*Two fair copies for counsel	8 12 0	5 0 0
Agency		10 10 0

Milneard, Q.C. (A. Cohen with him) appeared in support of the motion.—Mr. Cowl was acting as an attorney, and not as clerk to Mr. Coote, and hence came under the penal clause of the Stamp Act (33 & 34 Vict. c. 97, s. 59), which provides that if any person, directly or indirectly, acts or practises in any court as an attorney, solicitor, or proctor, without having a certificate (under sect. 62), he shall forfeit 50*l.* and be deemed incapable of maintaining any action for the recovery of any fee or reward. Although no penalty will be pressed for, yet the practice is objectionable, and ought to be stopped by the court. It was clear that Cowl had originally instructed Mr. Coote, and was not his agent, but rather acted as an independent country attorney. The charges allowed were such as could

only be made by an attorney, and having been made by Cowl ought to be disallowed.

Clarkson, contra.—The practice of allowing unqualified persons to act as agents for proctors in outports, arose out of the exclusive position of the proctors before the admission of attorneys to practise in this court, and this practice has never been objected to. Formerly the proctor was the only person recognised, and his country agent stood in the same position whether an attorney or not.

Whatever the position of the agent, the costs as between party and party were allowed only to the proctor, and it could make no difference whether the work had been done by a clerk sent down to the outport by the proctor, or by some one acting at the outport on behalf of the proctor. There can be no advantage in compelling a proctor or attorney to have the whole work done by some one in his own office. [Sir R. PHILLIMORE.—I may, perhaps, be speaking somewhat rashly, but I should say there is not. The question seems to be, whether he was acting as an agent *pro hac vice*. I do not suppose that Mr. Milneard would contend that he might not have any number, provided they were his agents, and did not do what was substantially the duty of the proctor. It might be true enough that the complaining party in this action was not injured at all, and yet it might be that the charges be objects to might be such that the court must necessarily take cognizance of them.] The greater part of outport business necessarily comes, in the first instance, into the hands of the agent; and in this case Mr. Cowl has placed it in the proctor's hands; no costs were allowed for anything done before it was so placed. The proctor, once having the business, might have employed another person to do the work he could not do himself. [Sir R. PHILLIMORE.—But he draws out briefs and charges for them.] They were drawn for the proctor, and he is responsible for them; the place where they were drawn is immaterial. Mr. Cowl was clerk *pro hac vice* for Mr. Coote. [Sir R. PHILLIMORE.—If certain items in the bill are branches of the law, can the court allow those charges, though no injury may be done?] The whole question is rather whether the proctor might employ a clerk *pro hac vice*. [Sir R. PHILLIMORE.—No; it is whether the clerk, employed *pro hac vice*, has a right to act as a solicitor.] Every clerk in a solicitor's office must at some time act as a solicitor. Mr. Cowl had a right to act as a salvage agent in the employ of the proctor.

Milneard, in reply.—There is no question of Mr. Cowl being a clerk *pro hac vice*; he was acting as the attorney, and not Mr. Coote, who was rather in the position of Mr. Cowl's London agent. The case was already in the hands of Mr. Cowl before Mr. Coote had heard of it. If Mr. Cowl was only a clerk it could be proved, and this had not been done.

Cur. adv. vult.

Ang. 2.—Sir R. PHILLIMORE.—In this case objections have been taken to certain items allowed by the registrar in the bill of costs brought in by the proctor of the plaintiffs.

The principle upon which the objections are founded is that a person, who is not a proctor

(a) The items marked with an asterisk were those which were afterwards ordered by the judge to be struck out on the motion.

only be made by an attorney, and having been made by Cowl ought to be disallowed.

Clarkson, contra.—The practice of allowing unqualified persons to act as agents for proctors in outports, arose out of the exclusive position of the proctors before the admission of attorneys to practise in this court, and this practice has never been objected to. Formerly the proctor was the only person recognised, and his country agent stood in the same position whether an attorney or not. Whatever the position of the agent, the costs as between party and party were allowed only to the proctor, and it could make no difference whether the work had been done by a clerk sent down to the outport by the proctor, or by some one acting as the outport on behalf of the proctor. There can be no advantage in compelling a proctor or attorney to have the whole work done by some one in his own office. [Sir R. PHILLIMORE.—I may, perhaps, be speaking somewhat rashly, but I should say there is not. The question seems to be, whether he was acting as an agent *pro hac vice*. I do not suppose that Mr. Milward would contend that he might not have any number, provided they were his agents, and did not do what was substantially the duty of the proctor. It might be true enough that the complaining party in this action was not injured at all, and yet it might be that the charges he objects to might be such that the court must necessarily take cognizance of them.] The greater part of outport business necessarily comes, in the first instance, into the hands of the agent; and in this case Mr. Cowl has placed it in the proctor's hands; no costs were allowed for anything done before it was so placed. The proctor, once having the business, might have employed another person to do the work he could not do himself. [Sir R. PHILLIMORE.—But he draws out briefs and charges for them.] They were drawn for the proctor, and he is responsible for them; the place where they were drawn is immaterial. Mr. Cowl was clerk *pro hac vice* for Mr. Coote. [Sir R. PHILLIMORE.—If certain items in the bill are breaches of the law, can the court allow those charges, though no injury may be done?] The whole question is rather whether the proctor might employ a clerk *pro hac vice*. [Sir R. PHILLIMORE.—No; it is whether the clerk, employed *pro hac vice*, has a right to act as a solicitor.] Every clerk in a solicitor's office must at some time act as a solicitor. Mr. Cowl had a right to act as a salvage agent in the employ of the proctor.

Milward, in reply.—There is no question of Mr. Cowl being a clerk *pro hac vice*; he was acting as the attorney, and not Mr. Coote, who was rather in the position of Mr. Cowl's London agent. The case was already in the hands of Mr. Cowl before Mr. Coote had heard of it. If Mr. Cowl was only a clerk it could be proved, and this had not been done.

Curr. adv. vult.

Aug. 2.—Sir R. PHILLIMORE.—In this case objections have been taken to certain items allowed by the registrar in the bill of costs brought in by the proctor of the plaintiffs.

The principle upon which the objections are founded is that a person, who is not a proctor or solicitor, employed in a case of salvage as agent by the proctor at an outport has been allowed remuneration for doing work which the law does not permit to be done except

[Ann.]

THE EUGENIE (Nos. 6491 & 6524).

[Ann.]

by a proctor or solicitor. Two bills were delivered in by the proctor in this case, one headed, "Plaintiff's Bill," the other, "Outport Charges," but the only person who is responsible and who seeks for payment is the proctor. It is easy to see how the custom of presenting two bills arose under the old practice of the court. In my recollection all causes were conducted by affidavits, and evidence *voir dire* was never taken. It was then just as lawful to employ an unprofessional agent as a solicitor. Moreover, from the nature of these salvage suits, it was necessary to collect evidence from sailors in different outports, and an agent was almost necessarily employed for that purpose. The expenses incident to his employment were allowed on taxation, and gradually, for the sake of supposed convenience, his charge formed the subject of a separate bill, though the agent himself had no *persona standi* before the registrar or the court, and could obtain payment from the proctor only. This practice, however, of separate bills, is upon various grounds now objectionable, and must be discontinued for the future.

The substantial question before me is, whether the proctor is to be allowed to charge in the outport charges bill for certain acts done by his agent. The charges amounted to £71. 8s. 9d., £11. 2s. 4d. were allowed on taxation. No charge was allowed for acts done by the agent before the proctor appeared before the court as conducting the case. But certain acts since he so appeared have been done by the agent for which the proctor claims to be paid, that he may pay his agent for them. The acts, it is alleged, are such as the general policy of the law and several statutes enforcing that policy forbid. I am of opinion that there are in this case certain charges allowed which on the face of them do violate this policy, at the same time I wish it to be understood that I do not pronounce the employment of agents as outports in these cases unlawful, or that they may not act as clerks *pro hac vice* of the proctor, and be remunerated on that ground. An illustration of what I mean is afforded by the case of *The Kerla* (Bro. & Lush, 367), in which the expenses of an agent employed to see foreign witnesses and interpret what they said, was allowed by the court. But the items which I am about to disallow challenge attention as claiming remuneration for acts done not as agent, but substantially so to speak, as proctor or solicitor.

The general charge for agency, 10l. 10s., I think quite proper. The items which I disallow are on the fourth page. "Instructions for brief for examination of defendant's witnesses;" that seems to have been disallowed; then there follows, "Drawing same, forty-five folios, 2l. 2s.; two fair copies for counsel, 2l. 2s.; two fair copies, captain's depositions to accompany, 5s." On the sixth page there is 6s. 8d. allowed for instructions; for affidavit of plaintiff and drawing the same, 5s.; and engrossing, 2s. 6d.; and a little lower down, also drawing instructions and for engrossing; and so again a little lower down I have marked with pencil one 5s. and 1s. 6d.; and on the next page there is drawing instructions for affidavit to be made, 6s. 8d.; drawing same, 5s.; engrossing, 2s. 6d.; and then these are the only considerable reductions in the case in the last page, drawing brief, 256 folios, 12l. 16s.; allowance, 7l. 10s. That I strike out; two fair copies for counsel, 8l. 12s.; 5s. allowed. You will

see marked with pencil those which I have struck out.

The Registrar.—All the charges connected with the brief and the affidavits.

Sir R. PHILLIMORE.—Yes. With regard to the costs, I shall not give costs in this case, I shall make no order as to costs. The practice, I must say, has been uncertain, but has rather appeared to warrant this charge, and I have no doubt that what Mr. Milward said to me was correct, that his clients were only desirous to see that the law was enforced.

Proctor for the plaintiff, Coote.

Solicitors for the defendants, Gregory, Rowcliffe, and Rawle.

July 17 and 29, 1873.

THE EUGENIE (Nos. 6491 & 6524.)

Bottomry—Master's wages, and disbursements—

Priority—Bottomry bond held by owners of cargo. Where a master has given a bottomry bond by which he has bound ship, cargo, and freight, and himself personally for the due execution of the bond, and the proceeds of the ship and freight alone are insufficient to satisfy both the bond and the master's claim for wages and disbursements, but the proceeds of ship, cargo, and freight will cover all, the High Court of Admiralty will marshal the assets, so that the master shall be paid in priority out of ship and freight, leaving the bondholders to fall back upon the cargo for the balance of their claim; the owner of cargo cannot take themselves out of the operation of this rule by becoming holders of the bond.

The Edward Oliver (2 Mar. Law Cas. O. S. 507) followed.

There was a motion on behalf of bottomry bondholders for the payment out of court of the proceeds of the French lugger *Eugénie*, which had been sold by order of court in a case of bottomry (No. 6491), the proceeds whereof had been paid into the registry. The motion was opposed on behalf of the master, who had also instituted a suit (No. 6524) against the *Eugénie* for his wages and disbursements.

The French lugger *Eugénie*, bound on a voyage to Bristol with a cargo of oats consigned and belonging to Messrs. Stoute, Hosegood, and Co. of that city, was forced by stress of weather into the port of St. Malo in a damaged condition; her master, being without funds and credit, was forced to raise money upon bottomry. He borrowed the sum of 2500 francs (100l.), and gave in consideration thereof a bottomry bond by which he undertook to repay the said sum and maritime interest to the amount of 245 francs 75 cents (9l. 18s.) within forty-eight hours after arrival at Bristol for the payment of which sum, "according to the words of the bond, "I bind and hypothecate by custom my said vessel *Eugénie*, her tackle and apparel, as well as her cargo consisting of oats, and I expressly bind my person according to law;" and the bond was to be void in case of total loss by perils of the sea. The *Eugénie* was duly repaired by the aid of this money, and set sail for Bristol, but was again damaged by bad weather, and was compelled to put into the port of Milford, and her master, having no credit, was again compelled to raise money on bottomry. He borrowed the sum of 1200, and gave in consideration thereof

[ADM.]

THE EUGÉNIE (Nos. 6491 & 6524).

[ADM.]

a bottomry bond, by which he undertook to repay the said sum together with 6l. as maritime interest two days after arrival at Bristol, and for the payment thereof he hypothecated the said vessel, her cargo and freight to the lender, and also bound himself personally for the repayment of the said sum; the bond was to be void if the vessel should be totally lost by perils of the sea. The *Eugénie* after being repaired sailed for and duly arrived at Bristol, but the bonds were not paid. The bonds passed from the original lenders through several hands, and were ultimately bought up by the owners of the cargo, who by indorsement became the legal holders. On May 5th 1873, a suit of bottomry was instituted on behalf of Messrs. Stocate, Hosegood, and Co., the legal holders of the bonds and owners of cargo, and on June 10th, the learned judge in default of appearance pronounced for the force and validity of the bonds, and condemned the *Eugénie* in the amount due on the bonds with interest and costs, and ordered the vessel to be appraised and sold at Bristol.

The master of the *Eugénie* had been engaged as master at the rate of 112 francs 50 cents (4l. 10s.) per month, and had served as master from Sept. 11th 1872 to June 11th 1873, and had thus earned as wages 1012 francs 50 cents (40l. 10s.), and had also made disbursements to the amount of 4l. 10s. 8d. To recover these sums a suit of wages and disbursements was instituted in the High Court of Admiralty on June 12th 1873, to which suit an appearance was entered by the bottomry bondholders on June 21st. The bondholders admitted the wages and disbursements to be due, and the judge ordered any questions as to the payment of any amount which might be due to the master should come before the court on motion.

The *Eugénie*, when sold, realised, after the expenses of the sale had been paid, the sum of 102l. Os. 6d. which was paid into court. The cargo was in the hands of the bondholders, and no hail had been required or given for it, nor had the freight been paid into court.

Cohen, for the bondholders, moved for the payment out of court of the amount of the bond. The master claims priority for his wages, but he has bound himself personally by the bonds, and has thereby abandoned his right to priority:

The Williams, Swab, 346;

The Jonathan Goodhue, Swab, 524;

The Salacia, Lush, 345; 7 L. T. Rep. N. S. 440; 1

Mar. Law Cas. O.S. 231.

No doubt *The Edward Oliver* (L. Rep. 1 Adm. and Ecc. 379; 16 L. T. Rep. N. S. 575; 2 Mar. Law Cas. O.S. 507), will be relied upon for the master; but I submit that the principle of that case ought not to be extended, as it will be if the master has priority here. In that case there was a bond upon ship freight and cargo, and the master had bound himself personally; but the owners of cargo had put in bail, and hence the bondholders, being different persons, had security amply sufficient to satisfy their claim after the master had been paid. Dr. Lushington there said, "It is argued for the master that the master's lien on ship and freight for wages and disbursements in general takes precedence of a bottomry bond, and though this lien is liable to be postponed to a bottomry bond, for which the master has made himself personally liable, there is no absolute rule to that effect; that it is a rule made only for the protection of

the bondholder, and consequently does not obtain where the bottomry bondholder does not need such protection. That in this instance the bottomry bonds will certainly be paid in full out of cargo, if not out of ship and freight; that the holders, therefore, have no interest in claiming to be paid out of ship and freight before the master, and that the owners of cargo have no equity to insist upon the holders of the bonds pressing their claims." On this argument the judgment proceeded, for it is further said that from the manifest wrong, which would be created if the master were paid in priority to bondholders to whom he has personally bound himself, springs "the rule by which the master's claim is liable, under these circumstances, to be postponed. But this rule frequently operates with great severity against the master, depriving him of his real remedy for recovering his wages and disbursements, and certainly ought not to be carried beyond the exigency of the case; that it ought not to be extended to circumstances where the bottomry bondholder would not be prejudiced by the master being paid before him." In this case the bondholder is also owner of the cargo, but that fact alters his position to the extent that, if he would be prejudiced by the payment of the master's wages, he ought to have priority according to the principle laid down in *The Edward Oliver*. The proceeds of the ship in the registry are not sufficient to satisfy the bonds without the cargo. [Sir R. PHILLIMORE.—If the assets of ship cargo and freight were marshalled as in *The Edward Oliver*, there would be enough to pay all. Can you by having purchased the bonds get priority over the master, and so avoid the principle laid down in that case?] If the bondholders were deferred to the master, they as owners of cargo would pay his wages and would have to recover them over against the shipowner by action. Why should not the shipowner be made personally liable to the master in the first instance. The principle of *The Edward Oliver* ought not to be extended so as to affect owners of cargo who have not given bail. There it was really held that, inasmuch as the owners of cargo had given bail, the bondholders were secure, and the master might be paid out of ship and freight. It cannot be said that the owners of cargo are bound to pay the wages of the master. By his own act he has deprived himself of his lien as against the bondholders, and he ought not to be allowed to take anything in derogation of his act. The only right he has remaining is a personal action against the shipowner. The principle of *The Edward Oliver*, even if not in my favour, is wrong, being founded upon the fact that security having been given by the owners of cargo, the bondholders could proceed against the bail. Here there is no bail for the bondholders to proceed against. [Sir R. PHILLIMORE.—But you have got the cargo and are safe so far.] Dr. Lushington was wrong, as I submit, in taking the fact of bail having been given into consideration at all. [Sir R. PHILLIMORE.—But he puts the case upon the ground that the master, although contracting with the bondholders, has made no contract with the owners of cargo, and the latter cannot invoke a rule made only for the protection of bondholders.] That is a very narrow ground and ought not to be extended. Where the owners of cargo and bondholders are the same person the case is not applicable, and by pur-

[ADM.]

THE EUGENIE (Nos. 6491 & 6524).

[ADM.]

chasing the bond owners of cargo can take themselves out of the rule.

Clarkson, for the master.—The master, in giving the bond, had no interest in the money advanced. The ship, cargo, and freight are the principal, and he is only surety. Nothing goes into his pocket, and no interest passes to him. That is the principle underlying the decision in *The Edward Oliver*. The only distinction between the two cases is, that here the owner of cargo has bought the bond. In *The Edward Oliver* the owners of cargo had to pay the bond; and here also, by having bought it up, they will have paid it; practically the same thing in result. The master bound the cargo, in the exercise of his right as agent for the owners of cargo, and they cannot now come forward in their character of bondholders and refuse to allow him to recover his wages. The master's interest was never in any way involved, and he bound himself only as surety for the owner, and not personally as for his own debt.

Cohen, in reply.—If for the purposes of the ship, ship and cargo are hypothecated, then the owners of cargo have a right of action against the owner of the ship if they have to pay (*Duncan v. Benson*, 1 Ex. 537; 3 Ex. 644); this shows that the theory about principal and surety is wrong; the cargo is never the principal in such a case. The master acts only as agent for the shipowner in giving the bond. If the argument for the master be good, the owners of cargo must pay his wages, and this is unjust. [Sir R. PHILLIMORE.—Your argument is, that the owners of cargo, by buying up the bond, have deprived the master of his right to enforce his lien, because *The Edward Oliver* decided that the owners of cargo are not obliged to pay the master's wages, although the assets may be marshalled so as to satisfy them out of the ship and freight, provided there is any cargo to satisfy the bond; whilst here there is practically no cargo to proceed against.] There is my contention. By buying up the bonds, the owners of cargo have placed themselves in the position of creditors of a bankrupt firm who have bought up from the holders bills accepted by the firm; they acquire the rights of the holders, and the additional security, without harming their former position.

Our adv. vult.

July 29.—Sir R. PHILLIMORE.—I have taken some time to consider this case, in which I have pronounced for the validity of the bottomry bonds. They are on ship, cargo, and freight; the ship has been sold; the proceeds are insufficient to cover the bonds; the net proceeds being 76*l.* 16*s.* 5*d.*; the bonds are for 236*l.* The master has instituted a suit for wages for 250*l.* The master has signed both the bonds, and made himself personally liable for them. Nevertheless, under the authority of the decision in *The Edward Oliver* (*ubi sup.*), as the proceeds of the ship and cargo would be sufficient to pay his wages and the bonds, the court might so marshal the effects as to do justice to both parties.

In *The Edward Oliver* the court said: "This is the first time the point has been raised. The general principle is clear. If a master by the terms of the bottomry bond has bound himself, as well as ship and freight, for the payment of the bond, it would be manifestly wrong that in defiance of his own contract he should not only not pay the bond himself, but obtain out of the

proceeds of the ship and freight payment of his own claims against the owners, leaving the bottomry bondholders unpaid. Hence the rule by which the master's claim is liable, under these circumstances, to be postponed. But this rule frequently operates with great severity against the master, depriving him of his real remedy for recovering his wages and disbursements, and certainly ought not to be carried beyond the exigency of the case; that is, ought not to be extended to circumstances where the bottomry bondholder would not be prejudiced by the master being paid before him. I see no reason why the owners of the cargo should be benefitted at the expense of the master. For the master, though he may have bound himself for the payment of the bond to the holders thereof, has made no such contract with the owners of cargo, and they are not entitled to invoke a rule made only for the protection of the bondholder. The court will therefore pronounce the proceeds of the ship and freight to be first applied in payment of the master's claim for wages and disbursements."

In the case before me, the owner of the cargo has bought up the bonds apparently with a view of taking this case out of the application of the rule in *The Edward Oliver*. Moreover, it is urged that in *The Edward Oliver* the owner of the cargo had given bail, which they have not done in this case. This does not appear to me to affect the principle on which I must decide.

It is said though that it is hard that the owners of the cargo should pay the wages of the master, who may bring an action at common law against the shipowner. But I am unable to distinguish this case from *The Edward Oliver*, and as far as general equity is concerned, I think it is in favour of the master's claim. The cargo owners may recover against the shipowner (*Duncan v. Benson*, 1 Ex. 537; 3 Ex. 644), and it is by the skill and exertions of the master that the ship has been safely navigated and the cargo brought to its destination. The bonds are somewhat curiously worded, but this circumstance does not affect the principle applicable to the case. The money is not raised for the benefit of the master, but of the ship, freight, and cargo—they are the principals, he is the surety. I do not see why the circumstance that the owner of the cargo has purchased the bond should put him in a better condition than any other purchaser.

I shall follow *The Edward Oliver*, and decree as prayed by the master.(a)

Solicitors for the bondholders, *Fletcher and Sumner*.

Solicitors for the master, *Clarkson, Son, and Greenwell*.

(a) The decree, as entered in the minute book in the case of wages, was as follows:—"The judge having maturely deliberated, pronounced that the sum of 48*l.* 1*s.* 4*d.* is due to the plaintiff for wages and disbursements, together with costs, and he directed that the said sum and costs be paid out of the proceeds of the vessel *Eugenie* and freight, in priority over the claim of the plaintiff in cause No. 6491, and he further ordered that the defendants, the owners of the cargo lately taken on board the said vessel *Eugenie*, do forthwith pay into court the freight due on the said cargo."

AMERICAN REFS.]

W. H. WOLF v. THE SCOW SULT.

[AMERICAN REFS.]

AMERICAN REPORTS.

Collected by J. F. ASHFALL, Esq., Barrister-at-Law.

UNITED STATES DISTRICT COURT IN
ADMIRALTY.—EASTERN DISTRICT OF
WISCONSIN.(a)

Nov. 1872.

W. H. WOLF v. THE SCOW SULT.

*Necessaries—Mortgage of ship—Priority—Lien—**Right to proceed in rem—Ship in home port—**Attachment of lien for necessities.**A right to proceed in rem may exist, although there*

(a) Although it is becoming a much more common practice in our courts to cite American decisions than it was a few years back, still it frequently happens that our judges in the Superior Courts are not very willing to accept the decisions of American courts as authorities on questions of law argued before them, with one notable exception, namely, the decisions of the Supreme Court of the United States. The reason for this hesitancy is apparent. In England there is a very prevalent notion that almost all the English judges in the United States, except those of the Supreme Court, are elected by the people for a term of years only. This, in the opinion of the English judges and lawyers, is calculated to diminish the authority of their decisions, on the ground that a judge, the tenure of whose office depends upon the will of an electoral body, cannot be free from extraneous influences; political pressure can be brought to bear upon him, and, it is to be feared, pretenses of even a more demoralizing nature. This is not only the opinion of Englishmen but of many Americans of the highest intellect. Alexander Hamilton, whose name is well known throughout the United States, writing in the *Federalist*, says, "The standard of good behavior, for continuance in office of the judicial magistracy, is certainly one of the most valuable improvements in the practice of government. . . . Nothing can contribute so much to its firmness and independence as permanency in office. . . . And next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support." In Story's Commentaries (No. 1636) this independence is pointed out with special commendation. From these considerations it is evident that wherever judges are appointed by an executive to hold their offices during good behaviour, their decisions are entitled to be treated with respect and as of authority, so long as there are no other circumstances, such as an undeveloped system of jurisprudence or lack of means of acquiring knowledge of the law, to detract from the value of those decisions. In a country like the United States public opinion is likely to secure the appointment of judges from amongst those men best qualified for their posts, wherever their tenure of office is permanent. In considering, therefore, what decisions in courts of the United States are to be treated as of authority in this country, without question and without the necessity of examining minutely the reasons given for such decisions, it may be taken as a rule that those courts whose judges are appointed during good behaviour are entitled to the most weight in this country. We have no wish to say, however, that there may not be judges in the United States, who are elected periodically to their offices, whose opinions are not most valuable; but considering the enormous number of State courts with elected judges, and the unfortunate instances of the behaviour of judges of those courts in the administration of the law, it is impossible for lawyers in this country not to draw a distinction between the two classes of judges. Another very prevalent idea in this country is that the Federal courts have power to deal only with constitutional questions or points of law connected in some way with treaties or statutes. Unfortunately but little is known in this country of the constitution of the various courts in the United States, and it is proposed to give a short notice of those courts which are, according to the rule stated, entitled to be treated with the utmost respect in this country. It would be a difficult task to deal minutely with their jurisdiction; but still, with a view of showing that almost every question that can come before our Superior Courts is also within the jurisdiction of such

may be no maritime lien upon the res against which the claim is made.

There is no maritime lien for necessities supplied to a ship in her home port, and yet by the United

courts as we have mentioned, it may be useful to point out in a general way the nature of these powers.

The courts in the United States are composed of two separate and distinct branches, frequently exercising the same jurisdiction over the same area. The first are the Federal or national courts, which derive their authority from the constitution of the United States, and have jurisdiction in certain matters over the whole of the States forming the United States; the second are the State courts, having a separate existence in each several State, depending upon the constitution of each State. The judges of the Federal courts are all appointed during good behaviour by the President, with the consent of Congress. The judges of the State courts are, as a rule, elected either by the people or the assemblies for various terms. There are, however, seven exceptions. In New Hampshire, Massachusetts, Delaware, and Florida, they are appointed during good behaviour; in Rhode Island, when appointed, they are removable on a vote of the majority of both Houses of Assembly; in Georgia they are appointed by the governor, but are removable on the address of both Houses of Assembly, or on impeachment and conviction; in the district of Columbia, the seat of government of the United States, they are appointed by the President of the United States during good behaviour; the courts of this last district are rather Federal than State courts. The State courts have jurisdiction in suits of every nature except where their jurisdiction is taken away by express enactment of the United States Legislature. The jurisdiction of the Federal courts is defined by various enactments of the United States Legislature, and, as it is rather with these latter courts that the present notice is concerned, from the nature of their constitution, an attempt will be made to show over what questions their power extends.

By the Constitution of the United States, Art. III. s. 1, the judicial power of the United States, that is, of the Federal courts "shall be vested in one Supreme Court, and in such inferior courts as the Congress may, from time to time, ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour." By sect. 2, "The judicial power shall extend to all cases in law and equity arising under the constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States, between a State and citizens of another State, between citizens of different States, between citizens of the same State claiming lands under grants from different States, and between a State or the citizens thereof, and foreign States, citizens, or subjects. In all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as Congress shall make." By Art. XI, amending the Constitution, "the judicial power of the United States shall not be considered to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State." Under the powers thus given by the Constitution, Congress constituted three courts: the Supreme Court named in the Constitution, and certain inferior courts, the circuit courts, and district courts. The Supreme Court has had a varying number of judges, but by an Act passed on the 10th April 1869 (41st Congress, sect. 1, c. 22), s. 1, it now consists of a Chief Justice and eight associate justices, any six to form a quorum. The circuit courts for the different districts, formerly, under the Judiciary Act 1789 (c. 22, s. 1), and Acts passed in 1793 (c. 22, s. 1), and in 1802 (c. 31, s. 4), consisted of a justice of the Supreme Court and the district judge of the district, the judgment of the court being in accordance with that of the justice of the Supreme Court; considerable doubt existed at one

Superior Courts is also within the jurisdiction of such

States' rules of practice for Courts of Admiralty the material men may proceed in rem against the ship. Semble, that the lien of material men for necessities supplied to a ship in her home port—that is,

their right to be paid out of the res—attaches only on the seizure of the ship under admiralty process.

Mortgages have no maritime lien upon a ship upon

time as to whether Congress had power to make the justices of the Supreme Court act as circuit judges, and as to whether they ought not to appoint circuit judges: (see *Stuart v. Laird*, 1 Cranch Rep. 209; 1 Cond. 316.) Now, however, by the above-mentioned Act of the 10th April 1869, s. 2, a circuit judge has been appointed for each of the nine judicial circuits, with the powers of a justice of the Supreme Court within his circuit; and circuit courts are to be held by the justice of the Supreme Court, or by the circuit judge, or by the district judge sitting alone; or by the justice of the Supreme Court and the circuit judge sitting together, the justice of the Supreme Court presiding; or in the event of the absence of either of them, the other (who shall preside) and the district judge; and (sect. 4) it is the duty of the justice of the Supreme Court to attend at least one term of the circuit court in each district of his circuit during every period of two years. The circuit of each justice of the Supreme Court and each circuit judge, extends over several districts. The district courts are held by one district judge for each district, who is compelled to reside in the district for which he is appointed; (Judiciary Act 1789, c. 20, s. 3.) These districts consist either of the whole of a State, or of parts of a State divided into Northern, Southern, Eastern, and Western districts, as the case may be; and there are district courts having jurisdiction over every State of the Union. Here then there is a complete system of courts whose judges are appointed by the highest authority of the United States, and hold their offices apart from popular will. It only remains to show that these courts have jurisdiction in all matters which come before our courts in order to prove that, being competent to deal and dealing with all questions arising in a commercial country bearing an intimate resemblance to ours in its laws and customs, their decisions are entitled to respect at our hands.

It will, perhaps, be more convenient to deal with the lowest court first, and, in so doing, we shall only deal with the civil jurisdiction, omitting the criminal as apart from our subject. The district courts "have exclusive original cognizance of all civil cases of Admiralty and maritime jurisdiction, including all seizures under laws of import, navigation, or trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burden, within their respective districts, as well as upon the high seas, saving to enforce in all cases the right of a common law remedy, where the common law is competent to give it; and shall also have exclusive original cognizance of all seizures on land, or other waters than as aforesaid made, and of all suits for penalties incurred under laws of the United States. And shall also have cognizance concurrent with the courts of the several States, or the circuit courts, as the case may be, of all cases where an alien sues for a tort only in violation of the laws of nations, or a treaty of the United States. And shall also have cognizance, concurrent as last mentioned, of all suits at common law where the United States sue, and the matter in dispute amounts, exclusive of costs, to the sum of 100 dollars. And shall also have jurisdiction exclusively of the courts of the several States, of all suits against consuls or vice-consuls." (Judiciary Act 1789, c. 20, s. 8.) They have also an inherent jurisdiction in all matters of prize and capture at sea: (*Oliver v. Simpson*, 2 Pet. 444; *Bingham v. United States*, 19 Fed. 15; *The Amiable Nancy*, 3 Wheaton, 540; *The Emulous*, 1 Gallison, 563, 575), as well as by statute (Act of 1812, c. 107, s. 6; both on the high seas and inland waters (Act of 1818, c. 88, s. 7); and in cases of quasi admiralty jurisdiction arising in the inland lakes of the United States they may exercise the ordinary admiralty jurisdiction (Act of 1845, c. 20). The circuit courts have original cognizance concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars; and the United States are plaintiffs or petitioners; or an alien is a party, or the suit is between the citizen of the State where the suit is brought, and the citizen of another State, and "if a suit be commenced in any State court

against an alien, or by a citizen of the State in which the suit is brought against a citizen of another State, and the matter in dispute exceeds the sum of 500 dollars, exclusive of costs, to be made to appear to the satisfaction of the court," the defendant may by petition to the State Court have the cause removed into the district court (Judiciary Act 1789, s. 12), and this removal is of right (*Clorian v. Longest*, 16 Peters, 97, 104); similarly, any cause where citizens of the same State claim land under grants from different States may be removed into the circuit court; (Judiciary Act 1789, s. 12). The circuit courts have also cognizance in cases of patents and copyright; (Act of 1819, c. 19; Act of 1836, c. 357, s. 17; Act of 1842, c. 203, s. 5.) The circuit courts have also appellate jurisdiction from the district courts. Final decrees and judgments in civil actions in a district court, where the matter in dispute exceeds the sum or value of 50 dollars, exclusive of costs, may be re-examined and reversed or affirmed in a circuit court held in the same district upon a writ of error, but there can be no reversal on a writ of error for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court, or such a plea to a petition or bill in equity, as is the nature of a demurrer, or for an error in fact; (Judiciary Act 1789, c. 20, s. 22.) From final decrees of a district court in cases of admiralty and maritime jurisdiction, when the matter in dispute exceeds the sum or value of 300 dollars, exclusive of costs, there is an appeal to the next circuit court held in such district (Judiciary Act 1789, c. 20, s. 21), and also an appeal from all final judgments and decrees in any of the district courts where the matter in dispute exceeds the sum or value of 50 dollars to the next circuit court held in the district (Act of 1843, c. 40). The original jurisdiction of the Supreme Court has already been stated. It has, moreover, exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens, and except also between a State and citizens of other States, or aliens, in which latter case it has original but not exclusive jurisdiction; and has exclusive jurisdiction of such suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have or exercise consistently with the law of nations; and original, but not exclusive jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul or vice-consul, shall be a party; (Judiciary Act 1789, c. 20, s. 13.) The Supreme Court, moreover, has power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction; (See *United States v. Peters*, 3 Dallas, 121; 1 Cond. 69; *Bonnie v. Schooner James and Catherine*, Baldwin, 544, 563); and writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States; (Judiciary Act 1789, c. 20, s. 13.) The appellate jurisdiction has already been noticed in Article 3 of the Constitution before set out, and the way in which it is exercised is prescribed by Act of Congress. It has appellate jurisdiction from the circuit courts and from the courts of the several States in certain cases; (Judiciary Act 1789, c. 20, s. 13.) Final judgments and decrees in civil actions and suits in equity, in a circuit court, brought there by original process or removed there, from courts of the several States, or removed there by appeal from a district court, where the sum in dispute exceeds 2000 dollars, may, upon a writ of error, be re-examined and reversed or affirmed in the Supreme Court, subject to the same limitations as writs of error in the circuit courts (Judiciary Act 1789, c. 20, s. 22), and writs of error also lie to the Supreme Court from all judgments of a circuit court in cases brought there by writs of error from the district courts with the same limitations; (Act of 1840, c. 43, s. 3). From all final judgments and decrees rendered, or to be rendered in any circuit court or in any district court acting as a circuit court in any cases of equity, of admiralty and maritime jurisdiction, and of prize or no prize, where the matter in dispute, exclusive of costs, exceeds the sum or value of 2000 dollars, an appeal is

AMERICAN REPS.]

W. H. WOLF v. THE SCOW SELL.

[AMERICAN REPS.]

which they hold a mortgage; and, according to United States' law, no remedy against the ship in rem in the admiralty courts, but may appear as respondents in a suit in rem, and set up their mortgage as the conditional owners of the ship, and claim that their mortgage is a legal lien on the ship prior in date to the attachment under the monition in a suit by material men for necessities supplied in a home port, and also prior to the contract for the supply of the necessities.

Where mortgages know that repairs are being made on, and necessities supplied to, a ship on which they hold a mortgage, whereby she is made a more valuable security, and the material men execute the repairs, &c., with a knowledge of the mortgage, but relying on their right to proceed in rem against the ship, the parties are entitled, upon principles of equity, to be placed upon an equality as to the distribution of the proceeds of sale of the ship. (b)

THIS WAS A CAUSE OF NECESSARIES INSTITUTED IN REM

allowed to the Supreme Court: (Act of 1803, c. 40, s. 2.) An appeal or writ of error lies to the Supreme Court from the circuit courts in copyright and patent cases (Act of 1819, c. 19; Act of 1836, c. 357, s. 17); an appeal lies in cases of *habeas corpus*: (Act of 1842, c. 357.) From the final decree or judgment in any suit in the highest court of law or equity in a State in which the decision in the suit could be had, where is drawn in question the validity of a treaty, a statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any State on the ground of their being repugnant to the constitution, treaties and laws of the United States, and the decision is in favour of such their validity; or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision is against the title, right, privilege or exemption, especially set up by either party, a writ of error lies to the Supreme Court: (Judiciary Act 1789, s. 20, s. 25.)

We have now set out the jurisdiction of the several Federal courts so far as is necessary for our present purpose, and in doing so have endeavored for the sake of greater accuracy to follow the words of the various Acts conferring that jurisdiction. The jurisdiction of the State courts in all civil matters, save such as are expressly excepted, is concurrent and co-extensive with that of the Federal courts. A perusal of the above statement will be sufficient, we think, to show that there exist in the United States a number of courts which possess jurisdiction over every matter—bankruptcy, divorce, and probate only excepted—that can come before our own courts, and which possess those qualifications which confer upon the judgments of our courts the authority universally yielded to them. When it is remembered that the Federal courts have jurisdiction in all cases arising between citizens of different States, it will be seen at once that almost every question of law may arise, and be decided by the Federal courts. The opinions, then, of the judges of these courts may be accepted in this country, not as binding it is true, but as of the highest authority, and the same may be said also of the judges of those few States we have before enumerated, making allowance for the fact that the better lawyers would naturally be chosen for the Federal courts. It is not in any way our intention to depreciate the decisions of the State courts; but our object has rather been to point out, as far as our limited space would allow, the value of, and wide field covered by, the decisions of the Federal courts, about which there is little accurate knowledge in this country.—Ed.]

(b) The doctrine then there can be no right to proceed in rem unless there be a maritime lien in rem had by an ardent supporter; no less has it been contended that where there is a lien given, no matter how, there ought to be a proceeding in rem to enforce it. This question was very ably discussed in an article in that admirable periodical, *The American Law Review*, for Oct. 1872,

in the United States District Court in Admiralty against the *Scow Sell*. An appearance was entered on behalf of the mortgagees of the vessel. The facts are sufficiently set out in the judgment.

Markham for libellants.

Eismous and Hamilton for respondent.

Opinion of the court by MILLER, J.: The libellants are shipbuilders and proprietors of dry docks in the city of Milwaukee, and as such made necessary repairs upon the *Scow Sell*, a vessel owned in said city. This libel is brought to recover the amount of the repairs and supplies. The owner of the vessel not appearing, Osald Torrison, a mortgagee was allowed by the court to appear as a claimant and answer the libel. The answer alleges that the libellants have no maritime lien upon the vessel, and no lawful right to bring or maintain their libel, the said vessel being owned at the port of Milwaukee by a resident of the said city, and that the repairs and materials were performed and furnished in said city at the instance and request of the owner of the vessel. The respondent further alleges and propounds that one Patrick Hoyer, by

under the head of "Admiralty Rule XII," which is cited in the judgment of the present case. It was there contended that if a material man has by an act of Legislature acquired a lien for necessities supplied, he has a right to enforce that lien through the admiralty process; hence that where a State Legislature has given a material man such a lien upon a domestic ship, the Admiralty is bound to enforce that lien. It must be remembered, however, in discussing this question that Congress has reserved to itself the power of legislating on commercial questions; and it is, to say the least, questionable whether a State Legislature can create what is ordinarily understood by a "maritime lien," that is, a right to attach the *res* for a debt, and to enforce payment out of it in priority to other claims. The State may give power to attach the *res*, or rather if the admiralty forms permit, the *res* may be attached as on a maritime contract; but to give priority over other claims is to affect commercial relations, and to interfere with the rights of Congress. It would seem that the *American Law Review* has scarcely apprehended the distinction between maritime liens and other liens, which, although giving a right to attach the *res* as security, do not affect priority of payment. If a State statute gave in express terms a "maritime lien" upon domestic ships, it is possible that it might be held to be enforceable as such in an Admiralty Court: (see *The Planter*, 7 Peter's, U.S. Sup. Ct. Rep. 324), but even this is doubtful. But where the local statute gives only a lien, a mere right to proceed in rem against a ship, it cannot be said that it gives a maritime lien with all its attendant consequences. A maritime lien and a proceeding in rem are no longer equivalent terms, despite what was said in *The Bold Buccleugh* (7 Moore F.C.C. 284), which was decided at a time when the English Admiralty had jurisdiction to proceed in rem only in cases where there already existed a maritime lien. Now that the jurisdiction has been extended, proceedings in rem may be instituted by material men against British ships or by mortgagees: (3 & 4 Vict. c. 65, s. 6; 24 Vict. c. 10, ss. 5, 10, 35), yet in neither case is there a maritime lien conferred: (*The Pacific*, B. & L. 243; *The Two Elms*, 1 Asp. Mar. Law Cas. 40, 308.) It would seem more correct to conclude that a local statute giving a right to proceed in rem does not necessarily create a lien, or oblige an Admiralty Court to entertain a suit by a person having the right, but rather that the lien created by the local statute, unless expressly enacted to be a maritime lien, is to be applied by the Admiralty Courts only to enable the creditor to enforce his right against the ship whilst remaining in the hands of the owners, on whom orders the supplies are furnished; in other words, the lien attaches only on the commencement of the Admiralty process, and any prior claim against the *res* will take precedence of the claim of the material men, unless circumstances show that the prior claimant knowingly allowed the value of the ship to be increased and then seized her.—Ed.

a mortgage dated 23rd Dec. 1869, conveyed said vessel to him to secure a portion of the purchase price of the vessel, and that the mortgage was recorded in the office of the collector of customs in the city of Milwaukee on the 24th of the same month of December. He claims title to said vessel paramount to the claim of the libellants. The facts pleaded are not disputed.

A maritime lien was considered the foundation of proceedings *in rem* when admiralty and maritime jurisdiction was conferred upon the federal courts. Such proceeding was to make perfect a right inchoate from the moment the lien attached. When a maritime lien existed, a proceeding *in rem* was the proper course to carry it into effect. An Act of Congress, approved 29th Sept. 1789, entitled "An Act to regulate process in the courts of the United States" (1 Statutes at Large, 93) directed that the forms and modes of proceeding in causes of Admiralty and maritime jurisdiction shall be according to the course of the civil law. By the Act of 8th May, 1792 (1 Statutes at Large, 275), "the forms and modes of proceeding are to be according to the principles, rules, and usages which belong to the courts of admiralty in contradistinction from courts of common law, except so far as may have been provided for by the Act to establish the judicial courts of the United States, subject however to such alterations and additions as the said courts respectively shall in their discretion deem expedient, or to such regulations as the Supreme Court of the United States shall think proper from time to time by rule to prescribe to any circuit or district court concerning the same." The power here conferred on the Supreme Court was enlarged by an Act of Congress, approved 23rd Aug., 1842 (5 Statutes at Large, 317, sect. 4). Pursuant to the authority of these two Acts of Congress, the Supreme Court of the United States, at the term of Jan. 1842, adopted rules of practice for the courts of admiralty; one of these rules is this rule 12: "In all suits by material men for supplies or repairs or other necessities for a foreign vessel or ship, or for a ship in a foreign port, the libellant may proceed against the ship and freight *in rem*, or against the master or the owner alone *in personam*. And the like proceeding *in rem* shall apply to cases of domestic ships where, by the local law, a lien is given to material men for supplies, repairs, or other necessities." At the December term of the Supreme Court, 1858, the said 12th rule of practice was repealed, and the following rule was substituted in its place: "In all suits by material men for supplies or repairs, or other necessities, for a foreign ship or for a ship in a foreign port, the libellant may proceed against the ship and freight *in rem*, or against the master or owner alone *in personam*. And the like proceeding *in personam*, but not *in rem* shall apply to cases of domestic ships, for supplies, repairs, or other necessities." If this rule had not been repealed nor modified, these libellants could not maintain this libel *in rem*. But at the December term of the Supreme Court of 1871, the said 12th rule was amended, so as to read: "In all suits by material men for supplies or repairs, or other necessities, the libellants may proceed against the ship and freight *in rem*, or against the master or owner *in personam*." This libel is brought under this last rule.

The 9th section of the Act to establish the

judicial courts of the United States (1 Statutes at Large, 73) confers upon the district courts "exclusive original cognizance of all civil cases of Admiralty and maritime jurisdiction." The English rules that were supposed to exist at the date of the adoption of the Constitution of the United States, and when the above-mentioned Act was passed by Congress, that the admiralty jurisdiction did not extend beyond tide waters, and that proceedings *in rem* could only be sustained for the adjudication of a maritime lien, have been exploded. The admiralty and maritime jurisdiction granted to the Federal Government by the Constitution of the United States, is not limited to tide waters, but extends to all public navigable lakes and rivers where commerce is carried on between different States and with foreign nations: (*The Genesee Chief*, 12 Howard, U. S. Sup. Ct. Rep. 443, and many subsequent decisions.) Liens by bottomry bonds, for seamen's wages, salvage service, and for supplies and repairs in a foreign port, are supposed to be founded in contracts upon the credit of the vessel, and are distinguished from contracts at the home port of the vessel, which are contracts on shore on the credit of the owner. Contracts at the home port for repairs, supplies for the use, or insurance of a vessel, are now considered as maritime contracts cognizable in the Admiralty. In the case of the *Moses Taylor* (4 Wallace, U. S. Sup. Ct. Rep. 411) it is announced that the distinguishing and characteristic feature in a suit in admiralty is, that the vessel proceeded against itself is seized and impounded as a defendant, and is judged and condemned accordingly. And in *The Hine v. Trevor* (idem. 555), and in *Insurance Company v. Dunham* (11 Wallace, 1), it is stated that the true criterion, whether contracts are within the admiralty and maritime jurisdiction, is their nature and subject-matter, as whether they are maritime contracts having reference to maritime service, maritime transactions, or maritime casualties, without regard to the place where they are made. In view of these principles, it was held in this case that the contract of marine insurance is a maritime contract within Admiralty and maritime jurisdiction *in personam*. I think it is now settled that these libellants can maintain their libel *in rem* for the recovery of their claim for repairs and supplies.

The question is not presented in this case whether the lien attached at the date of the work done and the supplies furnished, or by the attachment under the monition. My impression at present is, that the rule merely extends a remedy to a domestic creditor, and that his lien attaches by the seizure. It is clear that a mortgagee of a vessel has no maritime lien or remedy *in rem* in the Admiralty Courts. The mere mortgage of a vessel, other than that of an hypothecated bottomry, is a contract without any of the characteristics or attendants of a maritime loan, and is entered into by the parties to it without reference to navigation or perils of the sea: (*The John Jay*, 17 How. U. S. Sup. Ct. Rep. 389.) The record of the mortgage set up in the answer makes it a legal lien, but not a maritime lien. The mortgagee, as such, cannot proceed in this court *in rem* for the condemnation and sale of the vessel. After a sale of a vessel under an admiralty decree, the mortgagee can petition the court for payment out of remnants and surplus. A legal title passes conditionally by the mortgagor to the mortgagee;

AMERICAN REPS.] WELLS, FARGO, AND CO. v. THE PACIFIC INSURANCE COMPANY. [AMERICAN REPS.]

and it is more equitable to pay out of the registry the surplus of proceeds of sale of a vessel to a mortgagee than to the owner of the equity of redemption. The mortgagee was allowed as the conditional owner of the vessel, and, in the absence of the mortgagor, to appear and set up his mortgage, and claim that it is a legal lien on this vessel prior in date to the attachment under the libellants' motion, and also prior to their contract propounded in their libel.

The State law provides for a lien for supplies and repairs upon boats and vessels used in navigating the waters of the State, and authorizes proceedings *in rem* against said boats and vessels. If this law has any validity as authority for such proceeding in the State courts, I need not decide. Since the cases of *The Belfast* (7 Wallace, U. S. Snp. Ct. Rep. 624), *The Moses Taylor*, and *The Mine v. Trevor* (*ubi sup.*), it is nugatory as authority for such proceeding in this court. The States can neither enlarge nor limit the admiralty and maritime jurisdiction of the Federal courts. The constitution and laws of the United States necessarily conferred exclusive admiralty and maritime jurisdiction upon the Federal courts for the protection of commerce, and for the preservation of amicable commercial relations with foreign nations. This vessel is libelled as a national, enrolled and licensed vessel used in navigating the lakes, and is not within the scope of the State law. The libellants might have proceeded in the State court against the owner of the vessel, or in this court, *in personam*; and before the modification of the rule, they would have had to make choice of these remedies. A sale of the vessel under an execution against the owner issued from either of the courts might not disturb the mortgagee's interest. The modification or alteration of Rule 12 was, no doubt, intended to place contracts for repairs and supplies for all ships and vessels on an equality as to proceeding in admiralty, whether foreign or domestic. All distinction in regard to proceeding *in rem* is abolished; but I do not suppose it was intended by the Supreme Court to abrogate the distinction between a domestic contract for supplies and repairs, and a maritime lien upon a foreign vessel. The alteration of the rule, in my opinion, applies to the character of the process to be used, and has no relation to the question of jurisdiction. The rules established, or altered, by the Supreme Court, under legislative authority, are not rules of decision, but are merely rules of practice prospective in their operation: (*The steamer St. Lawrence*, 1 Black, U. S. Snp. Ct. Rep. 522.) In that case it is decided, that the change of the rule in the year 1844, prohibiting a proceeding *in rem* on domestic contracts, could not interrupt the prosecution of a libel pending on such a contract.

But in this case the mortgagee rested upon his mortgage and its record, without having either instituted proceedings for the recovery of the amount secured, or having taken possession of the vessel under his mortgage. The mortgagee had knowledge of the repairs being made on the vessel by the libellants, who thereby made her a more valuable security. And it appears that the libellants with knowledge of the mortgage, expended a large amount in supplies and repairs, under the belief that they had a right to attach the vessel. By the ruling in the case of *The Island City* (1 Lowell's Decisions, 375),

the mortgage would be postponed to the claim of the libellants, upon the ground of a lien created by the State law. But in this case there is no such lien. It appears that the vessel was a wreck, affecting the security of the mortgage, and that the repairs have restored her to usefulness.

I think, upon principles of equity, these parties should be placed on an equality as to the distribution of the proceeds of sale. The proceeds of the sale of a vessel are not appropriated to liens, according to their priority in date. The seamen who brought a vessel into port are paid before a bottomry bond, and a bottomry bond before a lien on a contract of affreightment. Maritime liens are usually preferred on the score of merit and necessity, for the advancement and protection of commerce. Salvors are first paid out of property salvaged.

SUPREME COURT OF CALIFORNIA.

Dec. 10, 1872.

WELLS, FARGO, AND COMPANY v. THE PACIFIC INSURANCE COMPANY (a).

Marine insurance—Common carriers—Loading of goods—Advices—Warranty—Notices of loss.

A clause in a policy of marine insurance, providing that the adventure upon goods to be carried by the assured as common carriers between certain ports, shall begin "from and immediately following the loading thereof on board the said vessels at" certain ports enumerated, is not, unless so expressly provided by the policy, to be construed as a warranty that the goods shall be loaded at such ports, but as mere recital, description, or intention, or expectation, that the goods will be there loaded; and the policy attaches to goods in the custody of the assured for the purposes of transportation in the ordinary course of their business as common carriers, carried into a port named in the policy by one of the vessels, but not in the strict sense loaded at that port on board the vessel, provided that the facts show that, by reason of the nature of the transactions to which the policy relates, the parties intended that the policy should so attach.

A memorandum on an open policy of insurance upon goods carried between certain ports by the insured as common carriers, provided that the agents of the insured should send to their head office "advices of the amount of each shipment," and another memorandum provided for the "risks applicable to be reported to this company (the underwriters) for indorsement on the policy as soon as known to the assured." The course of business was that the agents of the insured at each port, on shipping goods for delivery to the insured, sent by the same steamer letters of advice, and by the succeeding steamer sent duplicate letters of advice. The goods whilst on board the steamer were in charge of an express messenger of the insured. One shipment the local agent omitted to advise by the steamer by which it was shipped. The steamer and goods were lost, but the messenger escaped and informed the insured of the loss, and they notified it to the underwriters for indorsement on the policy. The underwriters refused to indorse it. By the next steamer the local agent forwarded a letter of advice of the shipment, and the insured again requested the underwriters to indorse the loss on the policy.

(a) From the Pacific Law Reporter.

AMERICAN REPS.] WELLS, FARGO, AND CO. v. THE PACIFIC INSURANCE COMPANY. [AMERICAN REPS.]

Held, that the first memorandum was not a warranty, or condition precedent without the strict performance of which the right to demand an indorsement would not accrue.

Held also, that as the usual mode of forwarding letters of advice was by the steamers in which the goods were shipped, the losses must necessarily be notified to the underwriters after they had occurred, and that the insured were entitled to recover.

This was an action on a policy of insurance upon treasure, bullion and bonds, underwritten by the defendants, and was brought to recover the sum of 10,000*l.*, the value of treasure lost by the perils of the sea, whilst on board the ship *Continental* on a voyage from Guaymas to San Francisco. The facts and arguments are fully stated in the judgment.

The opinion of the court (Wallace, C. J., Rhodes, Niles, and Crockett, JJ.), was delivered by CROCKETT, J.—This action is founded on an open or running marine policy of insurance, whereby the defendant agreed to insure the plaintiffs in the various sums to be indorsed on the policy, upon treasure, bullion and bonds laden or to be laden on seaworthy steamships, steam vessels or propellers, "at and from Victoria, B. C., Portland, O., Astoria, O., Los Angeles, Cal., La Paz, Mazatlan Guaymas, Mexico, to San Francisco, or vice versa, San Francisco to either of the before-mentioned ports or places . . . beginning the adventure upon the said treasure, bullion and bonds from and immediately following the loading thereof on board the said vessels at ports and places aforesaid, and so shall continue until the said treasure, bullion and bonds shall be safely landed at ports and places aforesaid; . . . in all cases the agent of Wells, Fargo, and Co. to forward to the San Francisco office of Wells, Fargo and Co., advices of the amount of each shipment." On the left hand margin of the policy is a memorandum, which need not be recited, except one clause thereof, in these words: "Risks applicable to be reported to this company for indorsement on the policy as soon as known to the insured." On the right hand margin is a memorandum in these words: "This underwriting to cover treasure and bullion shipped by Wells, Fargo and Co.'s express, at their risk, and by reason of their assuming the responsibility of insurance thereon." These are the only provisions of the policy affecting the present controversy.

It appears from the agreed statement of facts that it was the usual custom and course of business between these parties for the local agents of the plaintiffs at the ports of shipment to forward by each steamer on which a shipment was made to the San Francisco office of the plaintiffs, advices of each shipment, on the receipt of which plaintiffs sent said order to the defendant, and the proper indorsements were then made on the policy, in accordance with the advices; that the steamer on which the shipment was made, being the ordinary and most expeditious means of communication between the said ports, the advices were necessarily received and indorsements made after the safe arrival (or loss) of the treasure; that the premiums were paid by the plaintiffs after the indorsement upon the monthly statements made up and presented by the defendant. It further appears that in Sept. 1870, the steamer *Continental* left Guaymas in a seaworthy condition for San Francisco; and that in the due course of her

voyage she touched at Mazatlan, where she received and discharged freight and passengers; after which she resumed her voyage, and within a few days thereafter, while in the due course of her voyage, was wrecked by the perils of the sea, and became with her cargo, including the treasure hereafter to be mentioned, a total loss; that at Guaymas and Mazatlan the agents of the plaintiffs received for them from various shippers money and treasure to be carried to San Francisco, which were shipped on the *Continental*, accompanied with advices in the usual form from the local agents, which advices were lost with the vessel. But duplicate advices were forwarded by the succeeding steamer, and on being received by the plaintiffs were sent to the defendant, and the indorsements made on the policy in accordance therewith. The advices sent from the agent at Mazatlan notified the plaintiffs of a shipment of treasure by the *Continental* to the amount of 6148 *dols.* only; which sum was duly indorsed on the policy. But it appears from the agreed statement while the vessel was en route from Guaymas to Mazatlan, one Smith, a messenger for the plaintiffs, and in the due course of his business and employment as such, received from passengers on board the sum of 7342 *dols.* 50 cents., to be by the plaintiffs, as an express company, carried to San Francisco, "and for which—being duly authorised so to do—he had given to divers shippers receipts in which the safe carriage of said treasure was insured against all perils;" that said messenger had said treasure in his possession on board said steamer during the time she was lying at Mazatlan; and whilst lying at said port other treasure was brought on board by other shippers, and delivered to and received by said messenger to the amount of 2658 *dols.* 50 cents., to be in like manner transported to San Francisco, and for which he gave similar receipts; and whilst at Mazatlan, with all of said treasure in his possession as messenger on board said steamer, he notified the local agent at that place of his receipt and possession of these sums, amounting in the aggregate to 10,000 *dols.*, in order that the local agent might endorse that amount in his letter of advice to be sent to plaintiffs by the steamer; but the local agent forgot and omitted to do so, and included in his letter of advice only the 6158 *dols.* shipped by himself. It further appears that the 10,000 *dols.* was lost with the steamer, and the plaintiffs have paid to the several shippers the full amounts thereof. But the messenger escaped from the wreck, and on his arrival at San Francisco the plaintiffs ascertained from him the foregoing facts in respect to the 10,000 *dols.*; and thereupon on delivering to the defendant duplicate letters of advice above mentioned verbally notified the defendant of said facts, and that they had learned the same from Smith, and requested that the 10,000 *dols.* be indorsed on the policy, which request was refused. Subsequently the plaintiffs procured from their local agent at Mazatlan a correct letter of advice, bearing date as of the day of the shipment of the *Continental*, and which included the 10,000 *dols.*; and after serving this on the defendant, again requested that this sum be indorsed on the policy, which request was again refused.

This action is brought to enforce payment of the 10,000 *dols.*, and the only question for consideration is, whether on these facts the defendant is liable on the policy.

The principal points relied upon by the defence

AMERICAN REFS.] WELLS, FARGO, AND CO. v. THE PACIFIC INSURANCE COMPANY. [AMERICAN REFS.]

are: First, that by the terms of the policy the defendant is not liable for treasure or bullion except "from and immediately following the loading thereof on board the said vessel" at one of the enumerated ports; and it is claimed that this treasure was not loaded on the *Continental*, in the sense of the policy, at either of the said ports; secondly, that one of the conditions of the policy is that "in all cases agent of Wells, Fargo, and Co. (shall) forward to the San Francisco office of Wells, Fargo and Co. advices of the amount of each shipment," and it is insisted that this condition was not complied with in respect to the 10,000 dols. The argument is that this provision has the force and effect of an express warranty on the part of the assured, and that without a performance of it the defendant under the policy never attached.

In construing policies of insurance, courts are governed by the same general rules which are applicable to other instruments, and effect is to be given to the intention of the parties, to be ascertained by the same method which is employed in the interpretation of other written contracts. Notwithstanding the numerous technical phrases which are usually inserted in policies, and the peculiar language in which they are generally couched, they are, after all, only written contracts, to be interpreted by the same rules which apply to other contracts, and to be enforced according to the intention of the parties. Applying these rules to this policy, the first inquiry is what was intended by the provision, that the adventure was to begin from and immediately after the "loading" of the treasure on board the vessel at one of the enumerated ports? In order to comply with this condition, was it essential that the treasure should have been actually placed on board at one of these ports, or was it sufficient that it was already on board when the vessel arrived in port, and continued on board until she departed on her voyage? Similar clauses are generally inserted in marine policies, and have been frequently considered by the courts.

In *Murray v. The Columbian Insurance Company* (11 John. N. Y. Sup. Ct. Rep. 301) the policy was "at and from Cagliari to St. Petersburg . . . upon all kinds of goods and merchandise, laden or to be laden on board the good American ship *Bella*, beginning the adventure upon the said goods and merchandise from and immediately following the loading thereof on board the said vessel at Cagliari." It appeared that on arriving at Cagliari the vessel had still on board a portion of the outward cargo, and also merchandise put on board at Messina. On her arrival at Cagliari, the cargo was hoisted out of the hold and re-stowed, but no new cargo was taken on board except a quantity of salt. The court held that the policy did not attach any portion of the cargo except the salt taken on board at Cagliari. In its opinion the court says, it has "been solemnly determined, on different occasions, by this court, as well as the courts of England, that in policies like the present the insurance attaches only on the cargo taken on board at the port where the venture is to begin." In commenting on this case, Phillips, in his treatise on insurance, says: "But if in this case the goods had been landed upon a wharf, and then taken on board again, there seems to be no ground to doubt of this

being a 'loading' within the terms of the policy." (sect. 939.) Some of the English cases also hold that a partial unloading of the cargo and then putting it on board again will not constitute a loading at the port of departure on the voyage covered by the policy: (*Spitta v. Woolman*, 2 Taunt 416; 16 East 183, n.) In another case of a similar character, and which was decided in the same way, the court puts its decision partly on the ground that a partial unloading and reloading of the cargo, at the port of departure of the voyage insured against, is not a "loading" at that port within the terms of the policy, because it could not be known whether the goods had been damaged on their previous transit, before the commencement of the risk insured: (*Moraney v. Lushington*, 15 East 46.) But in a later case, where enough of the cargo had been unloaded to enable the Custom House officers to examine the whole, and it was then again placed on board, Lord Ellenborough held this to be a loading at port within the policy. He said "the period of time from which the responsibility of the underwriter is to commence as to goods, and to which the policy refers to that purpose, is as fixed by this partial unloading and reloading at Landsdown, as by a more perfect and entire re-shipment there; it is sufficient for supplying a date, which is the only object of the reference in question." (*Nouwen v. Reid*, 16 East 176.) In commenting on this rule, in *Bell v. Hobson* (16 East 240), the eminent judge said that "a very strict, and certainly a construction not to be favoured, and still less to be extended, was adopted in *Spitta v. Woolman*. If there be anything to indicate that a prior loading was contemplated by the parties, it will release the case from that strict construction." In *Rickman v. Carstairs* (5 B. & Ad. 651) the rule we are commenting upon is adverted to "as strict and to be relaxed when there is anything in the policy to satisfy the court that the policy was intended to cover goods previously on board." The same proposition, substantially, is announced in *Robertson v. French* (4 East 130). After summing up all the decisions on this point the result is thus stated in Phillips on insurance (sect. 939): "From all these cases it is not easy to determine the construction of a policy, in which the risk is to commence on the loading of the goods at a port named. If it be considered a warranty that the goods shall be loaded as such port, the courts seem, in some of the above cases, to have departed from the usual construction of express warranties. But if these words are to be considered as merely description, having at most the force of a representation, they will not affect the contract if the policy provides any other way of ascertaining the time when the risk commences. These discrepant decisions certainly do not coincide in support of any general proposition. That to which they seem to be the nearest approximation, and which may be adopted without a departure from any general principle, is, that this specification of the terminus *a quo*, unless it appear by the policy to be intended as a warranty of the loading at a designated place is to be taken as mere recital, description or intention or expectation, being at most an implied representation of the loading, and is to be construed accordingly." The author further adds: "There is no need of resorting to the doctrine of warranty to provide for the case of aggra-

AMERICAN REPS.] WELLS, FARGO, AND CO. v. THE PACIFIC INSURANCE COMPANY. [AMERICAN REPS.]

vation of the risk by reason of the cargo not being put on board at the place named, which is mentioned in some cases, since that comes appropriately within the doctrine of representation and concealment."

Testing the policy under consideration by these rules, we think the clause which provides that the adventure is to begin "from and immediately following the loading" of the treasure on board at one of the enumerated ports is not to be construed as a warranty, but, in the language of Mr. Phillips, "as mere recital, description, or intention or expectation" that the treasure was to be shipped from the enumerated ports. We arrive at this conclusion from the policy itself and from the agreed statement of facts. It was known to the defendant that the plaintiffs were engaged in the business of common carriers of treasure by their express between San Francisco and Guaymas and the intermediate ports; and the agreed facts leave little room for doubt that it was also aware that the treasure whilst on board was to be in the care and custody of the plaintiffs' messenger, who was authorised to receive treasure for transportation from passengers on board *en route* between San Francisco and the enumerated ports. But leaving this fact out of view, enough appears on the face of the policy to indicate clearly that the "loading" in a strict sense at one of the specified ports was not intended as a warranty. From the very nature of the transactions to which the policy relates it cannot be reasonably inferred that if treasure was received on board at some other place than one of those designated, and was carried on the vessel, in the custody of the messenger, into one of the specified ports, *en route* for San Francisco, the policy was not intended then to attach, unless the treasure was put over the vessel's side and again placed on board. It cannot be denied that if this had been done at Mazatlan, with the treasure received by the messenger, it would have been a "loading" at that port within the very letter of the policy. But the parties contemplated no such idle and useless act as a condition on which the risk was to commence. We have not the least doubt that the risk was intended to commence when the treasure was actually on board at one of the specified ports, in the possession of the plaintiffs' messenger for transportation, whether it was first taken on board at that port or at some other place in the course of the voyage. The rule of law is that policies are to be construed liberally in favour of the assured: (*Rolker v. Great Western Ins. Co.*, 3 Keys 23.) But to hold that this treasure was not "loaded" on board at Mazatlan in the sense of the policy would be to sacrifice the substance to the shadow and to defeat the rights of the assured by a strict and over-technical construction at variance with the plain intention of the parties, to be deduced from the nature of the transactions to which the policy relates.

In considering the second point made by the defendant, it will be necessary to construe, in connection with other provisions of the policy, the clause which requires "in all cases the agent of Wells, Fargo, and Co. to forward to the San Francisco office of Wells, Fargo, and Co. advices of the amount of such shipment." The policy does not require these advices to be forwarded nor in any manner delivered to the insurance company. On the contrary, another clause provides how the

information was to be given to the defendant of the shipment—"risks applicable hereto to be reported to this company for indorsement on the policy as soon as known to the assured." It was the duty of the plaintiffs under this clause to report to the defendant the amount of the shipment as soon as the fact was made "known" to them, by whatever method the information was obtained. They were not to be at liberty to await advices from their agent, provided the fact came to their knowledge earlier and through a different channel. The clause requiring advices from the agent was doubtless intended in some degree for the benefit of the insurance company, to enable it to guard against fraud or mistake as to the fact, date, and amount of the shipment. It was apparently inserted for the purpose of affording evidence of these points in case a controversy should arise, either before or after the indorsement, as to the fact, date, or amount of the shipment. But it was not a condition precedent without the performance of which the plaintiffs could in no event nor under any circumstances become entitled to the indorsement. If it had been so intended, the policy would have provided that the advices or duplicates thereof should be forwarded or delivered to the underwriter, and that the indorsement should correspond with the advices. But so far from this, the policy fails to provide that the advices were even to be shown to the defendant prior to the indorsement; but requires the plaintiffs to report the shipment for indorsement "as soon as known" to them, omitting any reference to the advices as the source of the information. If the forwarding of the advices by the agent is to be deemed an express warranty on the part of the assured, as contended by the defendant, then it must have been strictly and even literally performed before the right to demand the indorsement accrued. Even in overwhelming necessity, an accident against which no degree of vigilance could have guarded, a force which was irresistible, would not have excused its performance. In *Pewee v. Watson* (Comp. 785) Lord Mansfield says: "A warranty must be strictly performed; nothing tantamount will do." In *Blackburn v. Cockell* (3 Term, 360) Mr. Justice Butler said: "It is a matter of indifference whether the thing warranted be material or not; but it must be literally complied with." In *De Hahn v. Hartley* (1 Term, 343), Mr. Justice Ashurst said: "The very meaning of a warranty is to preclude all question whether it has been substantially complied with; it must be literally." In *Newcastle Fire Insurance Company v. Macmorran* (3 Dow's Ho. of L. Cas. 255), Lord Eldon said: "Whoso a thing is warranted, it must be exactly what it is stated to be." See also Phillips on Insurance, s. 702. It is clear, therefore, that if the provision under discussion is to be deemed an express warranty, it must have been strictly performed to entitle the plaintiffs to an indorsement of the 10,000 dols. on the policy. Treated in that light, they would not have been entitled to the indorsement, even though the treasure had been shipped by the agent in the most formal manner at Mazatlan, but before preparing his advices he had suddenly died or been disabled; nor even though some other person, having knowledge of the fact, had sent the advices of his own accord. In the case supposed, if the treasure had arrived safely at its destination, the defendant, on this theory, would not have been entitled to demand

H. of L.]

WATSON AND COMPANY V. SHANKLAND AND OTHERS.

[H. of L.]

the premium on it, nor the plaintiffs to recover its value, if it had been lost. In other words, it would not have been protected by the policy, as the risk had never attached.

Constructing the whole policy, according to what we think was the intention and understanding of the parties, and considering the nature of the transactions to which the policy related, we are satisfied it was not contemplated that the forwarding of advices by the agent should be deemed a condition precedent without a strict performance of which a right to demand an indorsement by the one party or the payment of premiums by the other would not accrue.

The only remaining point made by the defendant is that the loss having already occurred and become known to the parties before the indorsement was demanded, the defendant was under no obligation to assume a loss which was known to have already happened. If this theory be correct, the plaintiffs were under no obligation to report for indorsement shipments which had already arrived safely, nor to pay the premiums thereon. Such a construction would practically nullify the policy in respect to shipments from the Mexican ports named therein. The agreed statement shows that the usual and most expeditious method of forwarding advices from those ports was by the steamer on which the treasure was shipped; and if the plaintiffs were not bound to report for indorsement, nor to pay premiums on shipments which had already arrived, nor the defendant to pay losses known to have occurred before the indorsement was demanded, it results that the policy was a nullity in respect to shipments from those ports, and imposed no obligation on either party. But the parties have themselves interpreted the contract in this respect. The agreed statement shows that it was the practice of the plaintiffs to pay and of the defendant to receive premiums on shipments which had already arrived, and it ought not now to be permitted to escape liability for a loss on the ground that the loss was known to have occurred before the indorsement was demanded.

Judgment reversed and cause remanded, with an order to the court below to enter judgment for the plaintiffs on the agreed statement of facts.(a)

HOUSE OF LORDS.

Reported by DOUGLAS KIRSGORD, Esq., Barrister-at-Law.

Friday, May 16, 1873.

(Present: The LORD CHANCELLOR (Selborne), LORD CHILSFORD, LORD COLLYER, and LORD CAIRNS.)

WATSON AND COMPANY V. SHANKLAND AND OTHERS.

Charter-party—Advances against freight—Stipulation for insurance upon advances being effected by charterers.

By a charter-party made at Bombay, a ship of the respondents, merchants at Greenock, was to proceed from Bombay to Calcutta, and there load a cargo to be conveyed to the United Kingdom. A clause in the charter-party was as follows: "Sufficient cash for ship's ordinary disbursements to be advanced the master against freight; subject to interest, insurance, and 2½ per cent. commission; and the master to in-

dorse the amount so advanced upon his bills of lading." Of this charter-party the appellants were indorsees. While the ship was at Calcutta preparing for the voyage, various advances for the ship's ordinary disbursements were made by the appellants, and the master gave them, on account of such advances, a bill drawn on the respondents. The respondents refused to accept the bill, on the ground that the master had no power to give it, and that under the charter-party the appellants should have effected an insurance on freight to the amount of their advances. No such insurance was, however, effected, though the appellants had time to insure after notice of the respondents' refusal to accept the bill. The ship having been lost on the voyage to the United Kingdom, the appellants brought an action to recover the amount of their advances.

Held (affirming an interlocutor of the First Division of the Court of Session), that under the charter-party the respondents had a right to rely on an insurance upon the advances being made by the appellants, who had stipulated for and received the right to charge the premium; and that the appellants, having chosen not to insure, must bear the loss.

Held further that a clause in the interlocutor appealed from, affirming that in law advances against freight for a ship's ordinary disbursements can be recovered in the event of the loss of cargo, should be omitted, because unnecessary and, assuming the question to be governed by English and not Scotch law, incorrect.(a)

This was an appeal from the Court of Session.

The facts were as follow: On 20th Aug. 1863, a charter-party was entered into between James M'Kirdy, master and part owner of the ship *Janet Cowan*, and Balli Brothers, of Bombay, where the vessel then was, in terms whereof the ship was to proceed to Calcutta, there to be loaded by the charterers or their agents with a cargo for the United Kingdom, "the freight to be paid on unloading and right delivery of the cargo."

The charter-party contained the following clause: "Sufficient cash for the ship's ordinary disbursements to be advanced the master against freight, subject to interest, insurance, and 2½ per cent. commission; and the master to indorse the amount so advanced upon his bill of lading."

On 2nd Oct. 1863, Balli Brothers transferred their rights and interest in the charter-party to Messrs. Grant, Smith and Co., by whom it was indorsed to Messrs. William Watson and Co. on the 13th of the same month.

The vessel, in pursuance of the charter-party, proceeded to Calcutta, where she was loaded with a cargo for the United Kingdom by Watson and Co., who, between 7th Nov. and 17th Dec. 1863, while the ship was preparing for the voyage, made various cash advances to or on the order of the master for the ship's ordinary disbursements, to account whereof the master granted a bill to Watson and Co. for 500*l.* drawn upon Robert

(a) There is no doubt that, by English law an advance against freight made in the port of loading cannot be recovered if the ship be lost before reaching her destination. The American rule, on the other hand, is directly contrary to the English rule. All the authorities on the subject, both American and English, will be found collected in a note by the Sheriff, who decided this case, appended to the report of the case in the Court of Session. Court of Session Cases, 2d series, vol. 10, p. 144.—Ed.

(a) This case is taken from a report furnished by the official reporter of the court to the *The Chicago Legal News*.

Shankland, merchant, in Greenock, the managing owner of the vessel. This bill was presented for acceptance on 17th Dec. 1863, but Shankland refused to accept it, on the ground that the master had no power to grant it, and that under the charter-party Watson and Co. should have effected an insurance upon the freight for the amount of their advances. No such insurance, however, was made by Watson and Co., although they had time to do so after receiving intimation of Shankland's refusal to accept the bill. The ship sailed from Calcutta on 19th Nov. 1863, and was, with her cargo, totally lost on 7th April, 1864.

Under these circumstances Watson and Co. brought an action in the Sheriff Court of Renfrew against Shankland, McKirdy, and the other owners of the ship, for recovery of 500*l.* 0*s.* 3*d.*, the alleged amount of their advances against freight for the ship's disbursements while preparing for the voyage, with interest and 2½ per cent. commission on the total amount of freight, which they claimed as having acted in the capacity of shipping agents for the vessel. This action was not founded on the bill for 500*l.* granted by the master, which, not being stamped, was invalid under the stat. 17 & 18 Vict. c. 83, s. 5, but the bill was referred to as evidence of the nature of the transaction.

The pursuers pleaded: First, the defenders are liable for the obligations of the defender McKirdy, incurred in his character of master and part owner of their ship; secondly, the defender Robert Shankland, as managing owner or ship's husband, having authorised the defender McKirdy to pass drafts on him for the ship's debts, was bound to accept the bill, and is liable therefor and for the loss caused by non-acceptance; thirdly, the whole defenders are liable for the acts of the master and part owner and of the managing owner or ship's husband; fourthly, the defender McKirdy is liable individually for the sum in the bill granted by him and dishonoured.

The defenders pleaded: First, the advances by the pursuers for the ship's disbursements at Calcutta, being a payment and not a loan, cannot be recovered back from the defenders; secondly, the pursuers, as the charterers of the vessel, or the transferees or indorsees of the charter-party, were not entitled to take and the master was not entitled to grant, a bill of exchange for repayment of a sum of money in which the pursuers themselves under the charter-party were at the time indebted to the master and owners of the vessel; thirdly, the master of a vessel has no power in a foreign port to bind his owners in a bill debt, even for the ordinary disbursement of the vessel; and more especially he has no power to bind his owners in such a debt to the charterers of the vessel when such parties are themselves bound to provide, by means of a payment on account of freight, the master of the vessel with the funds necessary to pay such disbursements.

The Sheriff-Substitute (Tennant) pronounced an interlocutor, which, after various findings in regard to the facts, proceeded: "In point of law finds that the money thus paid by the pursuers was not a loan made by them to or for behoof of the defenders, or of the master of the *Janet Cowan*, but that it is to be held as having been made in terms of the clause of the charter-party, in regard to cash for ship's disbursements, to which the pursuers were parties: Finds that by the terms of the said clause the pursuers were bound to furnish sufficient cash for ship's ordinary disbursements,

as an advance against the freight which it was expected would be earned at the conclusion of the voyage; and that the defenders were not bound to repay to the pursuers the sum thus advanced to them in terms of the charter-party: Finds that the pursuers are entitled to receive interest, the premium of insurance, and a commission of 2½ per cent. upon the advances made by them; and of consent of parties deems for the same, amounting to the sum of 411*l.* 4*s.*: Finds that it has not been proved that the pursuers were agents for the ship at Calcutta, and therefore finds that they are not entitled to the commission charged by them in the account appended to the summons. With the exception of the sum above-mentioned, associates the defenders from the conclusions of the summons, finds the defenders entitled to expenses, &c."

On appeal the Sheriff (Fraser) allowed the pursuers to add the following plea in law to the record: "Sixthly: the sums sued for having in any view been made as an advance against freight, and no freight having been earned, the defenders are obliged to repay the same and commission thereon to the pursuers, with interest, as libelled."

The Sheriff afterwards recalled the judgment of the Sheriff-Substitute, and in place thereof: "Finds that the money paid by the pursuers to the captain was not a loan made by them to or for behoof of the master of the *Janet Cowan* as representing the defenders, but was an advance as against freight for ship's ordinary disbursements, subject to interest, insurance, and 2½ per cent. commission. Finds in law that the defenders are bound to pay to the pursuers the sum of 411*l.* 4*s.* thus advanced to the captain, with interest thereon at the rate of 5 per cent. from the last date of the advance, together with commission of 2½ per cent. upon the advances: Finds that, as the pursuers did not effect insurance upon the advances so made by them, they are not entitled to recover from the defenders any sum under that head: Finds that the pursuers were not agents for the ship at Calcutta, and that they were not entitled to charge commission as such. Deems against the defenders for the said sum of 411*l.* 4*s.*, together with interest thereon at the rate of 5 per cent., from 17th Dec., 1863, till payment; and also for the sum of 11*l.* 0*s.* 6*d.*, being commission of 2½ per cent. upon the said advances, together with interest on the said sum of 11*l.* 0*s.* 6*d.* at 5 per cent. from 17th Dec., 1863, till payment: Finds no expenses due to either party," &c. The defenders appealed, and, after hearing counsel, the court appointed the cause to be re-argued before them, with the assistance of three judges of the Second Division.

On 2nd Dec. 1871, the court pronounced the following interlocutor. "Recall the interlocutors of the sheriff and sheriff-substitute. . . . Find that by this action the pursuers as charterers claim repayment of their advances to the master at Calcutta, besides interest at 5 per cent. thereon till payment, and 2½ per cent. commission; but find that they do not claim the amount of premiums that would have been required to insure so much of the freight as corresponds to the amount of their advances: Find in law that cash advanced against freight to the master of a ship for ordinary ship disbursements at the port of loading is not, in ordinary circumstances, equivalent to a payment of freight, but is to be held as an advance in consideration of the subsequent performance of the

H. of L.]

WATSON AND COMPANY v. SHANKLAND AND OTHERS.

[H. of L.]

contract by the owners and shipmaster by the right delivery of the cargo at the port of discharge; and that if there is a failure of the consideration, by the voyage not being accomplished and the cargo rightly delivered at the port of discharge, the charterers are entitled, in respect of such failure of consideration, to recover the amount of the said advance from the owners; but find that in the present case the charterers, having stipulated that they should be entitled to insure freight at the owner's expense to an amount corresponding with the amount of their advances, must be held to have limited their security for repayment of the advances to the right of set-off in settling with the owners if the freight should be earned, and to the amount of the said insurance if the ship and cargo should be lost, and to have relinquished or discharged the personal obligation of the owners for repayment in the latter event: Therefore, find that the pursuers have failed to establish their claim of repetition against the defenders; but, in respect of the agreement and covenant of parties, decern against the defenders for payment to the pursuers of £11, 17s., being the amount of the premium of insurance and commission stipulated by the charter-party to be paid to the charterers in respect of the advance made to the master at Celcutta as aforesaid, with interest thereon at the rate of 5 per cent. per annum from and after 7th July, 1864, till payment. *Quoad ultra* assoilzie the defenders and decern: Find the defenders entitled to expenses both in this court and the inferior court; allow accounts, &c." The grounds of this interlocutor were: First, that an advance by the charterers of a ship to account of freight is, on the loss of ship and cargo, recoverable from the ship-owners where the charter-party contains no stipulation, express or implied, to the contrary; the law of Scotland upon this point, although contrary to that of England, being in conformity with the law-merchant of every other trading community; but, secondly (by a majority of seven judges, *dis. the Lord Justice Clerk and Lord Kinloch*), that the clause in the charter-party in this case, "sufficient cash for ship's ordinary disbursements to be advanced the master against freight, subject to interest, insurance, and 2½ per cent commission," exempted the shipowners from liability for repayment of such advances, by giving the charterers an insurable interest in the freight to the extent of the sums advanced, so that not having insured, as they might have done, at the expense of the shipowners, they were in the position of being their own insurers, taking upon themselves the risk of the safe arrival of the ship and cargo: (Court of Session Cases, 3rd series, Vol. 10, p. 144.)

Butt, Q.C. and F. M. White, for the appellants, contended that the Court of Session was wrong in deciding that the terms of the contract overrode the general rule of the law of Scotland.

Young, Q.C. (Lord Advocate), and Benjamin, Q.C. contra, cited the judgment of Willes, J., in *Tynes v. Worms* (34 L. J. 274, C. P.; 12 L. T. Rep. N. S. 548).

The Lord Chancellor (Selborne).—My Lords, the true construction of this contract may be that the advance was to be a loan upon the security of the freight, and not a prepayment of freight. It is not necessary that your Lordships should decide the question, and I should not advise your Lordships to pass your decision in such a form as to affect

the future determination of such a question should it arise. But, assuming this was to be a loan upon the security of the freight, and not a prepayment of the freight, or a part payment of the freight, or a payment on account of the freight, within the principle of the authorities which have been referred to, still the question is whether, according to the true and sound construction of this contract, it was not understood and agreed between the two parties that the insurance, which it was for the interest of both to have made in the most proper and convenient manner, should be made by the charterers.

Apart, my Lords, from any evidence as to usage, I cannot but think that it is a sound view of this mercantile contract to hold that it provides for insurance, and does not leave the subject of insurance uncertain and indeterminate. Insurance is mentioned, as your Lordships will observe, in direct connection with two other things, which were not uncertain, and which were not indeterminate, namely, interest and commission. Interest was to be charged at all events; commission was to be charged at all events. It appears to me that there is nothing to lead us to suppose that insurance was not to be as much a fixed term of the contract as interest and commission, and that not the less because all these terms are primarily in favour of and for the protection of the person advancing the money. The shipowners subject themselves to the burden, but both parties have an interest in diminishing that burden; and, therefore, as either one or the other ought to make an insurance, it was reasonable that they should make a contract between themselves as to how the insurance was to be effected.

One of your Lordships put to Mr. Butt this observation, in which Mr. Butt expressed his concurrence, that "these are all things as to which the charterers were to be creditors of the other party." But if the charterers were to be the creditors of the other party for all these things, then that was a part of the contract. The charterers were to advance the money, they were to charge interest, they were to charge commission, and they were to charge insurance; and how could they charge insurance unless insurance was effected?

The good sense of the matter concurs with that view; because the charterers would not be satisfied unless the insurance was made under their control—a control for which it was reasonable that they should stipulate; and it would be only by them, when the advances were made, that the precise amount for which the insurance was to be effected would be known. I take it, therefore, that as between these parties it is a contract in substance to this effect: "I, the borrower, give you, the lender, a right to charge me with the premium of insurance," which is very much the same thing in principle as if the borrower had put the money into his hands for the purpose of effecting that insurance; by no means think it necessary to say what the result might have been if for any reasonable cause he had determined not to avail himself of the right to insure and to charge the premiums of the insurance, and had given notice of that to the other party in reasonable time. The charterers here did not, in fact, do so; although, according to the evidence, there was abundance of time for them to do so. Still less do I desire to say anything which would affect the question

H. OF L.]

THE WILLIAM LINDSAY.

[PRIV. CO.]

which might have arisen, if, having effected that insurance, that insurance had, through some cause not imputable to the charterers, become unavailable. I proceed, my Lords, upon the assumption that it may be the construction of this contract, that in either of these events the charterers, acting reasonably and according to good faith, would be held entitled to recover in the event of the loss of the ship.

The question is, whether under this contract the shipowners had not a right to rely upon that insurance being made by the charterers, who here stipulated for and received the right to charge the premiums. I think the shipowners had this right.

The charterers neglected to insure, and neglected to give notice of the non-insurance. What must be the consequence of a loss of the ship, the charterers knowing that the insurance was not effected? Upon one or the other of these two parties that loss must fall. If the insurance had been made, and the money paid by the shipowners, then the benefit of the insurance would have accrued to the shipowners. It is very much like the right of a man who gives several securities, when he pays off the mortgage, to have all the securities delivered up into his own hands, unless a reason, which is a sound and good one, and consistent with the duty of the mortgagee, and which is not imputable to his own fault, can be given for the failure of any one of them. This seems to have been really the view which prevailed, on the whole, in the minds of the learned judges in the court below; and I think the soundest course for your Lordships to take will be to found your judgment entirely upon that view.

But in the interlocutor under appeal, there are certain findings which your Lordships will probably think go beyond the requirements of the present case. There is a finding as to the general law upon the subject. Now I do not think it expedient that that finding should be retained; first, because it does not appear to me that upon this occasion we ought to decide any question of general law at all; and, secondly, because if we did it would be necessary to consider how far that law ought to be the English or the Scotch law; and, finally, if it ought to be the English, whether it would be a safe thing to lay down the rule in the terms which are here stated—terms which certainly do not agree with the rule lately stated in the English case of *Byrne v. Schiller* (25 L. T. Rep. N. S. 211; L. Rep. 6 Ex. 319). I should therefore propose to your Lordships to vary the interlocutor appealed from, by omitting the following words:—

"Find in law that cash advanced against freight to the master of a ship by the charterers for ordinary ship's disbursements at the port of loading, is not in ordinary circumstances equivalent to a payment of freight, but is to be held as an advance in consideration of the subsequent performance of the contract by the owners and shipmaster by the right delivery of the cargo at the port of discharge; and that if there is a failure of the consideration by the voyage not being accomplished, and the cargo rightly delivered at the port of discharge, the charterers are entitled, in respect of such failure of consideration, to recover the amount of the said advance from the owners."

The court below further propose to put a construction upon the contract, going beyond the view which I have submitted to your Lordships, the interlocutor appealed from, containing these words:—

"That the charterers having stipulated that they should be entitled to insure freight at the owners' expense, must be held to have limited their security for repayment of the advances to the right of set-off in settling with the owners if the freight should be earned, and to the amount of the said insurance if ship and cargo should be lost; and to have relinquished or discharged the personal obligation of the owners for repayment in the latter event."

I cannot think, my Lords, that we are called upon to leave such an interpretation of the contract upon the face of the interlocutor. One of your Lordships has suggested words to be substituted for those which I have read, words which would make the finding run thus:—

"Find, that in the present case the charterers having stipulated that they should be entitled to insure freight at the owner's expense, to an amount corresponding to the amount of their advances, must be held to have made such insurance a part of their security, and, not having effected any such insurance, must be held to have relinquished, in the event of the ship being lost, any claim against the owners for repayment."

I would submit to your Lordships that these words should be adopted, and that the interlocutor should be varied in the manner I have suggested.

LORD CHELMSFORD.—My Lords, I agree with my noble and learned friend. By the contract between the parties, the insurance upon the advances was to be effected by the charterers. There was no obligation upon them to insure, except for their own protection; but as they chose not to insure, they took the risk upon themselves, and, therefore, they must bear the loss.

LORD COLONSM.—My Lords, I concur in the result which has been arrived at, and I think the grounds which have been stated are quite sufficient for the determining of this case.

LORD CAIRNS.—My Lords, I also concur.

Interlocutor varied.

Attorneys for the appellants, *Hillyer, Fenwick, and Stibbard.*

Attorneys for the respondents, *Simson, Wakeford, and Co.*

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

ON APPEAL FROM HIGH COURT OF ADMIRALTY.

Reported by JAMES F. ARTHUR, Esq., Barrister-at-Law.

Saturday, July 26, 1873.

THE WILLIAM LINDSAY.

Collision—Duty of master—Reasonable precautions—Private mooring buoy authorized by port authorities.

Although it is the duty of the master of a ship to take all such precautions as a man of ordinary prudence and skill, exercising reasonable foresight, would use to avert danger and to prevent his ship doing damage to others in the circumstances in which he is placed, there is no obligation upon a master who is ordered by the authorities of the port in which his ship lies to take up a berth in a particular part of the harbour to examine the sufficiency of a buoy to which he moors his ship in that place, although that buoy may belong to a private company, if the port authorities sanction the use of the buoy, and treat it as a proper and sufficient

PRIV. CO.]

THE WILLIAM LINDSEY.

[PRIV. CO.]

mooring place for vessels frequenting the port. If through the insufficiency of such a buoy the ship parts from her moorings on a storm arising, the shipowner will not be 'responsible for damage ensuing by collision if the master has taken other precautions sufficient under ordinary circumstances to meet the exigencies of the case.

The question whether a master should under such circumstances have let go an anchor, or whether the having an anchor ready to let go was a sufficient precaution, is a question of practical seamanship, upon which the court of appeal will be guided by the opinion of their nautical assessors.

This was an appeal from a decree of the High Court of Admiralty of England pronounced by the right honourable the judge of that court on the 24th Jan. 1873, in a cause of damage instituted on behalf of the owners of the barque *Estrella* against the *William Lindsey*, her tackle, apparel, and furniture, and against her owners intervening, for the recovery of damages in respect of a collision between the said two vessels.

The *Estrella* was a barque of about 499 tons register, and the *William Lindsey* a ship of 970 tons register. The collision in question took place in the port of Valparaiso, shortly after 11 o'clock a.m. on the 23rd Sept. 1871.

The case set up by the petition filed on behalf of the *Estrella* was that, on the evening of the 22nd and morning of the 23rd Sept., the *Estrella* was lying safely moored in the harbour of Valparaiso, and at the same time the *William Lindsey* was lying about three-quarters of a mile to the northward of the *Estrella*, fastened to a buoy in the said harbour by her starboard cable, from which the anchor had been unshackled. The said buoy was not one of the buoys belonging to the port authorities, nor intended nor adapted for use as a mooring buoy, and was not on the usual mooring ground. On the evening of the 22nd it came on to blow a gale from the north, but the *William Lindsey* did not let go any anchor, remaining at the buoy as before the gale. On the 23rd she became detached from the buoy, and began to drift to the southward. Those on board of her let go her port anchor in great haste; but, when about 30 fathoms had run out, the cable became 'jammed' in the windlass, and, continuing to drive to the southward, she struck the *Estrella* with great violence doing her much damage.

The case set up by the answer filed on behalf of the *William Lindsey* was as follows: "On the 19th Sept. the *William Lindsey* went into Valparaiso Bay to discharge fifty tons of coal, and moored to a buoy on the eastern side of the bay on the customary mooring ground. On the morning of the 20th Her Majesty's ship *Soud* was about to practise with shot, and the *William Lindsey*, happening to be in the line of fire, was ordered by the port authorities to remove to the western side of the bay and moor to a buoy there. This she accordingly did, mooring by 30 fathoms length of the starboard cable to a buoy not belonging to the port authorities, but used by vessels of her size. On the morning of the 23rd a fresh breeze came on from the north, with a swell, and about 3 a.m. 15 fathoms additional cable were paid out as a matter of precaution. Soon after 11 a.m. the shackle-band of the said buoy gave way, and the *William Lindsey* went adrift. The port anchor

which was in readiness to let go, was let go at once, but accidentally jammed under the windlass, and although the crew endeavoured to clear it they were unable to prevent the *William Lindsey* coming into collision with the *Estrella*." The respondents further alleged that the collision happened without negligence on the part of the *William Lindsey*, and that it was the result of inevitable accident.

At the hearing before Sir R. Phillimore, evidence was given in support of these respective allegations. It was shown that the master of the *William Lindsey* had moored to the buoy without examining it, but it was not proved by the respondents that the defect in the buoy was such that it could not have been discovered by ordinary care.

The remaining facts will be found set out in the judgment of the Judicial Committee.

The learned judge held that the collision was the result of inevitable accident, being of opinion that it was unnecessary to consider the question whether the owners of the *William Lindsey* were responsible for the breaking of the buoy, as was contended by the plaintiffs (the appellants), because the master having taken the ordinary precaution of having an anchor ready to let go in case of emergency, had done what a prudent seaman was required to, and was only prevented from bringing up his ship by that anchor through the jamming of the cable, which must be considered as an inevitable accident; the learned judge dismissed the defendants from the suit without costs.

From this decree the plaintiffs (the appellants) appealed on the grounds that the court below ought to have considered the question of the liability of the defendants for the insufficiency of the buoy; that the defendants should have proved that the defect could not have been discovered by ordinary care; that the master of the *William Lindsey* was guilty of negligence in mooring to the buoy without examining its strength and security; and that he was guilty of negligence in not letting go an anchor at the beginning of the gale.

Batt, Q.C. and H. Davison, for the appellants.—The question of the insufficiency of the buoy ought to have been determined in the court below. The defect in the buoy being the primary cause of the collision, it lay upon the respondents to show that the defect could not have been discovered by ordinary care. No doubt the appellants are bound to show a *prima facie* case of negligence, but that shown, the onus shifts to the respondents to show excuse for the collision. The appellants have shown that the respondent's ship broke away from her moorings and came into collision with their ship, and that in itself establishes a *prima facie* case of negligence, which requires the respondents to show that they took all reasonable precautions to ascertain the security of these moorings. It has been held that once *prima facie* evidence has been given, which will justify the court in concluding that the defendant's negligence was the cause of the collision, the onus shifts and the defendant must show that the collision was not occasioned by his negligence, but by some other cause for which he is not responsible; (*The Egyptian*, 2 Mar. Law Cas. O. S. 36). Here the respondents are bound to prove that they had tested the buoy with a view of ascertaining its sufficiency, otherwise it must be taken that its condition was defective, and that they could have discovered the defect by inspection. It was a private buoy, and must therefore be treated

PRIV. CO.]

THE WILLIAM LINDSAY.

[PRIV. CO.]

as the property of the respondents for the purposes of this case. No evidence on this point having been given by the respondents, the appellants are entitled to succeed. Again after the storm arose, the master of the *William Lindsay* was bound as a prudent man to let go his anchor; and, having neglected this precaution, his owners must be held responsible: (*The Volcano*, 2 W. Rob. 337.) The subsequent jamming of the cable cannot relieve them from the responsibility incurred by their prior negligence.

Dr. Deane, Q.C. and *Clarkson* for the respondents. —The use of the buoy was permitted by the port authorities, and the master was therefore entitled to consider it as safe and secure without examination. If this is correct, then the having an anchor ready to let go was a sufficient extra precaution, which would have been available but for an inevitable accident.

Brett, Q.C., in reply,

July 26.—Judgment was delivered by Sir MONTAGUE E. SMITH.—This is a case of collision which occurred at Vulperslo on the 23rd Sept. in the year 1871. On that day the *William Lindsay*, a steam vessel of the respondent's, was driven against the *Estrella*, a barque of about 500 tons, belonging to the appellants, doing her considerable damage. The *Estrella* was lying in the harbour at the usual mooring place for vessels to discharge cargo. She was moored in the usual way, with two anchors out at the bow, and one at the stern. She was in a position of entire safety, and undoubtedly no fault can be attributed to her. The *William Lindsay* was driven against her by the wind, and did her the damage complained of. The question is, whether the injury which was done to the *Estrella* by the *William Lindsay* was the result of an accident which ordinary care could not have averted, or whether it was due to any want of care and skill on the part of the *William Lindsay*. The *William Lindsay* entered the port on the 19th Sept., and she was moored by the tug which brought her into the port at one of the buoys which belonged to the Steam Tug Company. It appears from the evidence that there are several of these buoys in the port, and that it is usual, when vessels are towed into the port, to moor them to these buoys; that when they discharge cargo they are moved usually to mooring berths, which are appropriated to the discharge and taking in of cargo; but that it occurs at times, where a small quantity only of cargo is to be discharged or taken in, the port authorities allow it to be done at some of these mooring buoys. On the 19th the *William Lindsay* came in and was so moored. On the 20th, the following day, one of Her Majesty's vessels, the *Scout*, which happened to be in the port, was about to practise with shotted guns, and the *William Lindsay* was in the line of fire. It was necessary, therefore, that she should be moved, and it would appear that she was moved by the order of the captain of the port to another buoy belonging to the Steam Tug Company on the other side of the port. This being done, she fastened her cable to the buoy, and she rode there from the 20th Sept. until the 23rd, when the collision took place. It seems that on the 23rd a strong breeze, some of the witnesses say a gale, arose, and blew with considerable strength. It was what is known in the port as a norther, a wind very well known and undoubtedly a wind which blows with considerable violence, and usually for some length of time.

The vessel rode out the greater part of the gale, and she rode safely until the gale had moderated; but there was, after the gale had moderated, a heavy swell, and during that time the accident occurred which has given occasion for the present suit. The accident was that the iron band which was round the buoy, and in which there was a shackle to which the ship's cable was attached, broke. Of course the ship was no longer held by the buoy, and she began to drift. Now at the time that she so began to drift before the wind she had her anchor ready to let go; and it appears that, without any delay, and as promptly as they well could, her crew let go the anchor, and were paying out the chain, when the windlass became jammed. The consequence was that the anchor did not touch the ground, and she drifted until she came into collision with the *Estrella*. Now no blame is imputed to the *William Lindsay* for that jamming of the chain. It appears from the evidence, and was so found by the learned judge below, that the windlass was a proper one, that there were the usual appliances, that the chain was good, and that the men had done nothing wrong in the way they had handled it. It, therefore, was a purely accidental circumstance that the anchor did not find its way to the ground; and if it had found its way to the ground there seems to be no doubt that the ship would have been brought up, and this collision would not have occurred. These being the facts, the question arises whether there was any negligence in what was done or omitted to be done on board this vessel. Now, the master is bound to take all reasonable precautions to prevent his ship doing damage to others. It would be going too far to hold his owners to be responsible because he may have omitted some possible precaution which the event suggests he might have resorted to. The true rule is that he must take all such precautions as a man of ordinary prudence and skill, exercising reasonable foresight, would use to avert danger in the circumstances in which he may happen to be placed. In this case the immediate cause of the mischief was the breaking of the band on the buoy, and it is said that the *William Lindsay* must be responsible for that breaking, because the master had chosen to moor her to it, and to treat it, without examination, as if it was his own mooring chain. Their Lordships consider that that is not the correct view of the question. The first question is, whether there was negligence on the part of the master in availing himself of the use of the buoy; and, in order to see whether there was such negligence or not, it is necessary to ascertain what was the nature of the buoy, and how it was used and sanctioned. Now it appears that it was one of several buoys which had long been laid down in the port by the Steam Tug Company. It was undoubtedly under the care of a private company, as far as can be collected from the evidence; but the mooring of ships to these buoys is sanctioned by the authorities in the port. It must be assumed that when they give permission to vessels to moor at them, not only when they come into the port, but occasionally to take in and discharge cargo, they sanction the use of these buoys, and treat them as proper and sufficient mooring places for vessels frequenting the port. That being the state of the case as regards these buoys, their Lordships cannot think that there was anything like negligence on the part of the master

PRIV. CO.]

THE CHARKIEH.

[ADM.]

of the *William Lindsay* in mooring at one of them without examining for himself whether there might be latent defects in it. These questions of negligence must be decided by what a prudent and skilful seaman would do under the circumstances, and by what he is able to do. It is obvious that no man, however prudent and however desirous to be on the safe side, would be able to examine these hvoys, so as to discover whether there were latent defects in them or not. He must, to a certain extent, trust to the sanction which has been given to them by the authorities of the port. No doubt that would not absolve him from all further precaution. He ought not implicitly to trust to that which he cannot to a certainty know is a safe buoy, and he ought to take reasonable precautions, in the event of its not holding him, to bring up, and secure himself from danger. Their Lordships think, however, upon this first question that there was no negligence on the part of the master in mooring to the buoy, and not discovering the defect which undoubtedly led to the accident. Then the next question is, whether, having moored to this buoy, he ought to have taken any other precaution than he did. Now, it is scarcely contended on the part of the appellants that the master need have done more in ordinary weather than fasten his chain as he did to the buoy; but it is suggested that when the gale came on, and when he found it was likely to continue, he should have taken the further precaution of letting go his anchor—not only of keeping it prepared to take the ground, but that he ought to have let it down, and given that further security to his ship. Undoubtedly that is a question well worthy of consideration, but it is a question which depends entirely upon practical seamanship; and their Lordships upon that question have thought it right to consult the nautical assessors, whose valuable assistance they have, and to put the question to them very much in the way in which Dr. Lushington put a similar question to the Trinity Masters in the case of *The Volcano* (2 W. Rob. 237), which was relied on by the appellants. In that case the *Volcano* was not moored to a mooring buoy, but she had a small anchor dropped, and a large anchor ready to let go. The question Dr. Lushington put to the Trinity Masters was this: "How far there was an immediate necessity or otherwise for dropping the second anchor, is not the real question in this case. The question is, whether it would not have been a prudent and proper precaution to have done so. I do not mean that you are to strain the matter; but, considering the facts of the case with reference to position of the *Helen*, the state of the wind, and all the circumstances, you will have to determine how far it is a measure which men acquainted with nautical affairs ought, in ordinary prudence, to have adopted." The nautical assessors, in answer to the question put to them, have informed their Lordships that they think it was a better course for the master of the *William Lindsay* to have kept his anchor, as it was, prepared to be let go, than, when the storm came on, to have dropped it; that it is not usual nor safe, when vessels are riding at mooring buoys with the length of cable which this vessel had out, to drop an anchor. The more usual and practical, and, as they think, the better course, is to keep the anchor ready to let go in case of accident. That opinion having been given to their Lordships by gentlemen of nautical

experience, they think it determines the second question in the case in favour of the respondents. It is clear that the *William Lindsay* had her anchor ready to let go, that she did all that was possible to effect that manœuvre and to drop the anchor, and she did not succeed in that operation by reason only of an inevitable accident. Under these circumstances their Lordships are of opinion that the judgment of the Judge of the Admiralty Court is right; viz., that no negligence can be imputed to the *William Lindsay*. The result will be that they will humbly advise Her Majesty to affirm the judgment of the court below, and to dismiss this appeal, with costs.

Proctor for the appellants, W. W. Wynne, agent for Simpson and North, Liverpool.

Proctors for the respondents, Toller and Sons, agents for Hull, Stone, and Fletcher, Liverpool.

COURT OF ADMIRALTY.

Reported by J. P. ABBOTT, Esq., Barrister-at-Law.

Tuesday, July 1, 1873.

THE CHARKIEH.

Collision—Cross cause—Security—Foreign parties—Practice—Admiralty Court Act 1861 (24 Vict. c. 10), sect. 34.

Where a cause of damage is instituted in the High Court of Admiralty against a ship, in respect of a collision in which the ship of the plaintiffs is totally lost, and the defendants institute a cross cause in personam against the plaintiffs in respect of the same collision, both parties being foreigners resident abroad, and the plaintiffs decline to give security to answer judgment in the cross cause, or to enter an appearance, the court will apply the provisions of the Admiralty Court Act 1861 (24 Vict. c. 10), sect. 34, and will order proceedings to be stayed in the principal cause until security is given in the cross cause.

In this case a cause of collision was instituted in rem against the *Charkieh*, a vessel belonging to the Khedive of Egypt, by the owners of the Dutch steamship *Batavier*, and the *Charkieh* was arrested. The *Batavier* was sunk and totally lost, and the owner of the *Charkieh* instituted against the owners of the *Batavier*, who were resident abroad, a cross cause of collision in personam in respect of the same collision. (a) The owners of the *Batavier* had entered no appearance in the cross cause against them, and had declined to give bail.

The cause against the *Charkieh* now came before the court on motion made on behalf of the owners of the *Charkieh* that "all proceedings be suspended until appearance has been entered and security given to answer judgment in the cause of damage entitled the *Batavier*, being the cross cause brought for damage sustained by the defendant herein in respect of the collision which caused the damage for which the plaintiffs are in this cause proceeding against the defendant's ship *Charkieh*."

Service of the citation in the cross cause had been made upon the attorneys for the plaintiffs in the principal cause in accordance with rule 171 of the Admiralty Rules of 1850.

(a) In this case the Khedive of Egypt had protested against the jurisdiction of the court, but the protest was overruled and the cross cause afterwards instituted: see *The Charkieh*, *supra*, vol. 1, p. 351.—Ed.

[ADM.]

THE MELPOMENE.

[ADM.]

Gibson for the owner of the *Charkieh* in support of the motion.—Formerly no security could be demanded in a cross cause where the defendant in that cause was out of the country, although this court endeavoured by every means to enforce the giving of such security:

The Seringapatam, 3 W. Rob. 41;

The North American, Lush. 79;

The Heart of Oak, 20 L. J. Adm. 78.

Now by the Admiralty Court Act 1861 (24 Vict. c. 10), sect. 34, it is enacted that "The High Court of Admiralty may on the application of the defendant in any cause of damage, and on his instituting a cross cause for the damage sustained by him in respect of the same collision, direct that the principal cause and the cross cause be heard at the same time and upon the same evidence; and if in the principal cause the ship of the defendant has been arrested or security given to answer judgment, and in the cross cause the ship of the plaintiff cannot be arrested, and security has not been given to answer judgment therein, the court may, if it think fit, suspend proceedings in the cross cause, until security has been given to answer judgment in the cross cause." Here the *Charkieh* has been arrested in the principal cause, but the plaintiffs in that cause decline to enter an appearance or to give bail. They are resident abroad, and the owner of the *Charkieh* has no remedy against them without the assistance of the court. The owners of the *Batavier* are not entitled to come here and claim against the *Charkieh*, except upon the terms that they submit to the jurisdiction of the court and give security in the cross cause. The *Batavier*, being lost, cannot be arrested, and is therefore within the meaning of the section.

Clarkson for the owners of the *Batavier*.—We are not bound to find security for a non-existent ship. A foreigner cannot institute a suit in this country against another foreigner also non-resident and having no property within the jurisdiction. Unless the owners of the *Batavier* can be attached there is no jurisdiction. There is no *res* to proceed against, and no means of putting the process of the court into effect. [Sir R. PHILLIMORE.—The contention is that the party claiming must submit to the *locus fori*. It has often been held here that the court has jurisdiction in cases of collision between foreign ships.] No doubt it was so held in *The Johans Friederich* (1 W. Rob. 35), but that was a proceeding *in rem*, and the *res* was in the hands of the court; whilst here the cross cause is *in personam*. The fact that we are before the court in another cause will not give jurisdiction in the cross cause. Moreover the section relied on only applies to a case where the ship is in existence, and a proceeding *in rem* is instituted, but the ship, having been removed from the jurisdiction, cannot be arrested. It does not apply where there can be no arrest under any circumstances. No bail can be required where there is no proceeding *in rem*.

Gibson in reply.—The section is remedial, and should be liberally construed. The words "security has not been given," would apply rather to a suit *in personam* than to a suit *in rem*. The word "bail" is not used, and that is the ordinary expression when a ship can be arrested.

July 1.—Sir R. PHILLIMORE.—The court ought not to be astute to find other than a liberal meaning to the sections of a remedial statute.

I take a different view from Mr. Clarkson of the construction of the statute. The court has power, I think, to stay the proceedings in the principal cause until such time as security shall have been given by the defendants in the cross cause. I think it is equitable that such should be the rule. The owners of the *Batavier* have instituted a cause of damage in this court, and they have obtained security in that cause by the arrest of the ship, but as defendants in the cross cause they refuse to give security. This court administers private international law, and here it must be remembered that both parties are foreigners, and that they are proceeding in this court for a tort. Now this Act was expressly passed to remedy a defect in the former curtailed practice of the court in this respect. I am clearly of opinion that the plaintiff in the cross cause is entitled to the security for which he asks, and it must be given within a week.

Solicitors for the *Charkieh*, *McLeod and Watney*.
Solicitors for defendants, *Clarkson, Son, and Greenwell*.

Friday, March 28, 1873.

THE MELPOMENE.

Salvage—Attempt to render assistance—Ultimate salvage by others—Right to reward.

Where a vessel makes a signal of distress, and another goes out with the bona fide intention of assisting that distress, and as far as she can does so, but some accident occurs which prevents her services being as effectual as she intended them to be, and no blame attaches to her, the Court of Admiralty will not allow her to go entirely unrewarded, but for the interests of commerce and navigation, and as an encouragement to perform salvage services will give some reward (semble) if the property is saved by other means.

This was a consolidated cause of salvage instituted on behalf of the owners, masters, and crew of the steamtugs *Fiery Cross* and *Resolute*, and against the ship *Melpomene*, and her cargo and freight. Both tugs belonged to the New Steaming Company (Limited), and were of considerable power and value. The *Melpomene* at the time of the services had just started upon a voyage from Liverpool to Melbourne, and her values were agreed to be—ship, 17,500*l.*, cargo, 72,324*l.*, and freight to be paid at Melbourne, 2421*l.* 7*s.* 8*d.*, making a total value of 92,244*l.* 7*s.* 8*d.*

From the evidence it appeared that about 3 a.m. on the morning of 9th Dec. 1872, the *Resolute* was lying in the river Mersey, near Soncombe Wall, when she sighted the *Melpomene* in collision with a screw steamer and drifting up the river on the flood tide. The *Resolute* followed the two vessels for the purpose of rendering assistance, and on the screw steamer getting clear of the *Melpomene*, went close to the latter, and was hailed by the *Melpomene's* crew to pass a hawser on board. This was attempted, but at first without success, and the *Melpomene* continued to drift up the river, and thereupon began to burn blue lights for assistance. When the *Melpomene* was nearly abreast of Woodside Ferry, another tug came up and attempted to make fast, but also failed. The *Resolute* having again got into position, succeeded in passing a hawser on board the *Melpomene*, and her crew were told that it had been made fast on

[ADM.]

THE CITY OF MOBILE.

[ADM.]

board the *Melpomene*, and were ordered to go ahead. The *Resolute* accordingly went ahead, but the hawser, not having been made fast, came away, and the *Resolute* again got out of position. Meanwhile the *Fiery Cross* came up, in answer to the signals for assistance, and succeeded in getting hold of the *Melpomene* and towing her, with the assistance of two other tugs, to a place of safety. The wind and sea during the whole service were very high, and there was considerable danger to the *Melpomene* from the risk she ran of drifting into other vessels or on shore.

The defendants admitted that the *Fiery Cross* had rendered salvage services and paid into court a sum of 120*l.* as sufficient remuneration for those services; but they denied that any service was rendered by the *Resolute*, and prayed that her claim might be dismissed.

Butt, Q.C. and Cohen, for the plaintiffs, contended that the tender was insufficient. As to the claim of the *Resolute*, it is not because the efforts of a vessel to render assistance are unavailing, that she cannot recover reward. The ship was ultimately saved by other persons, but the *Resolute* endeavoured to render assistance, and would have done so, but for an accident which occurred through no fault of her own. Moreover the burning of blue lights was a call for assistance, and if in consequence of that call any vessel *bona fide* attempted to render aid in a proper manner, the owners of the *Melpomene* must be considered to have given an implied undertaking through their servants that they would pay for such services.

The E. U. 1 Spinks, 66;

The Undaunted, Lush. 91; 2 L. T. Rep. N. S. 520.

Milward, Q.C., and E. C. Clarkson for the defendants.—The amount tendered is sufficient. No further claim can be made in respect of the *Resolute*, because there can be no salvage reward where the exertions, however meritorious, do not contribute to the successful result.

The Edward Hawkins, Lush. 515.

Sir R. PHILLIMORE stated the facts, and awarded to the owners and crew of the *Fiery Cross* the sum of 150*l.* and then continued:—With regard to the question in this case, whether the *Resolute* is entitled to any remuneration at all, I have had considerable difficulty, seeing that her intention, however good, was according to the evidence practically unexecuted, but, on the other hand, I think there are no cases which would stand in the way of my adopting as a principle this, which appears to me of considerable importance to the interests of commerce and navigation, especially at the present time—namely, that where a vessel makes a signal of distress, and another goes out with the *bona fide* intention of assisting that distress, and, as far as she can, does so, and some accident occurs, which prevents her services being as effectual as she intended them to be, and no blame attaches to her, she ought not to go wholly unrewarded. I think it is for the interests of commerce and navigation, and also for the encouragement of others to perform salvage services, that some remuneration should be given. I think a slight remuneration will suffice on the present occasion, and I shall award the *Resolute* 50*l.*

Solicitors for the plaintiffs, Simpson and North.

Solicitors for the defendants, Hull, Stunc, and Fletcher.

Tuesday, Nov. 11, 1873.

THE CITY OF MOBILE.

Master's wages and disbursements—Master also co-owner—Right of the co-owners to set-off ship's expenses—Merchant Shipping Act, 1854 (17 & 18 Vict., c. 104), s. 191.—Pleading

In a suit for wages and disbursements by a master, who is also co-owner, the other co-owners may, under the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104) s. 191, set up a counter-claim or set-off in respect of outstanding co-ownership accounts, and claim that the balance (if any) be paid to them.

To a petition claiming master's wages and disbursements, and praying a reference of any accounts arising in respect thereto to the registrar and merchants, an answer alleging the master to be also co-owner, and that accounts are outstanding between the plaintiff and the defendants, as co-owners, showing a balance on all accounts in favour of the defendants, and praying a reference to the registrar and merchants of all masters' and co-ownership accounts, will be allowed by the High Court of Admiralty.

THIS was a cause of wages and disbursements, instituted on behalf of Thomas Purday, late master of the *City of Mobile*. The petition alleged that the plaintiff had agreed to become master of the ship at the wages of 300*l.* per annum, and 21*s.* per week board wages when ashore: that the plaintiff had made two voyages as master of the ship, and in respect of the first voyage his account for wages and disbursements had been settled; that upon the completion of the second voyage in March, 1873, the plaintiff had delivered to the owners of the said ship his account for wages and disbursements upon the said voyage; that there was due and owing to the plaintiff as master, 554*l.* 16*s.* 3*d.* for such wages and disbursements, in respect of the second voyage, and notwithstanding the plaintiff had applied to the defendants for payment, they had refused and neglected to pay the same, and that the said sum was still due to the plaintiff, together with a sum equal to ten day's double pay, under and according to the provisions of the Merchant Shipping Act 1854 (sect. 189). The petition concluded by praying the judge to pronounce for the said claim, and to condemn the defendants therein, and in the costs of the cause, and to refer any question of accounts arising between the parties with reference to such accounts, to the registrar and merchants.

To this petition the defendants filed the following answer:—

The defendants admit that the plaintiff earned wages, and made certain disbursements as master of the *City of Mobile*, but they say that his accounts in respect thereof are not accurate, and that the plaintiff was during the voyage in respect of which he is claiming, and that he is still, owner of sixteen sixteenth parts or shares in the said ship, and that accounts are outstanding and unsettled between the plaintiff and defendants as co-owners of the said vessel, and that upon the balance of all the accounts between the plaintiff as master and co-owner, and the defendants, nothing is due from the plaintiff, but on the contrary, a sum of money is due from the plaintiff to the defendants.

The answer concluded by praying the judge "to refer all accounts outstanding and unsettled, between the plaintiff and the defendants, both as to the wages and disbursements of the plaintiff as master of the said ship, and as to the earnings and disbursements of the said ship, to the registrar,

ADM.]

THE CITY OF MOBILE.

[ADM.]

assisted by merchants, to report thereon, and to condemn the plaintiff to pay the defendants the balance which shall appear due from him to them with costs."

The plaintiff, on this answer being filed, gave notice of motion calling on the defendants to show cause why so much of the prayer of the answer as related to the plaintiff's co-ownership and the co-ownership accounts, and so much of the prayer of the answer as prayed that those accounts might be referred to the registrar and merchants should not be struck out.

R. G. Williams and *H. James* in support of the motion.—It is not competent for the defendants to set-off a claim not directly arising out of the relation of master and owners; hence they cannot plead by way of set-off any such claim arising out of matters immaterial to the issue. The claims pleaded here are matters in account between the plaintiff as owner and his co-owners, and not between him, as master, and his owners. [The *Admiralty Advocate* referred to *The Feronia*, L. Rep. 2 Adm. & Ecc. 65; 17 L. T. Rep. N. S. 619; 3 Mar. Law Cas. O. S. 54.] That case does not go beyond the short point that a co-owner may sue as master for his wages, and so far supports our case, but it does not show in any way that the other co-owners may set-off their claims. Fair deductions the court is entitled to make; but what is purely matter of set-off arising out of extraneous matters not connected with wages cannot be entertained.—

Williams and Bruce, Adm. Practice, pp. 170, 171;

The D. Jee, 13 L. T. Rep. N. S. 21; 2 Mar. Law Cas. O. S. 293.

In *Parsons on Shipping*, p. 433, it is said: "If the respondent has a claim against the libellant, he can in many cases avail himself of it in his answer as a set-off. The Admiralty has no jurisdiction of an independent set-off, and those usually allowed are where advances have been made upon the credit of the particular debt or demand for which the plaintiff sues, or which operates by way of diminished compensation for maritime services, on account of imperfect performance, misconduct, or negligence, or as a restitution in value for damages sustained in consequence of gross violations of the contract."

Willard v. Dorr, 3 Mason (U. S. First Circuit Rep.), 161, 171;

The Lady Campbell, 2 Hag. Adm. 14, n.;

Dexter v. Monroe, 2 Sprague (U. S. District Court, Massachusetts), 39.

In the last-cited case a court of admiralty refused to allow a set-off to be pleaded in a suit for master's wages, he being co-owner, and his co-owners seeking to retain the balance of his wages on account of a claim made by them as co-owners, against the master as co-owner. It is equitable that master's wages should be paid to him as subsistence money. The set-off should only be allowed if it arises out of a claim made in respect of the particular voyage in which the wages are earned, and out of the relation of master and owner as such. No doubt the language of the *Merchant Shipping Act 1854* (17 & 18 Vict. c. 194), sect. 191, is very wide, but looking at the subject matter and the interpretation given to it in *The D. Jee* (*ubi sup.*), it can only relate to claims as between master and owner.

The *Admiralty Advocate* (Dr. Deane, Q.C.) and *Clarkson* for the defendants.—This is a suit for wages and disbursements, not, as in the cases cited from *Parsons on Shipping*, for wages only. The plain-

tiff claims a balance, and the defendants say that for the purpose of ascertaining that balance all the accounts must be gone into. The 191st section of the *Merchant Shipping Act 1854* includes not only a set-off but also a counter-claim; and this signifies any outstanding accounts. The section directs the payment of the balance to whomsoever it may be due, and this we claim. Once the accounts are opened they must be all gone through, and a balance made.

The Glenanner, Swab. 422;

The Caledonia, Swab. 19.

A master who is also co-owner has only the same rights as the other co-owners, and cannot claim to be paid a balance except upon the whole accounts between them. [Sir R. PHILLIMORE.—That does not agree with *The D. Jee* (*ubi sup.*); for there it is said that only matters relating to wages and disbursements can be gone into.] In that case the only question at issue was whether the court should take cognizance of an equitable claim of the master, and it was held that such a claim could not in any way come under the head of either wages or disbursements. [Sir R. PHILLIMORE.—Can you in any way bring your counter claim under the head of wages and disbursements?] The counter claim relates to disbursements made by the managing owners on ship's account during the last voyage only, and the plaintiff's share of these disbursements we claim to deduct. A master cannot equitably claim a balance in his favour as master, and evade payment of a balance against him as co-owner, more especially where part of his claim is for disbursements against his co-owners seek to set-off other disbursements. If this part of the answer is struck out the court will, in effect, compel the defendants to bring another suit for co-partnership accounts. The plaintiff might in one suit claim not only his wages and disbursements, but also his share of the ship's earnings, as co-owner; why cannot his other co-owners set these last off in this suit? The master could have no action at common law to recover wages against his co-owners, as they would have to be paid out of property in which he himself holds a share. He sues in this court, therefore, as in a court of equity, and such a court will not allow him to succeed against his co-owners, when he himself is indebted to them. The 191st section is wide enough to include such a set-off, and really gives power to refer all matters of account between the parties.

R. G. Williams, in reply.—The co-ownership accounts are necessarily complicated, and should be settled in another suit; otherwise the court has before it no claim in respect of these accounts. At the time of the passing of the *Merchant Shipping Act 1854*, a master could only claim in respect of his wages, and not for disbursements as well; and by *The D. Jee* only such things as directly related to wages could be set-off. The right to claim for disbursements arose only under the *Admiralty Court Act, 1861*, sect. 10, and the passing of that section does not give any right to set off claims other than might have been set off previously.

Sir R. PHILLIMORE.—This is an application to the court to strike out certain portions of the answer in a suit of wages and disbursements, instituted on behalf of the master of the vessel, against certain owners of the vessel. The master is himself a co-owner, and his co-owners set up a defence that "upon the balance of all the accounts between

C. P.]

ENSWORTH AND OTHERS v. THE ALLIANCE MARINE INSURANCE COMPANY.

[C. P.]

the plaintiff as master and co-owner, and the defendants, nothing is due to the plaintiff, but, on the contrary, that a sum of money is due from the plaintiff to the defendants." Now, the 191st section of the Merchant Shipping Act enacts that "every master of a ship shall, so far as the case permits, have the same rights, liens, and remedies for the recovery of his wages which by this Act, or by any law or custom, any seaman, not being a master, has for the recovery of his wages; and if any proceeding in any court of Admiralty or Vice-Admiralty, touching the claim of a master to wages, any right of set-off or counter-claim is set up, it shall be lawful for such court to enter into and adjudicate upon all questions, and to settle all accounts then arising, or outstanding and unsettled between the parties to the proceedings, and to direct payment of any balance which is found to be due." I think it would be impossible to deny that the language of this section is amply wide enough to cover the set-off pleaded in the article objected to—and the only question which has perplexed the mind of the court is whether the decision in the case of the *D. Jee* (13 L. T. Rep. N. S., 22; 2 Mar. Law Cas., O.S. 283) affords a precedent which limits the construction to be put upon the words of the clause, in the manner contended for; that is, whether the provisions of the section are wholly confined to a set-off of claims in the capacity of master and owner, or include a set-off of claims arising out of the relation of master and co-owner. In the case of the *D. Jee*, Dr. Lushington, after referring to the section, said, "Now what is the meaning of the words, 'to settle all accounts then arising or outstanding and unsettled between the parties to the proceeding.' It will be observed that it was only in case of a set-off or counter-claim that this power was conferred upon the court. It is true that in this case there has been a counter-claim, but it appears to me that the intention was not to refer to this court the decision of all questions which might exist between the parties on matters entirely foreign to wages and disbursements. The object of this section was to enable the court to do justice whenever the owners set up a counter-claim with reference to the ship or her disbursements. All these are matters properly cognizable by the Court of Admiralty, but the exposition set up by the plaintiff might include matters wholly foreign to its jurisdiction, and to the decisions of which it is unaccustomed." It has been truly said that it would be incompetent to the court to entertain the counter-claims now set up by the defendants in another suit, and that in all probability the court would hold its hand, and not pay out the sum found due to the master for wages till after the decision in this second suit. It is clear that these counter-claims relate to the ship and her disbursements, and are cognizable by the court in another, if not in this, suit. Then the court has a strong inclination in the interests of justice, as well as of the parties, not to lean towards that construction of the section which would lead to a multiplicity of suits. I am of opinion that the portions objected to in the answer should stand, and I must therefore reject the prayer of the motion. The costs to be costs in the cause.

Proctor for the plaintiff, W. G. Jennings, agent for Whitby and Maddock, Liverpool.

Solicitors for the defendants, S. and T. Martin.

COURT OF COMMON PLEAS.

Reported by JOHN ROSE and R. A. KIRULANA, Esqrs.,
Barristers at Law.

Thursday, July 17, 1873.

ENSWORTH AND OTHERS v. THE ALLIANCE MARINE
INSURANCE COMPANY.

*Marine insurance—Insurable interest—Open policy
—Right of consignees to insure.*

The plaintiffs who are cotton brokers and agents in London were, in the course of their business, in the habit of receiving consignments of cotton from Bell and Co., of Bombay, and other correspondents abroad, the plaintiffs making advances by acceptances against the consignments. The bills of exchange were usually negotiated in India and sent to the plaintiffs with the bills of lading attached, who accepted the same against delivery of the shipping documents. The plaintiffs usually insured the cotton thus consigned to them from Bombay with the defendants, by means of an open floating policy for 5000L on cotton, lost or not lost, from Bombay to London, in ship or ships, and the insurances were expressed to be made "as well in their own names as for and in the name or names of all and every person and persons to whom the same doth, may, and shall appertain in part or in all."

Bell and Co., having advised the plaintiffs of a shipment of cotton, drew upon the plaintiffs for 3000L, at six months' sight, at the same time requesting the plaintiffs to insure the cotton. The bill of exchange was negotiated by a bank in India and the plaintiffs accepted it on its arrival in London against the delivery of the shipping documents. The plaintiffs having two open policies then running with the defendants declared the cotton against them, and at the same time wrote to the London branch of the bank offering "to hold the amount insured at their disposal until payment of the acceptance for 3000L."

The vessel in which the cotton was shipped having been lost at sea, the plaintiffs paid the bill of exchange for 3000L, obtained possession of the bill of lading, and demanded the policy moneys from the defendants. Payment being refused, the plaintiffs brought an action on the policies, averring that the plaintiffs, or some or one of them, were or was interested in the goods to the full amount claimed, and that the insurances were made for the use and benefit and on account of the person or persons so interested.

Held (per Bovill, C.J., and Denman, J.), that the plaintiffs had an equitable interest in every part of the cotton, they being liable upon their acceptance, and that the plaintiffs had such an interest in selling and managing the consignment as in law entitled them to insure; and also that as the plaintiffs intended to cover the interests of all parties interested in the cotton, they might recover the full amount under a declaration averring interest in themselves, applying the proceeds to the extent of their claims, and holding the remainder as trustees for the other persons beneficially interested.

Held (per Keating and Brett, JJ.), that the plaintiffs having made advances on goods in transitu, had only a contract right in the cotton to have the bill of lading endorsed to them on payment of their acceptance, and that they, as consignees, though they were interested in every part, were not the

legal owners, nor the trustees for the persons beneficially interested, and could not therefore recover more than their own beneficial interest.

Thus was an action brought to recover the amount due to the plaintiffs on two open floating marine policies of insurance on goods for 5000*l*.

The plaintiffs were cotton brokers and agents in London, and as such were in the habit of receiving from Bell and Co., of Bombay, consignments of cotton for sale. Against such consignments they made advances by acceptances. Having in May 1870 received from Bell and Co. advice of the shipment of 250 bales of cotton per *Aurora*, consigned to them on the joint account of Bell and Co. and one Cusumdas Mathowdass, the plaintiffs, accepted a bill at six months sight for 3000*l*, drawn by Bell and Co. on account of the shipment, and acting on instructions from Bell and Co., declared the cotton so consigned on the open policies with the defendants. The plaintiffs paid their acceptance at maturity and received the bill of lading; this was after the loss of the cotton. Both ship and cargo were totally lost on 11th June 1870.

The plaintiffs alleged in their declaration "that the plaintiffs or some one of them were or was interested in the said goods to the amount of the moneys by them insured thereon, and that the said insurance was made for the use and benefit and on account of the person or persons so interested." The plea traversed the allegations that the plaintiffs caused them to be insured as alleged, and that the goods or any part of them were shipped as alleged, and also that the plaintiffs were not interested in the said goods, nor were the insurances made for the benefit of such persons as alleged. At the trial before Keating, J., at the sittings at Guildhall, after Hilary Term, 1872, a verdict was found for the plaintiffs for the whole amount insured subject to leave reserved to the defendants to move to enter a verdict for them, if the court should be of opinion that the plaintiffs had not an insurable interest, or to reduce the damages to 3000*l*. in the event of the court being of opinion that the interest alleged and proved, and the plaintiffs' right to recover was limited to the amount of their actual advance. The court was to have power to draw inferences of fact.

Sir John Karslake, Q.C., having obtained a rule, pursuant to leave reserved.

H. James, Q.C., and Watkin Williams, Q.C., showed cause.—The whole legal interest was in the plaintiffs when they accepted the draft; that from that date they would only be obliged to account to the consignees for any surplus that might remain after they had been paid. Even if they had not the whole interest, they had such an interest in the whole and every part of the goods as would give them an insurable interest in the whole. They might insure to the full value in their own names holding the surplus above their own actual interest as trustees for the consignors. The whole of the goods must be treated as security for these advances. They cited:

Bell v. Bromfield, 15 East, 364;

Bell v. Ansley, 16 East, 141;

Hiscox v. Burnett, 16 East, 145;

Wolfe v. Horncastle, 1 B. & P. 316;

Page v. Fry, 2 B. & P. 340;

Cohen v. Hannam, 5 Taunt. 101;

Lucena v. Crawford, 3 B. & P. 75; 2 B. & P., N. R., 390;

Carruthers v. Shedden, 6 Taunt. 141;

Sparkes v. Morshead, 2 Bing. N. C. 761;

Hunter v. Leathley, 10 B. & C. 658;

Watson v. Brown, 11 C. B., N. S., 756;

Waters v. Monarch Insurance Company, 5 E. & B. 870;

London and North Western Railway Company v.

Glyn, 1 E. & E. 682;

Joyce v. Swan, 17 C. B., N. S., 84;

North British and Mercantile Insurance Company v.

Moffatt, L. Rep. 7 C. P. 25;

Stephens v. The Australasian Insurance Company, L.

Rep. 8 C. P. 18; ante, vol. 1, p. 458;

2 *Duer on Insur.* 22, 29, 74.

Sir John Karslake and Cohen in support of the rule.—The plaintiffs have no insurable interest in the cotton. Their interest is only an expectancy of profit resting upon a contingency. If they have any interest at all, it is merely to the extent of their actual interest, viz., 3000*l*, and they can only insure in their own names and on their own behalf to the extent of that interest. The plaintiffs were not in law nor in equity trustees of this cotton, and hence without a beneficial interest equal to the whole value of the goods, they cannot insure to the full value nor recover the full value. The following cases, in addition to those above given, were referred to on behalf of the defendants:

Robertson v. Hamilton, 14 East, 522;

Ex parte Waring, 19 Ves. 345;

Forbes v. Hayman, 3 M. D. & De G. 430;

Irving v. Richardson, 2 B. & Ad. 193;

Stockdale v. Dunlop, 6 M. & W. 224;

Sutherland v. Pratt, 11 M. & W. 206; 12 M. & W. 17;

Smith v. Vertue, 9 C. B., N. S., 314;

Bank of Ireland v. Fary, L. Rep. 7 Ex. 14;

Ex parte Smart, L. Rep. 8 Ch. App. 220;

The Freedom, L. Rep. 3 P. C. 504; *ante* vol. 1, p. 28.

July 15.—BOVILL, C.J.—I regret to say that, after the very able arguments of the learned counsel on both sides, and the assistance which we derived from them, and after much consideration on our part, the members of the court who heard the argument are equally divided in opinion as to the result. I will first deliver judgment on behalf of my brother Denman and myself. The action was brought upon two policies of insurance, to recover a loss upon cotton shipped at Bombay for Liverpool by a vessel called the *Aurora*. Both policies were effected by the plaintiffs in their own names, under the firm of Irving, Emsworth and Holmes, and were two of a series of insurances which they had effected in the usual course of their business. The plaintiffs were brokers and agents engaged in the cotton trade in London, and were in the habit of receiving consignments of cotton from Bombay for sale on behalf of the shippers, who drew bills upon the plaintiffs against the consignments. These bills were usually negotiated in India, with the bills of lading attached as security, and were then remitted to this country. The holders of the bills on their arrival here presented them to the plaintiffs for acceptance, and the plaintiffs accepted them against delivery of the shipping documents; their security being the goods in respect of which the bills were drawn. The holders of the bills of lading had no further interest in them, or in the goods which they represented, than as security for payment of the bills drawn upon and accepted by the plaintiffs, subject to which the plaintiffs had the right to the bills of lading as security for the amount for which they had come under acceptance against the consignment; and they had also the right to sell the goods for their reimbursement, as well as to earn their commission upon the sales, and had generally to manage the consignment. The plaintiffs were in the habit of effecting insurances with the defendants to cover goods thus consigned to them; and the policies, including

C. P.]

ESSWORTH AND OTHERS v. THE ALLIANCE MARINE INSURANCE COMPANY.

[C. P.]

those now sued upon, were all in the same form, expressing in the usual way that they were made by the plaintiffs "as well as in their own names as for and in the name or names of all and every person or persons to whom the same doth, may, or shall appertain in part or in all," and were each for 5000*l*. "on cotton [or] produce from Bombay to London or Liverpool direct or via Havre . . . by ship or ships," and at the rate or premium per cent. stated in each policy. As the plaintiffs received advices of the shipment, they declared to the defendants, and upon the policies, the particulars and value of the goods and the names of the vessels by which they were shipped. The terms on which goods were to be shipped are contained in the following extract of a letter from the plaintiffs to Messrs. Robert Bell and Co. of Bombay, dated the 28th Oct. 1869:

Our previous letters of credit for advances on cotton to our consignment having expired, we beg leave to renew the same as follows: You are by the present authorised to value on us at usance at the rate of 10*l*. sterling per bale of cotton, cost f. o. b. and freight, against shipping documents and timely insurance orders or policies of insurance; and we engage to accept your drafts so drawn on presentation, and to pay the same at maturity, or previously, at our option, under discount. The shipments not to exceed 300 bales of cotton by any one vessel, and the present credit to be limited to 30th April next, unless previously withdrawn.

On the 28th April 1870, Messrs. Robert Bell and Co., in Bombay, shipped 250 bales of Cotton on board the *Aurora* for Liverpool, under bills of lading making the goods deliverable to them or order, and the freight to be paid at the port of discharge. On the 24th April, Messrs. Robert Bell and Co. wrote to the plaintiffs as follows:

We have now the pleasure to inform you that we have induced Mr. Cursondas Madhowsdas (respectable merchant of this place) to ship in joint account with ourselves 250 bales new Dho Uera cotton per ship *Aurora* (freight at 1*l*. per ton), and against this shipment we have valued upon your good selves by this opportunity, through the National Bank of India, p. 5908*l*., at six months eight (ex. 1*l*. 11*l*. 4*d*.), to which we crave your kind protection. Sample of this shipment goes forward overland to your address by this mail. We hope this cotton will arrive with you at a very favourable opportunity; and confiding the same to your care and attention, and referring to the accompanying letter for market information we remain, &c.,

ROBERT BELL AND CO.

There was a further shipment by Messrs. Robert Bell and Co., of 250 other bales of cotton by the same vessel; and upon the whole of the cotton Messrs. Bell and Co. had advanced Cursondas Madhowsdas a sum of 6000*l*. A bill of exchange for 3000*l*. in respect of the 250 bales first mentioned was drawn by Robert Bell and Co., payable to their own order, upon the plaintiffs, and payable at six months after sight. This bill of exchange was indorsed by Robert Bell and Co., and then discounted by them with the National Bank of India, in Bombay; and at the same time, as security for the acceptance and due payment of the bill, Messrs. Robert Bell and Co. placed in the hands of the bank the bills of lading for the 250 bales of cotton against which the bill of exchange was drawn. The following letter was also signed by Robert Bell and Co., and given to the National Bank of India:

Bombay, 28th April, 1870.

To the Manager of the National Bank of India, Limited.

Sir,—Having this day negotiated to you one bill of exchange drawn by us on Messrs. Irving, Ebsworth and Holmes, of London, the particulars of which are noted

at foot, and having at the same time as collateral securities for the due payment of the said bill indorsed to you the bills of lading and handed to you the shipping documents of the several goods, also stated at foot,—we hereby authorise you or any of your managers or agents, if you or he shall think fit, at our expense to insure the above goods from sea risk, including loss by capture, and also from loss by fire on shore, in case Messrs. Irving, Ebsworth and Holmes (the plaintiffs) shall omit to do so immediately after notice from you to that effect, and to add the premiums and expenses of such insurance to the amount chargeable to us in respect of the said bills. We also authorise you or any such manager or agent, if you or he shall think fit, to sell any portion of the said goods which you or he may deem necessary, for payment of freight and of such premiums and expenses of insurance, and to take such charges for commission as in ordinary cases between a merchant and his correspondent. We also authorise you and the holders of the above bills for the time being to take, if you or they shall think fit, conditional acceptances to all or any of such bills, to the effect that, on payment thereof at maturity, the above-mentioned bills of lading and shipping documents shall be delivered to the drawers or acceptors thereof; such authorisation on our part to extend to cases of acceptance for honour. We further authorise you or any of your managers or agents, on default being made in acceptance on presentment or in payment at maturity of any of the above bills, to sell the said goods or a competent part thereof, and to apply the net proceeds (after deducting usual commission and charges), as far as they will go, in or towards payment of such bills, with re-exchange and charges, and to retain the surplus balance, if any, and place the same against any other of our bills which may at the time be in your hands; and, subject thereto, we request you to account for such surplus, if any, to the proper parties. We further authorise you or the holders of the said bills, for the time being, at any time before their maturity, to accept payment from the drawers or acceptors thereof, if required so to do, and on payment to deliver the said bill of lading and shipping documents to such drawers or acceptors; and we request that you or the holders of the said bills will allow, if required, in that event, discount thereon for the time such bills may have to run, at the Bank of England minimum rate of the day, if taken up in London, or if in ———, at the current rate of discount of the day on government acceptances in ———, but not to exceed the rate of five per cent. per annum.

(Signed)

ROBERT BELL AND CO.

Bills and documents above referred to:

Particulars of Bills.			Particulars of Goods.	
Date.	Amount.	Drawee.	Bill of Lading.	Name of Ship.
Ap. 24, 1870.	3,000 <i>l</i> .	Messrs. I. E. and Holmes.	250 bales cotton, R. B. & Co.	<i>Aurora</i> .

Messrs. Robert Bell and Co. at the same time also handed to the National Bank an order for insurance addressed to the plaintiffs, in the following terms:

Bombay, 28th April 1870.

Messrs. Irving, Ebsworth, and Holmes, London.

Dear Sirs,—We have to request you will effect English insurance on 250 bales of cotton shipped by us per *Aurora* for Liverpool, to the extent of 20*l*. per bale, and will thank you to deliver the policy to the National Bank of India, London, with their lien duly secured thereon, to be held by them until payment of our draft on you for 3000*l*., dated 28th April 1870. We beg to add that, should you omit to effect insurance, the bank will be at liberty to insure the shipment for their own protection, and recover the cost from you before giving up the bill of lading.

(Signed)

ROBERT BELL AND CO.

The letter of hypothecation was countersigned by Cursondas Madhowsdas, who was interested with Bell and Co. in the adventure; and he also indorsed the bill of exchange, and wrote and gave to the National Bank a letter addressed to the plaintiffs (but which was not shown to them until

C. P.]

ENSWORTH AND OTHERS V. THE ALLIANCE MARINE INSURANCE COMPANY.

[C. P.]

after payment of their acceptance), in the following terms:

Bombay, 29th April 1870.

Messrs. Irving, Ensforth, and Holmes.

Gentlemen,—I beg to advise you that I have shipped to your care, through Messrs. Robert Bell and Co. of this place, the undermentioned cotton: and I enclose invoice thereof, amounting to £. 38, 981. 6. Against the same I have drawn upon you as at foot, with the endorsement of the above-mentioned firm, and I beg your kind protection of my draft. I shall also feel obliged by your effecting insurance to the extent of 18s. p. B. (eighteen pounds per bale). On arrival of the shipment, please sell it to the best advantage, remitting to me any balance that may be due hereafter. Should, however, the net proceeds fall short of the amount of your acceptance, together with any charges that may have been incurred by you, I hereby authorize you to draw upon me at par for the difference, and I agree to honour any such draft or drafts that may be passed upon me, and also to accept as correct all accounts that may be rendered.

(Signed)

CURBOWDAS MADHONWALLS.

Then followed particulars of the shipment, describing by marks the 250 bales new Dho Uera, per *Aurora*, and bill dated 28th April 1870, for 3000*l.*, adding—"The cotton sample sent to you represents fair average quality of the 250 bales." No bill of exchange, however, was drawn by Curbowdass Madhonnawalls in respect of the 250 bales of cotton now in question. The National Bank of India remitted the bill of exchange for 3000*l.* and the other documents which had been given to them by Robert Bell and Co. to the chief manager of their bank in London. The bill of exchange was presented to the plaintiffs for acceptance on the 21st May, and they gave a conditional acceptance, as contemplated by the letter of hypothecation, in the following terms: "Accepted, 21st May 1870, against delivery of shipping documents for 250 bales cotton per *Aurora*. Irving, Ensforth and Holmes." The order for insurance from Messrs. Robert Bell and Co. was also shown to the plaintiffs by the National Bank; and it was arranged between them that the 250 bales of cotton per *Aurora* should be declared by the plaintiffs upon their open policies with the defendants' company, which were then running. At this time the plaintiffs had effected two open policies with the defendants for 5000*l.*, one of which was dated the 23rd Nov. 1869, and the other the 17th Dec. 1869; and as there remained a balance of 846*l.* not declared for upon the November policy, the plaintiffs declared that amount upon that policy, and a declaration, following other similar declarations, was made on the policy, under the general heading of "The interest attaching to the within policy is hereby declared to be shipped and valued as under," as follows, viz.: "23/5/70. per *Aurora* to Liverpool direct. [Marks] 250 bales of cotton, valued at 5000*l.*, attaching to this policy 846*l.*" A similar declaration of interest was endorsed upon the December policy, stating it to be "Per *Aurora*, balance from preceding policy on 250 bales cotton, valued at 5000*l.*, 4154*l.*" These are the policies upon which the plaintiffs are now suing in this action. The plaintiffs then sent the following letter to the National Bank of India:

London, 27th May, 1870.

To the chief manager of the National Bank of India, Limited, London.

Sir,—We beg to inform you that we have declared on our open marine policies for 5000*l.* dated 23rd Nov. 1869, and 17th Dec. 1869, effected with the Alliance Insurance Company, the following shipments from Bombay to Liverpool, as per specification at foot; and

we hereby undertake and guarantee to hold the amount insured at your disposal until payment of our acceptance for 3000*l.* due 24th Nov.

(Signed)

IRVING, ENSWORTH, AND HOLMES.

Goods, 250 bales cotton, R. B. & Co.; Ship *Aurora*; amount declared, 5000*l.*

The *Aurora* left Bombay on the voyage in question, and was lost at sea on the 11th June 1870, and there was a total loss of the cotton. On the 24th Nov. following, the plaintiffs paid their acceptance at maturity, and received from the National Bank the bill of lading, which until that day had remained with the bank as security for payment of the acceptance. The declaration contained averments (which were traversed) that the plaintiffs, or one of them, were or was interested in the goods to the amount of all the moneys by them insured thereon, and that the insurances were made for the use and benefit and on account of the person or persons so interested; and the question discussed upon the argument depended upon the issues raised. There was also a denial of the plaintiffs having caused themselves to be insured. It was agreed on the argument that the court should be at liberty to draw such inferences of fact as a jury should have drawn; and power was reserved to the court to amend the pleadings, if necessary. Upon the facts proved at the trial, it appears to us that the shipment in question was one of that description which was intended to be covered by, and which the plaintiffs were at liberty to declare upon, their floating policies. From the nature of the transactions in which they were engaged, their object in keeping on foot a succession of open policies must have been to cover shipments which might from time to time be consigned to them; and both they and the underwriters must, we think, be taken to have contemplated that the transactions would be conducted in the usual course of business, which is, that, when goods are so consigned, bills of exchange would be drawn upon the plaintiffs by the shippers, which would or might be negotiated with third parties with the bills of lading attached as security. Before the bill of exchange in this case was accepted the bill of lading and the goods which it represented would be a security to the holders of the bill of exchange, and the plaintiffs would have no present interest in them; but as soon as the plaintiffs accepted the bill, they became bound to pay it upon the shipping documents being delivered to them: *Smith v. Fortus* (9 C. B., N. S., 214); and, in the ordinary course of business, when the bill arrived at maturity, upon the plaintiffs paying the amount, the bill of lading would be handed to them. It was also contemplated as appears by the concluding part of Messrs. Bell and Co.'s letter to the National Bank, of the 28th April 1870, that the plaintiffs might desire to take up the bill of lading and pay the amount of their acceptance before maturity, and this would be in accordance with the usual course of business, in order to enable the plaintiffs, as consignees for the shippers, to take advantage of a favourable market and to make immediate sales of the cotton.

The bill of exchange being drawn by the shippers, and accepted by the plaintiffs against the consignment, that consignment immediately became an equitable security to the plaintiffs for the amount of their acceptance; and they would have been entitled in equity to have the cotton appropriated for their reimbursement—*Ex parte*

Barber (3 Mont. D. & D. 174); *Ex parte Mackey* (3 Mont. D. & D. 136); and see also the recent case before the Lords Justices of *Ex parte Smart, Re Richardson* (L. Rep. 8 Ch. 220; 28 L. T. Rep. N. S. 146); and *The Bank of Ireland v. Perry* (L. Rep. 7 Ex. 14; 25 L. T. Rep. N. S. 845). The plaintiffs would further be entitled to their commission on the sale of the goods, and also to be reimbursed the cost of the insurance, and their other expenses in respect of the consignment; and it was their business to sell, manage, and dispose of the cotton as consignees. The equitable interest of the plaintiffs, after coming under acceptance against the shipment, was not in any particular portion of the cotton, but in the whole and in every part of it; and no portion of it could have been withdrawn without diminishing their security. They had also the power to sell and dispose of every portion of it, and to receive the purchase-money. Under these circumstances, were they entitled to insure in their own names the whole of the cotton, and to its full value, or were they entitled to insure the cotton only to the extent of their personal liability under their acceptance?

It is clear that the mortgagee of goods by assignment would be entitled to insure the whole of the goods in his own name, and to their full value, and, in case of a loss, would be entitled to recover in his own name the full amount of the insurance, and would be a trustee for the mortgagor as to any surplus beyond the amount of his own debt. The plaintiffs, having an interest in every part of the cotton, would, as it appears to us, stand in the same position in equity as a strict mortgagee in a court of law, and would clearly be entitled to insure themselves against the loss of the cotton, as affecting not only their security for reimbursement of the amount of their acceptance, but also their commission on the sale; but it also appears to us that, having an equitable security upon the whole of the goods and every part of them, and the duty of selling and managing the consignment, they might, if it was so intended, insure in their own names, not only their own individual interest in the cotton, but also the interest of the other parties interested, viz., the shippers (Messrs. Bell and Co.) and the National Bank of India. *Prima facie*, an insurance by a mortgagee, whether legal or equitable, would cover only his own particular interest in the goods; but if the insurance was, as between him and the underwriters, intended to cover the interest of all parties and the whole value of the goods, there would be no objection to a legal mortgagee so insuring in his own name to cover all the interests and the entire value of the goods; and we think there is equally no objection to an equitable mortgagee, or a person who stands in a similar position, insuring in like manner. An insurable interest is clearly not confined to a strict legal right of property. It then becomes a question of fact what was the interest intended to be covered by the policy. If it was only the individual interest of the mortgagee, he could recover only the amount of that interest; but if the insurance was intended to cover the interest of the mortgagor also, then he would be entitled to recover in his own name for both interests: (See *Iring v. Richardson*, 3 B. & A. 193). In that case the assured, though a mortgagee of the ship, had under the Registry Acts no legal ownership, but only an equitable interest in it; and yet it

was considered that he might insure and recover in his own name the whole amount, if the insurance was intended to cover the mortgagor's interest as well as his own; and that whether it was so intended or not, was the proper question to be left to the jury in such a case: (See also the observations of Parke, B., in *Sutherland v. Pratt*, 12 Me. & W. 17). Upon the facts of the present case, and having power to draw inferences, we can entertain no doubt that the insurances effected by the plaintiffs were intended to cover the whole interest of all the parties interested in the consignment. They seem to us to have been effected for that express purpose, and to have been so treated by all parties; and we think that they must be considered in that light. It is, we believe, the common practice of consignees and underwriters to have floating policies of this description, with a view of covering the interest of all parties in the goods; and it seems to us that as each shipment was declared the policies would ensure for the benefit of the different parties who were interested in the goods so declared. In this case the cotton was declared by the plaintiffs under their floating policies after orders to insure from Bell and Co., and with the assent of the National Bank of India; and, upon the declarations being made, these policies would as to this shipment ensure, not only for the benefit of the plaintiffs themselves, who were interested in the safety of the whole of the goods, to cover their own liabilities and claims, but also for the benefit of the National Bank of India to secure to them the amount of the acceptance, as well as for the shippers, as the persons entitled to the surplus proceeds of the goods when sold by the plaintiffs. There was also the very possible contingency that the goods when sold might not from various causes realise the amount for which the plaintiffs had come under acceptance.

Although the insurances would, in our opinion, as they were intended to do, cover the whole value of the shipment, and all the different interests in the goods, yet from the nature of these floating policies, and their being effected in anticipation of future transactions of the plaintiffs with various persons who were unknown at the dates when the policies were effected, they were necessarily effected by the plaintiffs in their own names; and it could not be said that as contracts they were made by the plaintiffs by order or for account or on behalf of persons who were then unknown, but who might at some future time consign goods to the plaintiffs. The consequence of this is, as it seems to us, that no action could be maintained upon the policies in question by or in the names of any persons except the plaintiffs; and, in this particular case, if it had been averred that Messrs. Bell and Co. were interested in the cotton, and that the insurances respectively were made for their use and benefit and on their account, we think that such an allegation would not have been maintained (*Watson v. Swann*, 11 C. B. N. S., 756). Neither could it have been properly alleged that the plaintiffs and Messrs. Bell and Co., either with or without the National Bank of India, were jointly interested in the cotton, and that the policies were effected on their account; for no such joint interest existed, and the policies at the time they were made were not effected on their behalf; and the only proper conclusion in law from the facts, as it appears to us, is that the plaintiffs, having effected the policies in their own names to

cover future consignments, such as the cotton in this case, not only may, but must, sue upon the policies in their own names, and we think that the averments in this declaration that the insurances were made for their use and benefit and on their account, and that they were the parties interested, were the proper, and, indeed, the only correct mode of framing the declaration. It is quite true that Messrs. Bell and Co. had an interest in the cotton, and were, in fact, the general owners of it, subject to the rights which they had created on the part of the National Bank of India and the plaintiffs; but, as between the underwriters and the plaintiffs, the former must, we think, be taken to have agreed that the plaintiffs might declare goods consigned to them under circumstances like the present, upon the floating policies effected by them, and that they might recover upon them the full value in their own names. There is no doubt that in a declaration, the averments of interest, and as to the person on whose behalf the insurance is effected, must be correctly made, and that a variance in that respect would be fatal, though the interest is now allowed to be alleged alternatively in various persons. It is also not sufficient to aver the interest to be in another person, without also alleging that the insurance was made on his behalf. These averments likewise affect the evidence and rights of recovery at law, though where a plaintiff sues as trustee for another, a recovery might be had in equity from the *cestui que trust*, and relief obtained as against him. It is quite true that, after the floating policies had been opened, and when the shipment was made, there was an order by Messrs. Bell and Co. to the plaintiffs to insure, and that by agreement with the National Bank of India the declarations of interest by the plaintiffs under these floating policies were to be treated as covering this cotton; but that would not entitle either Bell and Co. or the bank to sue upon the policies in their own names, or maintain an allegation that the policies were made on their behalf. The law with respect to the insurable interest which a consignee may include in a policy and recover in his own name, is, we think, correctly stated in the third edition of Arnould on Insurance, at p. 72, in the following terms: "As a general principle, then, there can be no doubt that consignees of the goods, being in advance to the consignors, or under acceptances for them, may insure in their own names and on their own account to the full value of the goods, and apply the proceeds of the policies to their own benefit up to the extent of their claims in respect of such advances and the acceptances, holding the residue in trust for the consignors." The practice of the mercantile community, as well as of underwriters, has also, we believe, been entirely in accordance with this view of the law; and there is the manifest convenience in it, that it saves a multiplicity of insurances upon the same subject-matter, and avoids the necessity for any nice distinctions as to the precise nature of the various interests of the several parties which are intended to be covered by the particular insurance. This more especially applies to the case of floating policies effected by consignees to cover goods of all persons who may thereafter consign goods to them, and to similar floating policies which wharfingers, warehousemen, factors and others are in the habit of effecting to cover the owners' interests as well as their own; and it seems to us

that it would lead to great practical inconvenience if a different rule were now to be laid down. Many of the passages which were cited for the defendants from text-writers had reference only to what a person might insure on his own account; and a great part of the argument for the defendants rested on the assumption that there was, in fact, an insurance in this case of the separate interests of Bell and Co., and that these policies were made by the plaintiffs as the agents of Bell and Co. and on their behalf; but which assumption, for the reasons before stated, we consider to be not well founded. The case of *Robertson v. Hamilton* (14 East, 522) is an important decision to show that, where a person having a limited personal interest in the safety of every portion of the subject-matter of insurance insures not only that particular interest but the whole of the subject-matter to its full value for the benefit of the other parties who are interested in it as well as of himself, he will be considered entitled to recover the full amount in his own name upon an averment of interest in himself, and will be considered a trustee for the other parties interested. In that case the plaintiffs were owners of the *Rose*, which, with another ship called the *Atlantic*, belonging to Fisher and Co., and their cargoes, had been captured as Spanish prize. The plaintiffs and the respective owners of the other ship and of the cargoes employed one Cowan as their agent in Spain to obtain restitution or compromise the claims of the captors, and to send the property back to England. He effected an arrangement by giving up part of each cargo, and upon the terms that the two ships and the rest of the cargoes should be restored for the common benefit of the original owners of both ships and cargoes in the lump; and he drew a bill upon the plaintiffs (which was accepted and paid by them) for the general expenses of effecting the arrangement, and for the outfit of the vessels on their return homewards. The agent stated in a letter to the plaintiffs, "The whole property restored is to form a mass, and the reparation made agreeably to the respective values that may be affixed to both ships and cargoes. The *Atlantic* I shall consign to you, in order to simplify the concern; and you can arrange with the owners. The above information will guide you with respect to insurance." The plaintiffs then effected an insurance upon the *Atlantic*, and that vessel was again captured by the French. The plaintiffs thereupon sued in their own names to recover for a total loss of that vessel. It was held that the plaintiffs, though not the owners of the *Atlantic*, had an insurable interest in her and to the full amount of the insurances. In the course of the argument, when the case of *Lucena v. Craufurd* (3 Bos. & P. 75) was cited, Lord Ellenborough said (14 East, 526), "Independent of that case, can there be any doubt but that the plaintiffs had an insurable interest? The ships and cargoes were all thrown into hotchpot; and the plaintiffs had an interest in the conjoint property, and had expended their own money upon it, and were further authorised to make the insurance, by Cowan, of Corrunna, who had full powers of attorney from all the original owners of the property." And, upon its being argued that the ship insured never was in the possession of the plaintiffs, and therefore that they could have no lien on it (and which argument was also pressed upon us in this case), Lord Ellenborough said (14 East 530), "This is no ques-

C. P.]

ENSWORTH AND OTHERS v. THE ALLIANCE MARINE INSURANCE COMPANY.

[C. P.]

tion strictly of lien. Cowan was in possession of the whole, and Cowan continued to be the plaintiff's agent for this purpose after the *Atlantic* and the *Ross* were thrown into hotchpot for the benefit of all concerned. The whole then became a new property, and a new interest was constituted in the former several owners conjointly, so that the proprietors of the ship *Ross* thereby came to have an interest in the *Atlantic*. Upon the arrangement made with the captors, Cowan received restitution of the whole property in the lump, as it is said, for the common benefit of the original owners of both ships and cargoes; and then Cowan being such agent of the conjoint interest, as well as agent for the plaintiffs, consigned the *Atlantic* to them, and drew bills upon them for the general expenses of the whole concern, which they accepted and paid. If this does not give them an insurable interest, it is difficult to say what will." And, in giving judgment, Lord Ellenborough says (14 East, 532): "The plaintiffs, having an insurable interest in the whole mass of the property restored, may recover upon this policy as trustees for those who are interested with themselves in the whole, though they may be afterwards called upon to divide it amongst the several claimants in the proportions due to each, and a recovery in this action will not exclude any of the parties from unravelling the account in equity." And again (14 East, 534): "The assured, therefore, upon this policy, are entitled to recover from the underwriters if they had an insurable interest in the ship. The question then is, who had such an interest? I answer the original proprietors of both ships and cargoes, whose interest had been united in hotchpot through the medium of their common agent, Cowan. Cowan himself had an interest in the whole, and the plaintiffs had also an interest in respect of the bills which they had accepted and paid for Cowan on account of this conjoint property. The whole was thrown into hotchpot when it was delivered up to Cowan by the first captors; and therefore the plaintiffs, who were the original owners of the ship *Ross*, became interested in the whole. They were also interested in it as the consignees and representatives of Cowan, who had expended money upon the whole in hotchpot, and for whom they had accepted and paid bills on that account. It cannot therefore be said that the plaintiffs had not an insurable interest in the subject matter." It was held that the plaintiffs might insure and recover as for a total loss on the policy on the *Atlantic*, of which they were not the owners, though they might be responsible over to the owner of that vessel or his representatives for a proportion of the money when recovered. That case seems to us a very good authority in favour of the plaintiffs in this action.

A similar principle has been adopted and acted upon in the case of fire policies, where persons having a very limited personal interest, such as a warehouseman, in one case, having only a lien for his charges, and not being himself an insurer by law, and a carrier in the other, had effected and kept on foot floating policies for the purpose of covering, and which were considered to cover, not only their own individual interests, but also the interests of the owners of the goods, and these persons were held to have insurable interests as against the insurers, to the full value of the goods, and to have a right to recover the whole amount of the insurances in

their own names, though they would be trustees as to any surplus beyond their own individual claims for the other parties interested: (see *Waters v. The Monarch Insurance Company*, 5 E. & B. 570, and *The London and North-Western Railway Company v. Glyn*, 1 E. & E. 652.) It is true that those were cases of fire insurance, and upon policies which expressly covered "goods in trust;" but if the policies in this case were intended to cover the interests of all parties in the goods, as we think they were, then they must be treated as if they had contained express words to include all such interests; and in that view the cases above cited would be quite analogous to the present, for the purpose of considering the other question, viz., whether the persons insuring had an insurable interest in and were entitled to recover the whole value of the goods in their own names. It is upon the this latter point, viz., as to the nature and extent of the insurable interest and the right to recover the full amount, that these cases seem to us to have an important bearing upon the present question.

In the case of the warehouseman (who is not an insurer) *Waters v. The Monarch Life Assurance Company*, Lord Campbell, after deciding that upon the proper construction of the policy the interest of the general owners of the goods was intended to be covered, proceeds as follows (5 E. & B. 581): "And I think that a person intrusted with goods can insure them without orders from the owner, and even without informing him that there was such a policy. It would be most inconvenient in business if a wharfinger could not at his own cost keep up a floating policy for the benefit of all who might become his customers.

The last point that arises, is to what extent does the policy protect those goods? The defendants say that it was only the plaintiffs' personal interest. But the policies are in terms contracts to make good 'all such damage and loss as may happen by fire to the property hereinbefore mentioned.' This is a valid contract; and, as the property is wholly destroyed, the value of the whole must be made good, not merely the particular interest of the plaintiffs. They will be entitled to apply so much to cover their own interest, and will be trustees for the owners as to the rest." Crompton, J., also says (5 E. & B. 582), "The parties meant to insure those goods with which the plaintiffs were intrusted, and in every part of which they had an interest, both in respect of their lien and in respect of their responsibility to the bailors. What the surplus after satisfying their own claim might be, could only be ascertained after the loss, when the amount of their lien at that time was determined; but they were persons interested in every particle of the goods." In *The London and North-Western Railway Company v. Glyn* where the plaintiffs were carriers, Wightman, J., says (1 E. & E. 660), "The question in this case is whether the plaintiffs are entitled under this policy to recover more than their own particular interest in the goods which they as carriers had in the warehouse when it was burnt. I think that they are, and that they ought to recover the full value of the goods. They must, in my opinion, be considered as having insured the goods which they held in trust as carriers, for the benefit of the owners, for whom they will hold the amount recovered as trustees, after deducting what is due

[C. P.]

BENSWORTH AND OTHERS v. THE ALLIANCE MARINE INSURANCE COMPANY.

[C. P.]

in respect of their own charges upon the goods." And again (1 E. & E. 661), "It is true that this insurance is in the nature of a voluntary trust undertaken by the plaintiffs without the knowledge of the *certain que trust*, the owners of the goods; but it is a trust clearly binding on the plaintiffs in equity, who will hold the amount which they now recover, in the first place, for the satisfaction of their own claims, and in the next, as to the residue, in trust for the owners. If a different construction was put on such a policy as this, it would be necessary, as my brother Crompton has observed, that several policies should be effected on the same goods, and thus insurance companies would obtain several premiums instead of one in respect of what to them is the same risk." Crompton, J., at p. 663, also states that, in his opinion, the plaintiffs intended to insure, first, their own interest (if any) in the goods, and secondly, the interest of their *certain que trust*, the owners of the goods, and the case of *Waters v. Monarch Assurance Company* has established that persons who are the bailees of goods, have an insurable interest in them as against the insurers to their full value, although the assured may be trustees for third persons of part of the amount recovered on the policy.

In the great case of the Dutch commissioners, *Lucena v. Cranford* (3 B. & P. 375), the ultimate decision of the House of Lords awarding *averture de novo*, rested upon the ground that general damages had been assessed in one aggregate sum for all the vessels, whereas one of them having been lost after the declaration of hostilities, and thus become vested in the Crown, could not in any sense be considered within the jurisdiction of the commissioners. But, at the same time, the House of Lords expressed a clear opinion, adopting the views of Chambre, J., and Lawrence, J., that the commissioners had not an insurable interest. This was, however, on the ground that their authority was derived entirely from an Act of Parliament and a commission, which gave them no power or right of interference or control over any of the ships or property until after they were detained or brought into the ports of this kingdom; that up to that time the control and power over the vessels rested entirely with the Crown; that the vessels might never have come under the power of the commissioners; that they had nothing more than a mere expectation or hope and possibility that the vessels might come under their control; and that they therefore had no insurable interest to support the policies which had been effected whilst the vessels remained abroad, and before they had been brought to this country. It was contended for the commissioners, the plaintiffs, in that case, that they had authority to sell, manage, and dispose of the vessels, and were therefore in a position similar to that of ordinary consignees, and entitled equally as such consignees to insure and recover the full amount of the insurances in their own names, under an avowment of interest in themselves. It seems to us to have been considered by all the judges, as well as by the House of Lords, to be clear law that ordinary consignees having a beneficial interest in the whole subject-matter, might recover the full sum insured, under an avowment of interest in themselves; and that if the commissioners could be considered as such consignees, they were entitled to recover. After the three arguments in the Exchequer Chamber (3 Bos. & P. 75), and the argument in the House of Lords,

it was said by the majority of the judges (2 N. R. 292) that no one ever questioned that an ordinary consignee having a beneficial interest might insure for the benefit of the owner of the goods, though a naked consignee, as he was termed, being a mere agent of the consignor, could not do so. But, as different views have been taken of the effect of the observations of the learned Judges and of Lord Eldon (who, as Chief Justice of the Common Pleas, had heard the three arguments in the Exchequer Chamber) upon the subject of insurable interest of consignees generally, it may be useful to refer to those observations more in detail. They are as follows, namely, in the judgment of the majority of the seven Judges in the Exchequer Chamber (3 Bos. & P. 95): "Independent, however, of these observations, it is not necessary that an insurer should have a beneficial interest in the property insured; it is sufficient if he be clothed with the character of a trustee, an agent, or a consignee: and if these commissions can be considered in either of these capacities, they have an insurable interest. According to the terms of the statute (35 Geo. 3, c. 80), it seems as if they may be considered in either of these capacities. They may be considered as trustees for the Crown, or for the persons who shall be ultimately entitled to the property; as general agents for the purpose of disposing of the property on its arrival in England, or as statutable consignees." Again (3 Bos. & P. 97): "Suppose a merchant upon his marriage to covenant with trustees in his marriage-settlement, that certain ships then upon the sea should when they came to England be vested in them for the purposes of the settlement, are we to be told that the trustees might not insure, because the settlor did not in terms convey and assign over the ships immediately? A court of equity would consider the interests in the trustees exactly the same as if the ships had been immediately conveyed. It is objected, however, that the Dutch commissioners did not resemble consignees, because they were directed to sell and dispose of the property intrusted to them according to the directions which they should receive from Government. But many consignees receive goods with orders to attend to the directions of the consignor as to their disposal; and yet they are not the less able to insure. So, every trustee is subject to the directions either of the *certain que trust* or of the Court of Chancery." In the judgment of Chambre, J., whose views were ultimately adopted by the House of Lords, he says (3 Bos. & P. 104): "I am not disposed to question the authorities in general: on the contrary, there appears to me to have been great propriety in establishing the contract of insurance wherever the interest declared upon was in the common understanding of mankind a real interest in or arising out of the thing insured, or so connected with it as to depend on the safety of the thing insured and the risk insured against, without much regard to technical distinctions respecting property, still, however, excluding mere speculation or expectation, and interests created no otherwise than by gaming. What the parties themselves may do, they may also do by their trustees, consignees, or agents, provided the act done by an agent comes within the scope of the authority given him by his principal, either expressly or impliedly from the nature of his employment." In the House of

C. P.]

ENSWORTH AND OTHERS v. THE ALLIANCE MARINE INSURANCE COMPANY.

[C. P.]

Lords, in the opinions of the seven Judges, and in which Thompson, B., concurred, the following passage occurs: (2 N. R. 289, 290): "It is with reference to these premises, they (the plaintiffs) aver that they as such commissioners were interested, and that the insurance was made for their use and benefit as commissioners. The nature of their connection with the property insured appears from the previous part of the declaration. They claimed no beneficial interest in it; they were merely consignees, agents or trustees for others; and, to make the whole declaration consistent, the averment must be taken to import, what the words will fairly admit, that the insurance was made for the benefit of those for whose benefit the plaintiffs were authorised by the Act of Parliament and commission to manage the property as consignees, that is, in the present instance, for the King. A consignee without any beneficial interest in himself is agent for the consignor, and may insure for his benefit; and, if such a consignee were to state in his declaration the circumstances of the consignment of goods to him to manage, sell, and dispose of for certain persons abroad, might he not aver the interest in himself as such consignee? and would not such an averment, coupled with the disclosure of his having no interest but for the consignor's use, be equivalent to an averment of interest in his consignor?" Again (2 N. R. 291, 292): "Though a consignee be usually appointed by bill of lading, it is not necessary to invest a person with that character. Mr. Justice Buller, in the case of *Wolff v. Horncastle* (1 B. & P. 316), defines a consignee to be a person residing at the port of delivery, to whom the goods are to be delivered on their arrival. A consignee, as distinguished from a vendee, is the mere agent of the consignor; and such a consignee may be appointed by any direction, verbal or written, to the captain, to deliver the goods to such particular person, or by a letter to the person himself requesting him to take care of the goods upon their arrival. Where, then, is the difference between such a consignee and these commissioners? The ships were directed, by the person who had the possession and power to direct the voyage, to Great Britain; and the commissioners were appointed to receive the ships and cargoes, and to manage and dispose of them upon their arrival. What is the effect of the most solemn appointment of a consignee different from this? What greater interest or closer connection with the ship does he acquire? If, then, there be no difference, no one ever questioned that a consignee or agent of the description spoken of might make an insurance for the benefit of the owner and person entitled, and for whom he as consignee is authorised to act." . . . "At the time both of the insurance and the loss, their (the commissioners') title, like that of a consignee, was inchoate; occupancy was necessary to perfect it. It is true that their interest was revocable. But so is that of a consignee." Again (2 N. R. 294): "And if it were now to be decided that the interest of these commissioners was not insurable, it would render unintelligible that doctrine upon which merchants and underwriters have acted for years, and paid and received many thousand pounds." Mr. Justice Channor, who thought that the commissioners had no insurable interest, says (2 N. R. 296): "The duties of their office were confined to Dutch property that was actually in the kingdom,

and provisionally detained there under the King's authority. No matter who brings it in. They have nothing to do as commissioners with consignments from abroad; nor was any consignment in fact made to them. They have been called statutable consignees. If that phrase means anything, it must mean that the statute had consigned these particular ships to the commissioners; but, look at the statute, and we find nothing more than that it authorises a commission under which whatever property of a certain description arrives, it will if they continue commissioners fall within their care and management officially, to prevent its perishing. But the Act had in no respect attached upon this property: it had only created a capacity in the plaintiffs in certain events to receive these or any other Dutch ships or merchandises." Again he says (2 N. R. 299): "A consignment is a species of mercantile conveyance operating upon the particular effects consigned, which, though it may be defeasible, may operate in the meantime, and enable the consignee by his acts to bind the consignor." In the opinion of Lawrence, J., who also thought that the commissioners had not an insurable interest, and whose opinion was also adopted by the House of Lords, there are the following passages (2 N. R. 304): "Conceiving for these reasons that the contract of marine insurance is not from its nature confined to protect the interest arising from the ownership of the subject exposed to risk insured against, I shall proceed to consider." &c. "Had they (the commissioners) been authorised generally to take care of ships detained by his Majesty's orders, by the act of detainer the ships would have become objects of their concern, and from thence a duty might possibly have been inferred to take all proper steps to prevent any damage from their loss, and an averment that the defendants in error insured as such commissioners might have borne the meaning which has been contended for. But that cannot be understood in this case: for the averment in effect refers their interest to the Act of Parliament and their commission, the terms of which respect only the case of ships and goods detained and brought into the ports of this kingdom; and I know not how to conceive an interest dependent on a thing with which thing the persons supposed to be interested have nothing to do. The defendants in error have been considered as trustees or consignees, who, it is said, have an insurable interest. But I do not think they can be considered as trustees or as consignees having such interest as will support this averment. A trustee who has an insurable interest must, as I conceive, have some existing right to the thing insured for the benefit of another; but the commissioners in this case had not any such right, and therefore cannot, according to my notions of a trustee, be considered as such. Nor can they be considered as consignees in whom any interest or right is vested by bill of lading or other instrument or consignment by which the property of the subject-matter of the consignment *prima facie* will pass. If they be consignees, they were naked consignees for the purpose of doing some act respecting the goods consigned, and rather agents than consignees, according to the common understanding of that word; and, taking them to be naked consignees who have not the legal property of the subject-matter of the insurance, and who are not bene-

ficially interested in it, they ought, I conceive, to have averred the interest to be in those on whose account the insurance was made, whether they were defined persons or uncertain persons, and not in themselves as commissioners; for, taking the meaning of the word interest to be what I have stated it to be, it is obvious that a naked consignee who means that the insurance should be applied to the protection of the things insured and the indemnification of him who suffers by losing the value of those things, his object being not to secure himself from some damage consequential to the loss as his commission, but that others interested as proprietors should be indemnified,—it is obvious, I say, that such consignee can himself suffer no prejudice by the total or partial destruction of a thing which forms no part of his property. In the safety of such thing such naked consignee can in this view have no interest. The persons prejudiced by the loss of property are his consignors, or those for whose benefit the property is to be disposed of, and in them only in such case and in such light is there any interest" (2 N. R. 306, 307). Lord Eldon, in giving judgment in the House of Lords, says (2 N. R. 324): "With respect to the case of a trustee, I can see nothing in this case which resembles it. A trustee has a legal interest in the thing, and may therefore insure. So, a consignee has the power of selling; and the same may be said of an agent. I cannot agree to the doctrine said to be established in the course below, that an agent may insure in respect of his lien upon a subsequent performance of his contract, nor can I advise your Lordships to proceed, without much more discussion, upon authority of that kind. There are different sorts of consignees: some have a power to sell, manage, and dispose of the property, subject only to the rights of the consignor. Others have a mere naked right to take possession. I will not say that the latter may not insure, if they state the interest to be in their principal." Lord Ellenborough and Lord Erskine concurred entirely in the views of Lord Eldon.

In the previous case of *Crawford v. Hunter* (8 T. Rep. 13), in the Court of King's Bench, where precisely the same points arose, it was considered that the commissioners were in the nature of consignees, and had therefore a right to insure and recover the whole sum insured in their own names; and it appears to us that the correct opinion to be collected from the observations of all the learned judges and also of the peers who took part in the judgment in the House of Lords in *Lacena v. Crawford* (*ubi sup.*) is, that an ordinary consignee, who has made advances or come under acceptance, and has a beneficial interest in the subject-matter, is entitled to insure to the full value and recover the whole sum insured, and to aver the interest to be in himself. In *Carruthers v. Shedden* (6 Taunt 14), the plaintiffs by order from Dowrick and Way had effected an insurance upon coffee in which Dowrick and Way were interested to the extent of seven-sixteenths jointly with three other persons. The policy professed to be made by the plaintiffs as agents and by order of and for account of Dowrick and Way. The adventure was managed by Dowrick and Way, who made advances and paid what was required. Gibbs, C.J., held at the trial that, as Dowrick and Way were the managers of the adventure, if the policy was intended to cover the interests of the three other persons (of

which the jury were to judge), the plaintiffs might, as the agents of Dowrick and Way, recover the whole amount insured; and he also thought "that Dowrick and Way, as consignees of the cargo, had an insurable interest in the whole amount, for that a consignee may insure as well as a principal;" and the court confirmed his ruling. We are unable to discover any intimation of opinion by the court in that case, or to see any inference that can properly be drawn from it, to the effect that a consignee who makes advances can insure and recover only to the extent of his own lien; and the language of Gibbs, C.J., which was adopted by the court, seems to us to be exactly contrary to that view. In *Godin v. The London Assurance Company* (1 Barr. 489), the only question was whether, where two persons having different interests had each insured by a separate policy, this was to be considered as a double insurance, so that the amount insured was to be apportioned between the two sets of underwriters; and, though some observations were made as to persons being entitled to insure for a lien, the case does not appear to us in any way to affect the main question in this case. In *Wolf v. Horncastle* (1 B. & P. 316), the plaintiffs had, without orders in the first instance (though their act was adopted afterwards), effected the insurance for their correspondents, Lund, for whom they were under advances, and for whom they were acting in respect of the shipment in question after it had been refused by the original consignee. They had also accepted for 300*l.* against the shipment. The declaration contained two counts, the first averring the interest in Lund, and the second averring it in themselves. Objections were taken, as to the first count, that it could not be supported under the statute of 23 Geo. 3, c. 56, for want of a previous order to insure from Lund, the principal; and, as to the second count, that the plaintiffs had not an insurable interest, and that they made the insurance on account of Lund, and not of themselves. The court supported the verdict for the plaintiffs on the first count for the full amount, upon the facts, on the ground of ratification by Lund; but they also held that the second count was supported; for that the plaintiffs had a clear right to insure to the amount of 300*l.* for which they were interested in the goods. The court considered that, upon the consignment being refused by the original consignee, the plaintiffs became consignees for Lund; and Buller J., said, in the course of his judgment (1 B. & P. 323), that "a debt which arises in consequence of the article insured, and which would have given a lien on it, does give an insurable interest;" and that "the case is not at all altered by the goods not having arrived." The plaintiffs in that case recovered the full amount of the insurance; and it does not seem to us that because the court thought it clear that the plaintiffs had no insurable interest to the amount of their acceptances sufficient to support the second count against the only objection that was taken to it, and gave judgment for the plaintiffs for the whole amount insured, that therefore it is to be inferred that the court thought the plaintiffs had no insurable interest beyond the amount of their acceptances; and more especially as that point was never raised upon the argument.

The subject appears to have been much considered in America; and in the year 1836, a case came before the Supreme Court of New

[O. P.]

KENWORTH AND OTHERS v. THE ALLIANCE MARINE INSURANCE COMPANY.

[C. P.]

York, of *De Forest v. The Fulton Insurance Company* (1 Hall, 84). In that case a commission merchant had effected insurances against fire upon goods in his own warehouses, "as well the property of the assured as held by him in trust or on commission," and a fire had destroyed goods belonging to his consignors as well as his own goods; and it was held that the plaintiff had an insurable interest in the goods held on commission for his consignors to their full value, and might recover the whole amount under an avowment of interest in himself, though he would be accountable as a trustee to his consignors for any sums beyond his own individual claims. Very elaborate judgments were delivered by the learned Judges in that case, which are well worthy of perusal; and the general principles applicable to insurable interests as regards marine insurances, as well as terrene policies against fire, are fully and very ably discussed. Mr. Duer, in his *Law of Marine Insurance*, vol. 2, pp. 108, 109, refers to this case in the following terms—"It must, however, be admitted that it has been held by a court of high authority that a consignee, as such, has in all cases an insurable interest co-extensive with the value of the property, and consequently that, when he has effected a policy in his own name, he is entitled to recover the entire loss that is claimed, on an avowment in himself of a sole and exclusive interest; and this without any evidence of an authority express or implied, or of any previous advances, or of any subsequent adoption of the contract. It is true that this decision was made in relation to a policy against fire; but the reasoning of the Judges was just as applicable to a marine insurance, and has been so considered by an eminent jurist (Mr. Justice Story), who seems to have given to their doctrine the sanction of his approval. I am, however, constrained to express the conviction that the decision thus interpreted is not sustained by prior authorities. My researches have not enabled me to discover a single case in the English reports in which a consignee, on an avowment of a sole interest in himself, has been permitted to recover beyond the amount of his own advances; but, on the contrary, there are several decisions from which the opposite doctrine, viz., that in such a case his right to recover is limited to his own beneficial interest, seems a plain and necessary deduction." At the date when this was published—in 1848—the English cases upon fire policies had not been decided. This decision of the Superior Court of New York is afterwards elaborately controverted by Mr. Duer in a long note at p. 161 of the same volume. With his views, however, we are entirely unable to concur. A great portion of his reasoning is founded upon the assumption which he makes at p. 167 with reference to *Lucena v. Crawford* (3 B. & P. 75), that "it is not to be denied that the assured in this case (that is, in *Lucena v. Crawford*) were consignees." It seems to us, however, that this assumption, and the argument of Mr. Duer which rests upon it, are not well founded. It is quite true that the Court of Queen's Bench in *Crawford v. Hunter*, and the whole of the Judges except Chambre, J., in the Exchequer Chamber, in *Lucena v. Crawford*, and all the Judges except Chambre, J., and Lawrence, J., in the same case in the House of Lords (2 N. R. 269), considered that the commissioners were in the position of ordinary consignees of the Dutch

vessels and goods, and as such entitled to insure them on their own account. But the two dissenting judges whose views ultimately prevailed, and the peers who decided the case in the House of Lords (though upon a point which applied to one only of the vessels), expressly repudiated that view of the position of the commissioners under the Act of Parliament, and considered that they had no right, interest or power of interference or control in or over the property in any way until its actual arrival in this country; and that, if they were consignees in any sense, it could only be as mere agents, or, as it was termed, naked consignees, having no beneficial interest whatever in the property, and having merely a right to take possession of it and act as agents for the owners after its arrival in this country. We, think, therefore, that it not only can be, but after the decision of the House of Lords must be denied that the commissioners were consignees; and, if so, a great portion of Mr. Duer's argument as to the insurable interests of consignees, which is founded on this assumption, necessarily fails. We also think that the other conclusions which Mr. Duer has drawn from those English cases which he cites, and which have been already noticed, are not warranted by those decisions, and that he has failed to establish that the decision of the Supreme Court of New York in *De Forest v. The Fulton Insurance Company*, which proceeded in a great degree upon the doctrines of *Lucena v. Crawford*, was not well founded. Mr. Justice Story, in his *Lew of Agency*, s. 111, refers to this subject in the following terms: "The question has often been discussed, whether factors or consignees for sale have an implied authority to insure for their principal; for there cannot be a doubt that they may inure on their own account to the extent of their own interest. The general doctrine now established is, that they may insure both for themselves and for their principal. But they are not positively bound to insure, unless they have received orders to insure, or promised to insure, or the usage of trade, or the habit of dealing between them and their principals, raises an implied obligation to insure. They may insure in their own names or in the name and for the benefit of their principal; and, if they insure in their own name only, they may in case of loss recover the whole amount of the value of the property insured from the underwriters, and the surplus beyond their own interest will be a resulting trust for the benefit of their principals. Whether, if they are mere naked consignees to take possession of the goods only, without a power to sell, they have a right to insure for themselves or for their principal, is perhaps more questionable; but the point has not as yet become the subject of a direct adjudication." And in a note to this passage, after referring to the authorities, Mr. Justice Story says: "The whole subject underwent much examination in the case of *Lucena v. Crawford*; but the most ample and satisfactory discussion of it is to be found in the very elaborate opinions delivered by Mr. Chief Justice Jones and Mr. Justice Oakeley in the superior Court of New York, in *De Forest v. The Fulton Insurance Company*." The case of *De Forest v. The Fulton Insurance Company* is cited by Mr. Phillips, 4th edit., p. 176, s. 311, without dissent or comment, though in some other passages he seems rather to adopt the view that a consignee's insurable interest is limited to his own lien. In *Parsons on Insurance*, edit. 1868, at p.

C. P.]

ESWORTH AND OTHERS V. THE ALLIANCE MARINE INSURANCE COMPANY.

[C. P.]

50, it is said, "but if the goods are insured by a consignee, or a warehouseman who describes them as goods in trust, he can recover, not only to the extent of his lien for charges, commission, &c., but also to the full value of the goods, and the balance will be held in trust for the owner of the goods." And at p. 201, "A commission merchant may insure for the full value of the goods consigned to him, and may recover, not only what will indemnify him for the loss of his commissions, but the value; so much of that value as is not needed to indemnify him being recovered by him for the benefit of the owners of the goods, provided he intends to insure for them, and the terms of the insurance are wide enough to cover their interest, and he has their previous authority to insure or their subsequent ratification of his act."

Upon the whole, it appears to us that the weight of authority in America, as well as in this country, is against the views of Mr. Duer; and, with all respect for so learned a writer, we cannot subscribe to his opinions upon the subject. We adhere to the law as stated by Mr. Aronold and by the Superior Court of New York, and by Mr. Justice Story and Mr. Parsons, which we consider to be in accordance with the decisions of the courts and the opinions of the great majority of the judges in this country, which have been already referred to. We believe it also to have been adopted in practice by merchants, agents, and underwriters, for a long series of years, without inconvenience or objection; and we are of opinion that the plaintiffs had an insurable interest to the full value of the cotton, and that the whole interest of all parties was covered by and recoverable by the plaintiffs in their own names, under the policies in this case. The effect of the plaintiffs' insuring and recovering in their own names would be to place them in the position of trustees for the other parties interested, as to any surplus beyond the amount of their own claim; and they, having received orders from Bell and Co. to insure, and having arranged with the National Bank of India to make their open policies available by declaring the whole value of the cotton under them, did by so doing constitute themselves, in our opinion, trustees for the other parties interested. The plaintiffs effected these policies in their own names. It appears to us that, with the concurrence of the underwriters, they effected them on their own behalf, and not as agents, they having then no persons as principals, and to cover goods to be thereafter consigned by various persons to them, and in every portion of which they would have an interest. The insurances were, we think, intended to cover the whole value of the goods to be declared, and the interests of the consignors as well as of the plaintiffs themselves, and, when the declarations were made, did in fact cover the interests of both. No other person except the plaintiffs could, in our opinion, sue upon these policies; nor could it be correctly alleged in the declaration that they were made on behalf of any persons other than the plaintiffs themselves; and, under these circumstances, and for the reasons before stated, we are of opinion that the allegations in this declaration were supported by the facts, and that the plaintiffs are entitled to recover the whole amount of the insurances in their own names in this action.

I will now proceed to read the judgment of my brother Brett, who is unavoidably absent, being upon the circuit.

BRETT, J.—This action is brought on two policies of insurance. By the first, dated the 23rd Nov. 1869, Messrs. Irving, Ebsworth and Holmes, the plaintiffs, as well in their own names as for and in the name or names of all and every person or persons to whom the same doth, may or shall appertain in part or in all, did cause themselves and every of them to be assured to the extent of 5000*l.* on cotton, lost or not lost, from Bombay to London or Liverpool direct, or *via* Havre, in ship or ships, to follow policy of the 4th Sept. 1869. By the second, dated the 17th Dec. 1869, the plaintiffs in the same terms as before caused themselves to be insured to the extent of 5000*l.* on cotton, lost or not lost, from Bombay to London or Liverpool direct, or *via* Havre, in ship or ships, to follow former policy. On 23rd May 1870, 846*l.* on the first policy was appropriated to 250 bales of cotton per *Aurora*; and on the same 23rd May 1870, 4154*l.* on the second policy was appropriated to the same 250 bales of cotton per *Aurora*. The declaration stated the interest in the cotton as follows: That the plaintiffs or some or one of them were or was interested in the said goods to the amount of all the moneys by them insured thereon, and the said insurance was made for the use and benefit and on account of the person or persons so interested. There were pleas traversing the allegations that the plaintiffs caused themselves to be insured as alleged, and that the goods or any part were shipped as alleged, and a plea alleging that the plaintiffs were not, nor were any, nor was either of them interested in the said goods, nor was the said insurance made for the benefit of the persons or person so interested as in the said counts alleged. It was proved at the trial before my brother Keating, at Guildhall, that Messrs. Bell and Co. of Bombay, were correspondents of the plaintiffs, merchants in London, and that, on the 28th Oct. 1869, the plaintiffs in London wrote and sent to Bell and Co. in Bombay a letter of credit, in the following terms—"Our previous letters of credit for advances on cotton to our consignment having expired, we beg leave to renew the same as follows, You are by the present authorized to value on us at instance at the rate of 10*l.* sterling per bale of cotton, cost f. o. b. and freight, against shipping documents and timely insurance orders or policies of insurance; and we engage to accept the drafts so drawn on presentation, and to pay the same at maturity, &c. The shipments not to exceed 200 bales cotton by any one vessel, and the present credit to be limited to 30th April next, unless previously withdrawn." On the 23rd Nov. 1869, the plaintiffs effected with the defendants the first, and on the 17th Dec. 1869, the second floating policy sued on. The plaintiffs on the 23rd Nov. 1869, declared on the first policy cotton per *Ann Milcent*, and on the 13th Sept. 1869, other cotton per *Clutha*, and so on. It is to be taken that, in April 1870, Bell and Co. and Curson & Madhowsdass, of Bombay, agreed to consign cotton to Liverpool on joint account, and that 250 bales were shipped by Bell and Co. on such joint account on board the *Aurora*. The bill of lading, dated the 28th April 1870, was as follows—"Shipped, &c., by Robert Bell and Co., of Bombay, &c., 250 bales of cotton, &c., to be delivered, &c., unto order or their assigns, he or they paying freight as per margin." &c. On the same 28th April 1870, Bell and Co. drew on the plaintiffs a bill of exchange in the following form—"Bombay,

[C. P.]

ESWORTH AND OTHERS v. THE ALLIANCE MARINE INSURANCE COMPANY.

[C. P.]

28th April 1870. Six months after eight, &c., pay to the order of ourselves the sum of 3000*l.* sterling, value received, which place to account of shipment of 250 bales cotton per *Aurora*." This bill was endorsed in blank by Bell and Co., and then specially to the National Bank of India or order by Cursonadas Madhowdass. Bell and Co. on the same day entered into a transaction with the National Bank of India, in Bombay, which is described in the following letter written and handed by them to the bank. (See this letter set out, *ante*, p. 127.) On the 29th April 1870, Bell and Co. wrote direct to the plaintiffs—"We have the pleasure to inform you that we have induced Cursonadas Madhowdass, of Bombay, to ship on joint account with ourselves 250 bales cotton per *Aurora*, and against this shipment we have valued upon your good selves by this opportunity, through the National Bank of India, for 3000*l.* at six months, to which we crave your kind protection. Sample of this shipment we forward overland to your address by this mail. We hope this cotton will arrive with you at a favourable opportunity, and, confiding the same to your care and attention, we are," &c. On the 29th April 1870, Cursonadas Madhowdass wrote to the plaintiffs, and sent their letter open to the bank—"I beg to advise you that I have shipped to your care through Messrs. Bell and Co., of this place, the undermentioned cotton, and I enclose invoice thereof. Against the same I have drawn upon you as at foot, with the endorsement of the above-mentioned firm; and I beg your kind attention to my draft. I should also feel obliged by your effecting insurance, and on arrival of the shipment please sell it to best advantage, remitting to me any balance, &c. Should, however, the net proceeds fall short of the amount of your acceptance, together with any charges, &c., I hereby authorize you to draw upon me," &c. The bill of exchange or draft before mentioned for 3000*l.*, endorsed by Bell and Co., and Cursonadas Madhowdass, being discounted by the National Bank of India, was forwarded by them to their agents in England, together with the bill of lading and shipping documents. The draft was presented to and accepted by the plaintiffs on the 21st May 1870, in the following form—"Accepted 21st May 1870, against delivery of shipping documents for 250 bales cotton per *Aurora*." On the 23rd May, the plaintiffs declared on the open policy of the 23rd Nov. 1869, 846*l.* on 250 bales cotton per *Aurora*, valued at 5000*l.*, and on the same day, on the open policy of the 17th Dec. 1869, 4154*l.*, to make up 5000*l.*, on the same 250 bales per *Aurora*, valued at 5000*l.* On the 27th May 1870, the plaintiffs wrote to the National Bank of India, in London, as follows:—

We beg to inform you that we have declared on our open marine policies for 5000*l.* dated 23rd Nov. 1869, and 5000*l.* dated 17th Dec. 1869, effected with the Alliance Insurance Company (the defendants), the following shipments from Bombay to Liverpool; and we hereby undertake and guarantee to hold the amount insured at your disposal until payment of our acceptance for 3000*l.*, due 24th Nov.

Particulars—250 bales cotton per *Aurora*: amount declared, 5000*l.*

The ship and cargo were lost by the fraudulent scuttling of the ship on the 17th June 1870. The plaintiffs met their acceptance when due, *i.e.*, on the 24th Nov. 1870, and then received from the National Bank of India the bill of lading endorsed and the shipping documents. The plaintiffs gave

evidence at the trial as follows:—"The insurance was effected for Bell and Co. and ourselves." A verdict was found for the plaintiffs for 5000*l.*, with leave to reduce the amount to 3000*l.* Sir John Karslake obtained a rule calling upon the plaintiffs to show cause why the verdict should not be entered for the defendants on the third plea, on the ground that the plaintiffs had not proved that which was therein traversed; or to reduce the damages.

Before entering on an examination of the different propositions of law which have been discussed as applicable to the relative positions of the plaintiffs, the defendants, and the other parties mentioned in the case, it is necessary to determine accurately what that relation was. The first transaction in evidence is the letter of credit from the plaintiffs to Bell and Co., dated the 28th Oct. 1869, authorising Bell and Co., within certain limits and on certain conditions, to draw on the plaintiffs. The next transactions—and which were before any act done by Bell and Co. having reference to the plaintiffs—were, the taking out by the plaintiffs of the floating policies now sued upon, and the declarations on them of cargoes shipped on consignment to the plaintiffs by other correspondents than Bell and Co. or Cursonadas Madhowdass. These policies were therefore clearly not taken out solely to cover any goods which might be consigned by Bell and Co. They were taken out before there was any binding contract between the plaintiffs and Bell and Co. as to future shipments. They were taken out when the name of Cursonadas Madhowdass was unknown in business to the plaintiffs. They were taken out with a view to cover either any interest which the plaintiffs might afterwards have in consignment from any correspondents of theirs, or such interests and also the interests of any as yet unascertained correspondents who might consign to them. The shipment of the cotton on board the *Aurora* is to be taken to have been made on the 28th April 1870. It was not within the terms of the letter of credit; it exceeded the limits, and was not according to the conditions; it was not on behalf of Bell and Co. only, but on behalf of Bell and Co. and Cursonadas Madhowdass jointly. It was a shipment which the plaintiffs were not bound to recognise. Until they did recognise it they had no interest in it. Bell and Co., however, drew in respect of it on the plaintiffs. The next transaction was between Bell and Co. and Cursonadas Madhowdass on the one part, and the National Bank of India on the other, which took place also on the 28th April, 1870. The bank discounted the draft for 3000*l.* drawn by Bell and Co. on the plaintiffs, and took as security an indorsement of the bill of lading of the cotton with a power of sale if the draft should not be accepted and paid. Such an indorsement passed the legal property in the cotton to the bank, subject to a trust in favour of Bell and Co. and Cursonadas Madhowdass jointly. Bell and Co. and Cursonadas Madhowdass then both addressed the plaintiffs, requesting them to accept and honour the draft and insure the cotton, and authorising the plaintiffs, on payment of their acceptance, to obtain the bill of lading and to sell the cotton, in order, first, to reimburse the plaintiff's advance, and then, subject to commission, to hold and pay over the surplus for and to Bell and Co. and Cursonadas Madhowdass jointly. On the 21st May 1870, the plaintiffs

C. P.]

EISWORTH AND OTHERS v. THE ALLIANCE MARINE INSURANCE COMPANY.

[C. P.]

accepted the draft for 3000*l.*, and thereby recognised the shipment and accepted the terms proposed to them. Then for the first time was established a relation of the plaintiffs to the cotton in question. Then arose a contract between them on the one part, and Bell and Co. and Cursondas Madhowdass on the other, by which they undertook to pay their acceptance and to receive and to sell the cotton, and to hold and pay over any surplus proceeds, and by which they acquired a right to have the bill of lading eventually indorsed to them, and to have the cotton placed in their hands for sale to cover their advances. This contract and position of affairs did not pass the legal property in the cotton to the plaintiffs, for that was still in the National Bank of India. It did not give a present right of possession of the bill of lading, or even a right of possession of the cotton on arrival. It gave a present interest in the cotton to the plaintiffs, that is to say, a right by an existing contract to have the bill of lading indorsed to them on the payment of their acceptance, so as to enable them to sell the cotton to pay themselves 3000*l.* and their expenses, and to earn their commission, and to hold the surplus proceeds as agents for Bell and Co. and Cursondas Madhowdass. The right in equity would, I apprehend, be to have a decree for a specific performance of such contract. But, until the acceptance should be met, I should apprehend that the plaintiffs could not be held to be either legal or equitable owners of the cotton. Nor were the plaintiffs trustees for Bell and Co. of the cotton. Speaking of the relation of the Dutch commissioners to the ships of which they would have had the disposal if they should have arrived, Lord Eldon says, in *Lucena Craufurd* (3 B. & P. 75).—"With respect to the case of a trustee, I can see nothing in this case which resembles it. A trustee has a legal interest in the thing, and may," he adds, "therefore insure." It was after entering into this relation with Bell and Co. and Cursondas Madhowdass, and having acquired this interest in the cotton, that the plaintiffs, on the 23rd May 1870, declared 5000*l.* in respect of the cotton on the policies. And, whatever may have been the terms used by the witnesses in giving evidence, it must, I think, be taken with regard to the declarations then made, that it was stated that the plaintiffs insured for Bell and Co. and themselves. In reality they intended then to declare for, and so to insure their own interest of 3000*l.*, and the interest of their correspondents in the anticipated or valued surplus of 2000*l.* It was whilst the transactions thus stood that the ship was lost. The plaintiffs then had the interest above described; they were not legal owners nor equitable owners, nor trustees, but contractors, having by contract certain rights to deal with the cotton in a certain way, on the happening at a future time of a certain contingency. Afterwards, on the 24th Nov. 1870, the plaintiffs paid their acceptance of 3000*l.*, and received the bill of lading indorsed by the bank. But the cotton was already lost, and no property therefore passed by such indorsement.

Upon these facts it was contended, on behalf of the plaintiffs, that they had the whole legal interest in the goods when they accepted the draft, and that all their obligation to Bell and Co. from that time was to account as trustees for the surplus proceeds of sale; and, if not, that still they had an interest in the goods which gave them an insurable

interest in the whole, so that they might insure the whole to their full value in their own name, hold the surplus (if any) above their own actual or beneficial interest as trustees for Bell and Co. and Cursondas Madhowdass, one or both. It was contended, on behalf of the defendants, that the plaintiffs had no insurable interest at all; that they had only an expectancy of profit resting on a contingency; that, if they had an insurable interest, it was to the extent only of their own beneficial interest, viz., 3000*l.*, that they could not insure in their own names and on their own behalf more than such interest; that the only persons who, without having a beneficial interest equal to their own value, can insure in their own names to the full value, holding a surplus as trustees, are those who are in law owners and in equity trustees of the property insured, and that the plaintiffs were not such legal owners, and consequently not such trustees. It was further argued that, if in consideration of law the plaintiffs could be said to have insured for themselves and Bell and Co., they failed on the pleadings, because they had invited and accepted an issue that they alone were interested and they alone had insured. In answer to this last objection, it was urged on behalf of the plaintiffs that the plea was severable; that, as to the allegation that the insurance was made on their behalf alone, it was true; and that there was no allegation that they alone were interested, but that the allegation amounted only to an assertion that they had an interest, which was true.

The first point thus raised is, whether the plaintiffs had any insurable interest. I think they had; because they had an existing contract with regard to the cotton, by virtue of which they had an expectancy of benefit and advantage arising out of, or depending on, the safe arrival of the cotton.

The next question is, what was the amount of the plaintiffs' insurable interest? If they had any, it would seem to be at least to the extent of 3000*l.*, their advance, and their expenses and expected commission. The main question is, whether they could insure for more than that in their own name, and recover for more on a declaration alleging the interest to be in themselves. Their relation to the cotton was described in argument, and I think fairly described, to be that of consignees for sale of goods not yet arrived, who have made advances on the goods, but have only a contract right with regard to the goods, without being legal owners of them. They have the interest described in every part of the goods, but are not legal owners of any part.

The ruling principle of insurance, which is that it should afford only an indemnity to any assured for his loss, would seem to limit the right of the plaintiffs under such circumstances to the recovery of their own beneficial interest only. If in an action at law the assured can recover on the contract of insurance more than his own beneficial interest, he recovers, according to law, more than an indemnity. It would seem to be no answer in a court of law to say that he holds a surplus of what he has recovered as trustee for some one else. The law has no means of enforcing the payment over by him, on the mere ground of his being a trustee. This view, it is true, should prevent a legal owner, but trustee, of the property insured from being able

C. P.]

EDSWORTH AND OTHERS V. THE ALLIANCE MARINE INSURANCE COMPANY.

[C. P.]

to insure and recover in his own name: yet it seems to be stated on high authority that a legal owner, being trustee, may insure and recover in his own name, holding the proceeds in trust for his *cestui que trust*. This must be on the ground that the law will not dispute the legal interest which is the legal result of the legal ownership; though in insurance contracts it will also recognise an equitable interest as entitling the owner of it to enter into or take advantage of the legal contract of insurance.

In *Lucena v. Craufurd*, Lawrence, J., says—"The defendants in error have been considered as trustees or consignees, who, it is said, have insurable interest. A trustee who has an insurable interest must, as I conceive, have some existing right to the thing insured, for the benefit of another." Having regard to what follows, and to the statement of Lord Eldon in the same case, the phrase "existing right," as here used, means an existing legal right. But, continues the learned judge, "the commissioners in this case had not any such right, and therefore cannot, according to my notions of a trustee, be considered as such. Nor can they be considered as consignees in whom any interest or rights is vested by bill of lading or other instrument of consignment by which the property of the subject-matter of the consignment *prima facie* will pass. If they be consignees, they were naked consignees for the purpose of doing some act respecting the goods consigned, and rather agents than consignees according to the common understanding of that word; and, taking them to be naked consignees who have not the legal property of the subject-matter of the insurance, and who are not beneficially interested in it, they ought, I conceive, to have averred the interest to be in those on whose account the insurance was made." The real effect of the decision of the House of Lords in this case is well discussed by Duer, vol. 2, p. 161 *et seq.*, in n. 2 to sect. 10. The proposition to be discussed, he says, and for the maintenance of which this case has been cited, is, "that a consignee clothed with the power of sale has in all cases an insurable interest to the full value of the goods consigned to him, and may cover them on the voyage of importation by a policy effected in his own name and on his own account. The truth of this proposition, and the justness of its deduction from the authorities relied on, are the questions I propose to examine: but I shall first endeavour to show that the opposite doctrine, viz., that the right of a consignee to recover on an averment of interest in himself is limited to his own advances, constituting a lien on the goods insured (which necessarily implies that he has no insurable interest beyond those advances), is established, not by ambiguous dicta, but by positive decisions." The learned author then minutely, and I think accurately, discusses the case of *Lucena v. Craufurd*, and sums up thus:—"The result is that the final decision in *Lucena v. Craufurd* seems definitively to have settled the law, that a consignee, where he means to cover, not a beneficial interest of his own, but the entire property of the consignor, must so frame the policy as by its terms to embrace that interest; and, to enable him to recover a loss, must aver that interest in the declaration, and on the trial, not only prove its existence, but his own authority to make the insurance, or the adoption of his con-

tract." In *Wolf v. Horncastle* (1 Bos. & P. 316), the plaintiff, who was held by the court to have become before the loss the consignee of the goods, and to have advanced 300*l.* on the security of the goods, was further held to be entitled to recover on the second count in the declaration, in which he averred the interest to be in himself. But Buller, J., says expressly: "I hold that the plaintiffs had a clear right to insure to the amount of 300*l.* for which they were interested in the goods." In *Caruthers v. Shedden* (6 Taunt. 14) the plaintiffs were held entitled to recover the full value of the cargo, upon a count alleging the interest to be in Dowrick and Way. The cargo was shipped under an agreement by which it was stated that Dowrick and Way and two others had agreed to become partners in an adventure of sending goods which Dowrick and Way had on their own separate and personal credit actually and really purchased, &c. The jury found for the plaintiffs, and that the policy was intended to cover all the partners in the adventure. The objection taken in argument was, not that the interest ought to have been declared to be in all, but that Dowrick and Way could not insure more than their own interests as partners. The court did not hold that Dowrick and Way might insure to the whole value merely on the ground of their being consignees; if that ground had been sufficient the whole argument was futile: the court held in terms, "that Dowrick and Way might protect all their species of interest under one policy." Duer, vol. 2, p. 162, holds that "the sole ground of the decision was that the advances which they had made as consignees, added to their individual interests as partners, were equivalent to the entire value of the property insured." It does not appear in the case whether Dowrick and Co. were indorsees and holders of the bill of lading. It may be inferred from the nature of the transaction and their position, that they were; and, if so, they were legal owners as well as consignees. Speaking of this case, and of *Wolf v. Horncastle*, Mr. Phillips, vol. 1, sect. 423, says—"So a consignee or other party entitled to a lien upon property on account of advances or otherwise may cover his own interest by insurance on it in his own name generally." In *Godin v. The London Assurance Company* (1 Bur. 489) it was held that the English factor, to whom the bill of lading was not indorsed, might insure to the full value of the goods; but on the ground that his advances were to the extent of the full value and more. "Such factor," says Arnold, Vol. 1, p. 247, abstracting this case, "had an insurable interest to the extent of his general balance, and might recover, averring the interest to be in himself." In *Robertson v. Hamilton* (14 East, 522), it is difficult to extricate the exact grounds of the decision. The interest was in two counts alleged to be in the plaintiffs; in the third count, in Fisher, Kidd and Co., the registered owners of the ship. The plaintiffs were consignees of the ship, and had made advances the amount of which is not disclosed in the case. It was held that the plaintiffs might recover the full value of the ship "as trustees," it is said, "for those interested with themselves in the whole." If the plaintiffs were entitled to recover as agents for Fisher, Kidd and Co., they recovered as for the legal registered owners. If they recovered on the counts alleging their own interest, it may be that their advances, *prima facie*, and until the accounts were settled in equity, were

C. P.]

ENSWORTH AND OTHERS v. THE ALLIANCE MARINE INSURANCE COMPANY.

[C. P.]

equal to the whole value. Lord Ellenborough says—"The plaintiffs had an insurable interest as upon a hotchpot right." That, I confess, I do not understand. In *Irving v. Richardson* (2 B. & Ad. 193), the question was whether the assured had insured in fact, that is to say, had intended to insure more than his own interest as mortgagee. If he intended to insure only that, he could keep only as much as his interest amounted to. If he had intended to insure both his own interest and that of the mortgagee, I collect from the judgment of Littledale J., that, in an action on the policy, he must under the new Registry Acts have alleged interest both in himself and the mortgagee. "Before the late Registry Act (6 Geo. 4 c. 110 s. 45)," he says, "the mortgagee of a ship was in point of law the owner, and might insure to the full extent of the ship's value to the mortgagee as well as to himself. But by the statute the interests of mortgagee and mortgagee are more distinctly severed than they formerly were." That says, in effect, that, when the mortgagee was legal owner, he could insure to the full value of the ship, though not beneficially interested to that extent; but now he was not legal owner, and could therefore insure and recover in his own name only to the extent of his beneficial interest. In *Sutherland v. Pratt* (12 M. & W. 17), it is obvious that the bill of lading, indorsed generally to bearer, was delivered to the plaintiff, so that he was the legal owner of the goods. In *Crouley v. Cohen* (3 B. & Ad. 478), the plaintiffs who were carriers and not the legal owners, were allowed to insure and recover the full value in their own name; but it was on the ground that they were carriers, and were themselves liable for the full value. Speaking of this case, it is said in 1 Phillips on Insurance, § 424, p. 234, "This is in effect a re-insurance, as the carriers may be considered to be insurers." In 1 Arnould on Insurance, 4th edit. p. 70, the cases of factors, consignees and agents are treated of—"There are different sorts of consignees; some have a power to sell, manage and dispose of the property, &c.; others have a mere naked right to take possession; others, again, though not instructed to sell, are yet interested in the property, as having a lien or claim upon it for their advances." As to mere naked consignees, i.e., those only entitled to take possession, they have, he says, no insurable interest—"they have no legal property; they are not beneficially interested." But, "with regard to consignees who have a lien or claim on the property in respect of advances, or commission-agents to whom it is intrusted for the purpose of sale, or indorsees of the bill of lading to whom a general balance is due, there is no doubt they may effect an insurance on the property in their own names and on their own account to its whole value, and recover thereon, averring interest in themselves, at all events to the amount of their lien, claim or balance." It is true that he afterwards says, "As a general principle, there can be no doubt that consignees of goods, being in advance to the consignors or under acceptances for them, may insure in their own name and on their own account to the full value of the goods, and apply the proceeds of the policies to their own benefit, up to the extent of their claims in respect of such advances and acceptances, holding the residue in trust for the consignors." For this proposition he quotes *Carruthers v. Shed-*

don (6 Taunt. 14), with which I have already dealt, and the American case of *De Forest v. The Fulton Insurance Company*. The terms of the policy, which was a fire policy, are set out in 1 Phillips on Insurance, § 311, p. 177, and they were "on goods as well the property of the assured as held by them in trust or on commission." It seems to me that this is no authority for Mr. Arnould's proposition as to consignees of goods on board ship who insure by a marine policy in the ordinary terms. And for the same reason the English cases on fire policies are no authority. The proposition may be correct if it be applied to consignees under advance or acceptance, who are holders of bills of lading, and thereby legal owners of the goods mentioned therein. In 1 Phillips on Insurance (c. 3, s. 7, sub-sect. 309, p. 174), the law is thus stated: "A consignee, factor, or agent, having a lien on goods to the amount of his advances, acceptances, and liabilities, stands in this respect (i.e. as to his insurable interest) precisely in the situation of a mortgagee. A debt is due to him from his principal for which he holds the property as collateral security, and the property is at the risk of the principal, as the debt would still subsist though the property should be lost; and the excess over the proceeds of the goods would be still due to him in case of the proceeds being insufficient to satisfy his claim. He has, therefore, an insurable interest in the goods to the amount of his lien." And in sect. 204: "It is a familiar doctrine that a party having a lien on a vessel or cargo under a contract for advances may be rightly considered as the special owner of them to the extent of those advances, and, as such, may protect himself by insurance; and that a creditor to whom goods are assigned as collateral security, has an insurable interest in them not exceeding the amount of his debt." To the elaborate note of Duer, n. 2, on sect. 10, I have already referred. In vol. 2, p. 109, he says: "My researches have not enabled me to discover a single case in the English reports in which a consignee, on an avowment of a sole interest in himself, has been permitted to recover beyond the amount of his own advances."

It seems to me to follow from these authorities, and from principle, that a consignee, as such, has no insurable interest at all. "To assert the universal right of a consignee to insure the entire property on the voyage of importation, is to assert that a valid insurance may be made by a person who has no title or interest, legal or equitable, and no authority express or implied."—2 Duer, p. 111. If it is necessary to bring in some advance, or some contract giving an interest, in order to give the consignee a right to insure, it seems to me to follow necessarily, i.e., logically, that the insurable interest is limited to the amount of the advance, or to the amount of the interest under the contract. It cannot be that a consignee without personal interest cannot insure at all, and that a consignee in advance to the extent of 1000. can insure to 10,000., and recover such an amount upon an avowment that it is the interest he has. He has no such interest. It seems to me therefore, both upon principle and authority, that the plaintiffs in this case, being only consignees to sell, under advance, and with a contract right to earn commission, but not being the legal owners of the cotton, could only properly insure, so as to recover in their own name, the 3000. for which they were liable on their

C. P.]

THE PHILOTAXE.

[ADM.]

acceptance, and any commission they would have earned by selling. It was urged that if that be the law, the plaintiffs could not recover at all, because they intended to insure, not only their own interest, but also the interest of their correspondents. But Duer, vol. 2, p. 45, points out that, in *Wolf v. Horn-castle* "the judgment of the court is an express decision that, where a policy is effected on behalf of the consignor, the consignee is at liberty to apply it to his own use to the extent of his own insurable interest, and that his claim is not answered by showing that, when he effected the insurance, he expected that it was to apply exclusively to the interest of the consignor." Moreover, it may be doubted whether the policy in this case could cover an interest of Bell and Co. or Curson & Madhowdass. At the time it was effected, the plaintiffs had no authority, express or implied, to insure on their behalf. It may be, though I think it unnecessary to determine the point, that *Watson v. Swann* (11 C.B., N.S., 756) is an authority for saying that a policy cannot cover the interests of persons who, at the time of effecting it, are wholly unconnected with and unknown to the person effecting the insurance. If the policy did not and could not cover the interest of Bell and Co. or Curson & Madhowdass, the declaration on the policy, though made with intent to cover those interests, has no effect—*Stephens v. The Australasian Insurance Company* (ante, vol. 1, p. 458; 27 L. T. Rep. N. S. 585; L. Rep. 9 C. P. 18; 42 L. J., N. S., 12, C. P.).

As I have come to the conclusion that the plaintiffs can recover to the extent of their own interest, and to that extent only, it seems to me unnecessary to determine the controverted question arising upon the third plea by way of traverse. I doubt whether the distinction affirmed by Mr. Duer between the allegation of interest and the allegation with respect to the party for whom the contract of insurance was made, is sound. It may be true to say that *Bell v. Anelay* (16 East, 141) and *Cohen v. Hannam* (5 Taunt. 101) do not necessarily overrule *Page v. Fry* (2 B. & P. 240). But most certainly in *Cohen v. Hannam* Lord Mansfield intended to overrule it; and the reasons in favour of confining the allegations of interest are, as it seems to me, precisely the same as the reasons for confining the allegation as to the person on whose account the policy was made. It is equally objectionable to have a person interested on the jury, as to have a person who is a party to the contract. It is equally just that the defendant should have the opportunity of interrogating a party interested as a party to the action. The present case is a remarkable instance. It was of the utmost importance to the defendants, if their suspicions were well founded, to have the opportunity of interrogating Bell and Curson & Madhowdass.

I am of opinion that the rule should be made absolute to reduce the damages.

BUTTE, C. J.—My brother Keating, who is also absent upon the circuit, concurs in the judgment of my brother Brett, which I have just read. The court being equally divided in opinion, the rule to enter the verdict for the defendants or to reduce the damages will be discharged, and the defendants will be at liberty to appeal to a court of error.

Rule discharged.

Attorneys for plaintiffs, Parker and Clarke.

Attorneys for defendants, Walton, Bubb, and Walton.

COURT OF ADMIRALTY.

Reported by J. F. ASPIWALL, Esq., Barrister-at-Law.

Friday, Nov. 14, 1873.

THE PHILOTAXE.

Salvage—Termination of service—Place of safety—Right to reward.

Where a steam tug is engaged to render assistance to a ship aground in the night time, and succeeds in getting her off, and takes her to a safe anchorage for the night, and lies alongside of her till morning, the salvage service does not end on the ship being anchored, but the steam-tug is entitled to reward for the time she lies alongside the ship ready to render further assistance if required.

THIS was an appeal from a decree of the judge of the City of London Court (Mr. Commissioner Kerr), in a cause of salvage instituted on behalf of the owners, master, and crew of the steam tug *Palmerston*, against the ship *Philotaxe*. On the night of the 16th April 1873, the *Philotaxe* got on to the Shoebury sand, at the entrance to the river Thames. The *Palmerston* came up and offered her services, and was engaged to render assistance and tow her up to London, but no price was agreed upon, as the master of the tug declined to name any sum, leaving the amount to be settled thereafter. The *Palmerston* made fast to the ship at about 11.30 p.m., but did not succeed in getting her off until 2.30 a.m. on the 17th April. In getting her off the tug had to resort to clicking; that is, getting her hawser slack, and going ahead full speed, so as to give the ship a jerk. When the ship got off the sand, she was taken to an anchorage off the Chapman Sand, and there she lay at anchor until 9 a.m. of the same day. The tug lay alongside of her until that time, and then towed her up to London.

The value of the ship and cargo was agreed at 2000*l*. The value of the tug was about 500*l*., and the plaintiffs claimed 60*l*. for damage and demurrage caused by the service. The defendants tendered 110*l*. and costs, which the plaintiffs refused to accept.

At the hearing in the City of London Court, no separate claim was made for the towage from the Chapman to London, but the question of when the ship was brought to a place of safety, and when the service ended, was discussed, and the learned commissioner found, as a matter of fact, that she was anchored in a place of safety off the Chapman; that the weather was perfectly fine, and that nothing was wrong with the vessel; that the salvage service ended there; that the payment into court was sufficient; and he allowed the plaintiff his costs up to the time of tender, and the defendant his costs after the tender.

From this decree the plaintiffs appealed to the High Court of Admiralty.

The *Admiralty Advocate* (Dr. Donne, Q.C.) and *W. G. F. Phillimore*, for the appellants.—The reward is insufficient on two grounds: First, because it does not include reward for the time during which the tug lay alongside the ship at the Chapman, nor for the towage up to London, which was all part of one service, and ought not to be divided. Moreover, the ship might have been injured by grounding, and the attendance of the tug was necessary; the Chapman could not be considered a place of safety; secondly, the award does not take into consideration the amount of damage and

ADM.]

THE NELLIE.

[ADM.]

demurrage, as that would leave only 50*l.* for salvage, which is insufficient.

Butt, Q.C. and *Charles Hall*, for the respondent.—The result proved that the Chapman was a place of safety, and the service, therefore, ended there. The reward was sufficient. Towing was not claimed below, and cannot be claimed now.

Sir R. Phillimore.—This is an appeal from a decree of the learned commissioner of the City of London Court. There can be no doubt that a salvage service was rendered, and the only question is, whether the amount awarded is sufficient. The *Philotars* was a full rigged ship of 370 tons, and having got on the sand clearly required steam assistance to get her off. The weather no doubt was fine, but was liable to change, and no vessel would be safe if left to lie on that sand. The tug was of considerable value and power, and did her work well, and the evidence has established that she was damaged by clicking, which operation was necessary to get the ship off the sand, and succeeded in its object. The tug took the ship to a berth near the Chapman Sand. It was contended by defendants that the service ended, as soon as the ship was anchored off the Chapman, and so it was found by the learned commissioner. No doubt the towing from the Chapman to London, for which no claim seems to have been made in the court below, was rightly excluded in the award; but it appears that the tug lay by the ship all night, and that both were in no very safe position, lying in the neighbourhood of the Chapman. If the ship had been injured whilst aground, as she well might have been, or as her master might reasonably have supposed she was, the tug's services would have been of great importance during the night, in case bad weather came on. This was no doubt the reason why the tug, at the request, or at least with the consent, of the master of the *Philotars*, lay by the latter all night. Hence, in the absence of evidence to the contrary, I must hold that the service continued whilst the tug lay by the ship during the night, and this I am justified in doing upon the construction of the cases heretofore decided in this court. That being the case I am of opinion that the amount of the tender was not sufficient. The damage and demurrage, even if they do not amount to the sum claimed by the plaintiffs, reduce the reward given below to that to which the nature and extent of the service entitle the plaintiffs. I shall increase the amount tendered to 170*l.*, but it must be understood that I intend this sum to include, as I consider I have a right to include, the 10*l.* claimed for towing service from the Chapman to London. I shall allow the appellants their costs.

Solicitors for the appellants, *Lowless, Nelson, and Jones*.

Solicitor for the respondent, *Thomas Cooper*.

Tuesday, Nov. 18, 1873.

THE NELLIE.

Salvage—Engagement to render assistance—Signals of distress—Uncompleted service—Right to reward.

Where a steamship has been engaged to render assistance to another in distress by towing her to a place of safety, and after several hours' towing, the ships are parted by no fault of the salvor, and the conduct of the ship in distress

leads the salvor to the honest belief that his services are no longer required, and thereupon the latter proceeds to his own destination, he is not thereby deprived of his right to salvage reward, but upon the other vessel arriving safe in port by her own exertions, may proceed against her in respect of the services actually rendered.

THIS was a cause of salvage instituted on behalf of the owners of the Russian ship *Lazareff*, against the English ship *Nellie*, cargo and freight, and against the owner of the *Nellie* intervening. Before the arrest of the ship the cargo had been sold out of the jurisdiction, and could not be proceeded against.

The *Nellie* was a screw steamer of 548 tons register, and 95 horse power nominal, manned by a crew of twenty-one hands, and at the time of the services was bound on a voyage from Kuntendje to Falmouth, with a cargo of grain; the value of ship and freight was 13,378*l.* The *Lazareff* was a screw steamer belonging to the port of Odessa, of 1650 tons gross, and 1500 tons net register, and had a crew of forty-nine hands; she was bound from Odessa to Antwerp with a cargo of grain; the value of the ship was 50,000*l.*, of her cargo 25,000*l.* On the 4th Feb. 1873, at about 9 a.m., the *Nellie* was in the Bay of Biscay, about 40 miles from Ushant and 120 miles from the Lizard. She had lost her foremast, and her starboard boiler was leaking, so that the fires under it had to be extinguished, and she could only use her port boiler. She was under sail and steam, but was making slow progress, and as the weather was bad her master signalled for assistance. The signal used was that of *Maryatt's Code*, signifying "in distress and want assistance." In reply to this signal the *Lazareff* came up; both vessels lay to and were made fast with two hawtens. The *Lazareff* then commenced to tow the *Nellie* towards Falmouth, at the request of the master of the *Nellie*. About half an hour after the *Nellie* signalled to be towed to Plymouth, and the course was accordingly changed. Shortly after one of the tow lines broke, and then two others were made fast, and the two vessels went ahead till about 9.30 p.m., when all three tow lines parted. The *Lazareff* went ahead slow, getting in the tow lines; the *Nellie* meanwhile passing her. The *Lazareff* burnt blue lights, which were answered by the *Nellie* by other blue lights. The *Lazareff* followed the *Nellie* until 3 a.m. on the morning of the 5th Feb., and then went up to her. The *Nellie* had then ceased to burn blue lights for some time, and when the *Lazareff* got up, the *Nellie* shut out her side light, which had been visible, and went ahead, and did not ask for further assistance. Meanwhile the hawtens had been got on board the *Lazareff*, and one had the appearance of having been cut in two. The master of the *Lazareff* thereupon judging that his services were no longer required, altered his course and proceeded on his voyage to Antwerp. The *Nellie* proceeded to Falmouth, where she arrived in safety at about 10 a.m. on the 5th Feb.

The *Lazareff* had towed the *Nellie* for about twelve hours, and had remained ready to render further assistance for six hours more. In respect of these services her owners, master, and crew claimed salvage reward. In answer to this claim, the defendants set up that the master of the *Lazareff* agreed to tow the *Nellie* to Falmouth, but had failed to complete his engagement, and that he

[ADM.]

THE RIO LIMA.

[ADM.]

did not do his utmost to complete it; and they submitted that there was no salvage service.

Butt, Q.C. (Phillimore with him), for the plaintiffs.—Where a ship, in answer to signals of distress, renders salvage service, which she fails to complete through no fault of her own, she is entitled to reward. There is no fault to be attributed to the plaintiffs here. The acts of the defendants caused the *Lazareff* to continue on her voyage, and hence we are entitled to reward.

The Undaunted, Lush, 90; 2 L. T. Rep. N. S. 520.

Clarkson (Webster with him), for the defendants.—There is no distinction in an agreement of this kind, whether made on sea or land. Where a man undertakes to perform a service, he must perform it all or can have no claim. The cases only decide that where a salvage is completed by third persons, those who rendered the first services, but did not complete, are entitled to share. There was no completion of the service here at all. The ship was left in the Channel, the engagement being to tow to Falmouth. Even if there was no express agreement as to place, an agreement to tow to a place of safety will be implied by salvage law. Hence the contract has not been performed, unless the plaintiffs were exonerated from the performance by those on board the *Nellie*, and no such exoneration took effect, because the *Nellie* continued to burn blue lights. [Sir R. PHILLIMORE.—You admit that the Russian *bond fide* believed that her services were not wanted. She has rendered service for eighteen hours; is she to have no reward?] Without completion of the service there can be no claim to payment. [Sir R. PHILLIMORE.—What shows the agreement?] The evidence establishes an agreement to tow to Plymouth; and even if the *bond fide* believed that we no longer required his services, but was mistaken, he must suffer for his mistake, and cannot recover. It lies upon the plaintiff to show exoneration.

W. F. G. Phillimore, in reply.

Sir R. PHILLIMORE (after stating the facts).—It has been argued by the defendants that there was a bargain made by the master of the *Lazareff* to take the *Nellie* to Plymouth, or at least to a place of safety. I cannot, however, think that this is a conclusion which the premises warrant. It cannot be said that there was any absolute contract at all to tow to any particular place. There can be no doubt that Falmouth was the *Nellie's* destination, but it was at no time agreed that she should be taken there; in fact, the only understanding between the parties was, that assistance should be given. Although it is true that in these cases there is usually a tacit contract that the ship shall be taken to a place of safety, and that contract must in the first instance have existed in this case, there was on the other hand no express contract to do anything.

The facts are undisputed, in so far as they show that the *Lazareff* went to the *Nellie* in answer to signals of distress, and duly performed the services required of her up to a certain point, when she left the *Nellie*, supposing her services to be no longer required. It is admitted that no moral blame attaches to the Russian ship for leaving the *Nellie*, and that in so doing her master acted as he thought was for the best, believing that his services were dispensed with. It was argued, however, that the master of the *Lazareff* was mistaken in supposing that the *Nellie* no longer required his services, and that the

consequence of this mistake being that the service was not completed, the *Lazareff* loses her right to reward, although there had been in the first instance an actual request to render assistance. Now, in the case of *The Undaunted* (Lush, 90; 2 L. T. Rep. N. S. 520), my learned predecessor said:—"There is a broad distinction between salvors who volunteer to go out and salvors who are employed by a ship in distress. Salvors who volunteer go out at their own risk for the chance of earning reward; and if they labour unsuccessfully, they are entitled to nothing; the effectual performance of salvage service is that which gives them a title to salvage remuneration. But if men are engaged by a ship in distress, whether generally or particularly, they are to be paid according to their efforts made, even though the labour or service may not prove beneficial. Take the case of a vessel at anchor in a gale of wind, hailing a steamer to lie by and be ready to take her in tow, if required; the steamer does so; the ship rides out the gale safely without assistance. I should, undoubtedly, hold in such a case that the steamer was entitled to salvage reward; the quantum to be determined by the risk encountered by both vessels, the value of the property at hazard, and the other circumstances of the case. The engagement to render assistance to a vessel in distress, and the performance of that engagement, so far as necessary, or so far as possible, establish a title to salvage reward."

Now it was no fault of her own that the *Lazareff* went away after the breaking of the hawsers. She stood by the *Nellie* for some time, burning blue lights, and I do not consider that the statement of the plaintiffs is at all exaggerated, where it shows that efforts were made to render further assistance. It has been proved that the *Nellie* got ahead of the *Lazareff*, and although lights were burnt, did not wait for the latter to come up. Moreover, when the *Lazareff* did come up, the *Nellie* altered her course, and stood away for Falmouth, which may have deceived the *Lazareff*. I consider that the master of the *Lazareff* arrived upon the facts at the honest conclusion, after the lights ceased burning, that he was no longer wanted, and thereupon went on to his destination.

I cannot then agree with the contention that upon these facts there is no salvage due. There was a manifest engagement to render assistance, and assistance was rendered, for which the plaintiffs are entitled to be paid. The case comes within the sensible remarks of Dr. Lushington, in the case I have cited. There was no *mala fides* on the part of the plaintiffs; their services were actually beneficial, and they are therefore entitled to remuneration. I shall award 300*l.*, with costs.

Proctor for the plaintiffs, H. G. Stokes.

Solicitor for the defendants, T. Cooper.

Nov. 18 and 19, 1873.

THE RIO LIMA.

Taxation of costs—Ship under arrest of High Court and County Court—Possession fees.

Where a ship, already under the arrest of the High Court of Admiralty, is arrested in an admiralty cause instituted in a County Court, the plaintiffs moving of the previous arrest, and that cause is afterwards transferred to the High Court, the pos-

ADM.]

THE RIO LIMA.

[ADM.]

session fees charged by the high bailiff in respect of the County Court arrest will not be allowed by the High Court upon taxation of plaintiff's costs. This was an objection to the registrar's taxation of costs in a cause of necessities, instituted against the ship *Rio Lima*.

The cause was originally instituted in the County Court of Northumberland, under the County Courts Admiralty Jurisdiction Act 1868, sect. 3, and a warrant of arrest was issued out of that court. Previous to the institution of this cause, two other causes, one of mortgage and the other of possession, had been instituted in the High Court of Admiralty, and in these two causes the ship was arrested by the deputy of the marshal of the High Court, on the 10th March 1873. On the same day, but at a later hour, the ship was also arrested by the high bailiff of the County Court in the cause of necessities. At the time of this arrest, the warrant of the High Court was affixed to the mast of the ship, and the marshal's deputy gave notice to the man in possession, on behalf of the high bailiff, that the ship was already under the arrest of the High Court. The high bailiff, however, remained in possession until the 22nd April 1873. On the 21st April 1873, an application was made by the plaintiffs to the High Court to transfer the cause of necessities from the County Court to the High Court, and in support of the application an affidavit, made by the plaintiff's solicitor, was filed, stating that at the time of the institution of the suit other suits had already been instituted in the High Court, and that the High Court had in those suits arrested the ship. On this application, the cause of necessities was transferred to the High Court, and according to the practice of the High Court, was again there instituted by *præcipe*. On the 22nd April the ship was released by the high bailiff of the County Court, and the plaintiffs filed in the registry of the High Court a *caveat* against the release of the ship, which continued under arrest in the other suits above mentioned. Appearances were duly entered in this suit for certain owners of the ship. On the 25th April the plaintiffs applied to the court to order the arrest of the ship in the cause of necessities; but this the judge refused to do, holding that a *caveat* was sufficient so long as the arrests in the other suits held good: (see *The Rio Lima*, 28 L. T. Rep. N. S. 775; *ante*, p. 34.) On the 3rd May the plaintiffs withdrew the *caveat* against the release, the cause of necessities having been settled for an agreed sum and taxed costs. The plaintiffs' costs were accordingly taxed by the registrar, and in the bill of costs, among the outport charges, there appeared an item, "Paid high bailiff's bill for arrest, possession, and maintenance, 16*l.* 13*s.* 6*d.*" This charge covered the period from the arrest of the ship on the 10th March to the release on the 22nd April. This was disallowed by the registrar, on the ground that at the time the warrant was served the ship was already under the arrest of and in possession of the High Court, and that, it being the practice of the marshal only to charge one set of possession fees, some arrangement producing the same result ought to have been made.

The defendants had in the first instance objected to the double possession, and the following letter was written to the high bailiff of the Northumberland County Court by the defendants' solicitor:—

6, Copthall-court, London, E.C.
March 20, 1873.

Rio Lima.

Sir,—I am informed by the marshal of the Court of Admiralty that a person has been put on board this steamer at the instance of a writ in your County Court. The vessel is under arrest in three suits instituted in the Admiralty Court, and the expense incurred in keeping the man above referred to on board will not be allowed as an item in the account sales upon the sale of this vessel. I will undertake that before the vessel is released due notice shall be given to you, so that if it is considered advisable so to do, possession may be taken by the plaintiffs in your court; but if, notwithstanding this, the man is continued on board, the additional expense occasioned by his remaining there will have to be borne by those who instruct him.—Yours truly,

To the High Bailiff. ROWLAND MILLER.

The plaintiffs' solicitors replied as follows:—

Newcastle-on-Tyne, March 21, 1873.

Rio Lima.

Dear Sir,—Your letter to the high bailiff of the County Court of Newcastle has been handed to us, as the plaintiffs' solicitors in the County Court. We find there are five arrestments against the ship and cargo, of which ours is only the third, and under such circumstances we cannot accede to your request and withdraw possession.—Yours truly,

Rowland Miller, Esq.

INGLETON & DARGENT.

To this taxation the plaintiffs objected, and gave notice of motion to review.

Phillimore, for the plaintiffs, in support of the motion.—The County Court was bound to arrest and to hold. Having no knowledge that there were suits already instituted in the High Court, the plaintiffs were bound to institute in the County Court, on account of the amount of our claim. We were entitled to institute a cause *in rem*, under the County Courts Admiralty Jurisdiction Act 1869 (32 & 33 Vict. c. 51), and without doing so we had no means of preserving our lien for necessities. The object of the arrest is for the purpose of keeping the property within the jurisdiction of the court: (see *Williams and Bruce Admiralty Practice*, supp. p. 26, rule 15.) This shows that the arrest must be continued. The arrest is not for the purpose of ousting the marshal, but in order to hold concurrently. If the marshal found the sheriff in possession of a ship, he would not withdraw, but would also enter into possession. Where there are several claims against a ship, those entitled to priority of decree are entitled to priority of payment out of the proceeds; hence, if the ship were released, no decree could be got against her, and the plaintiff would allow the other creditors to take priority. Moreover, the bailiff was entitled to hold the ship until the payment of his own fees:

The North American, 5 *Swab*, 466.

County Court Admiralty Jurisdiction Rules; Rule 20, *Williams & Bruce Adm. & Pr. supp.*, p. 27.

We could not have compelled the bailiff to withdraw without payment of his fees; nor was he entitled to do so without a formal release, which only takes place on abandonment of suit, or on a decree of the court against the plaintiff. In either case the bailiff would have his fees; but we could not be expected to abandon, having a good claim. The rules do not seem to have contemplated that the ship might be under the arrest of several persons at one time in different courts, but the plaintiffs ought not to suffer for that. The fees have been paid to the bailiff, and if we had not transferred to this court, the bailiff would have been paid everything by the County Court.

Clarke, for the defendants, *contra*.—The ship ought not to be in the possession of two persons

ADM.]

THE RIVER WEAR COMMISSIONERS v. ADAMSON AND OTHERS.

[Q. B.]

at one time. The plaintiffs were not bound to go to the County Court. It has often been held that when a ship is under arrest in the High Court, any person having a cause of action, however small, may sue in that court—in fact, ought to sue here to prevent confusion. Suppose this court ordered the ship to be brought round to London in charge of the marshal, would he have to bring the high bailiff of the County Court with him out of jurisdiction of the County Court? This clearly shows that there can only be one valid possession, and that the arrest of this court supercedes that of the County Court. The plaintiffs must have known that the ship was under arrest by the marshal, and ought at once to have transferred the cause here. The taxation is a matter in the discretion of the registrar, and this discretion has for the above reasons been rightly exercised.

Phillimore, in reply.—The ship was arrested on both suits on the same day, and we had no means of knowing of her previous arrest till we took possession. We are at least entitled to possession fees for one day. *Cur adv. vult.*

Nov. 19.—Sir R. PHILLIMORE.—This is an objection to the disallowance of one item in the taxation of the plaintiffs' costs by the registrar. That item consists of the high bailiff's charges for possession of the vessel *Rio Lima* during forty-four days, from March 10th to April 22nd, under a warrant issued from the County Court of Northumberland; the amount disallowed is 16*l.* 13*s.* 6*d.* At the time this warrant was served the *Rio Lima* was already under arrest under two warrants from this court, and in possession of the marshal's deputy. Both these warrants had been served at an earlier hour of the same day (the 10th of March in this year) on which the County Court warrant was served. These warrants had been issued on the 7th and 8th of March; the return showed that they were served in the usual manner by affixing the warrant, and afterwards the copy to the mast of the vessel. The vessel was subsequently arrested by warrants from this court in three other snits, namely, in a cause of possession on the 18th of March, of master's wages on the 21st of March, of co-ownership on the 29th of May. For holding possession of the vessel in all these five causes, the marshal has charged only one set of possession fees.

I am by no means prepared to say that, if the County Court arrest had been first in order of date, the subsequent arrest by the Superior Court would not have dispossessed the officer of the inferior court. But here the question is, whether it was necessary or justifiable that whilst the ship was thus in the custody of the Superior Court, a second person should have been placed, under the County Court warrant, in possession of the ship. The practice of this court with respect to cases in which proceedings have been taken in this court and in the County Court has been established for some time. In such cases I have invariably exercised the power given me under the statutes of transferring all the proceedings to this court, thereby, I believe, saving much expense and delay to the suitors. The plaintiffs ought to have been, and must have been aware of this practice; and they applied on the 21st April to this court for an order to remove the snit from the County Court into this court. The order was granted. This course should have been taken in the first instance.

VOL. II, N. 8

Moreover, an arrangement to avoid the expense of this double possession might easily have been made with the custom-house officer who acts as the deputy of the marshal on these occasions. He might have been instructed by the plaintiffs, in the event of the vessel being released from the warrants of the High Court of Admiralty, to retain her under the County Court warrant. The marshal has shown me a letter from his deputy, dated March 25th, in which is this paragraph—"I have given notice to the party on board under the County Court Admiralty jurisdiction process, that the vessel was before he was placed on board, and still remains under arrest under an Admiralty warrant;" and in the affidavit sworn by the plaintiffs' solicitor at Newcastle, I find this paragraph—"I have been informed and verily believe that previous to the institution of the snit in the County Court at Newcastle, that three different snits had been instituted in this honourable court, and the said court was and still is in possession of the said vessel."

I am of opinion that the plaintiffs were bound to know that the vessel was in possession under the warrant of this court, and, moreover, that the fact was distinctly brought to their notice by the correspondence which is set out in this case a month before they applied to transfer the cause, and that the charge for possession fees for forty-four days under the County Court warrant was rightly disallowed by the registrar. I agree with the observations that the County Court Acts were not drawn with due care or perhaps adequate knowledge of the practice of this court, but that is no reason why I should put such a construction upon them as would result in the defendant being made to pay a double set of fees to the plaintiffs for the detention of his vessel in a case where no concurrent possession was necessary. I dismiss the motion with costs.

Solicitors for the plaintiffs, *Ingledeu, Ince, and Greening.*

Solicitors for the defendants, *Rowland Miller; Simpson and Cullingford.*

COURT OF QUEEN'S BENCH.

Reported by J. SHORT and M. W. McKELLAR, Esqrs.,
Barristers-at-Law.

Friday, Nov. 7, 1873.

THE RIVER WEAR COMMISSIONERS v. ADAMSON AND OTHERS.

Damage to sea wall by vessel—Damage the result of stress of weather—Vessel abandoned by crew at the time—Liability of owner of vessel—The Harbours, Docks, and Piers Clauses Act 1847 (10 & 11 Vict. c. 27), s. 74.

The owners of a vessel, which the crew have left owing to stress of weather, are answerable, under sect. 74 of the Harbours, Docks, and Piers Clauses Act (10 & 11 Vict. c. 27) for damage done to a sea wall, after the crew have left her.

In this case, which was tried as the last Durham assizes before Quain, J., a verdict was entered for the plaintiff for an amount to be settled by an arbitrator, leave being reserved to the defendant to move to enter a verdict, or for a nonsuit.

The action was brought to recover damages for an injury done by the defendant's vessel to the sea wall of the port of Sunderland, the property in which is vested in the plaintiffs. The defendants'

L

Q. B.]

JOLLIFFE AND ANOTHER v. WALLASEY LOCAL BOARD.

[C. P.]

vessel, meeting with bad weather, made for the harbour of Sunderland, but grounded near the sea wall, and her crew were then taken off from the vessel. Some time after the crew had left the vessel, the tide rose, and the vessel was driven gradually against the sea wall, to which injury was thereby done.

Holker, Q.C. (with him *Greenhouse*) now moved in pursuance of the leave reserved. Sect. 74 of the Harbours, Docks, and Piers Clauses Act 1847 (10 & 11 Vic., c. 27) enacts that "The owner of every vessel or float of timber shall be answerable to the undertakers for any damage done by such vessel or float of timber, or by any person employed about the same, to the harbour, dock, or pier, or the quays or works connected therewith, and the master or person having charge of each vessel or float of timber, through whose wilful act or negligence any such damage is done, shall also be liable to make good the same; and the undertakers may detain any such vessel or float of timber until sufficient security has been given for the amount of damage done by the same; provided always that nothing herein contained shall extend to impose any liability for any such damage upon the owner of any vessel where such vessel shall, at the time when such damage is caused, be in charge of a duly licensed pilot, whom such owner or master is bound by law to employ and put his vessel in charge of." This enactment points to the case of injury done by a vessel which, at the time the injury is done, is under the control of some one, and not to such a case as the present, where the vessel, at the time, was abandoned by her crew. This view is confirmed by the words that "the master or person having charge of such vessel or float of timber through whose wilful act or negligence any such damage is done, shall also be liable to make good the same." [BLACKBURN, J.—The vessel in the present case must have been actually in charge of some one; it was not a derelict.] It was practically a derelict. It cannot have been the intention of the Legislature to make the owners of a vessel liable in case of such an inevitable accident. [BLACKBURN, J.—I entertain a suspicion that the Legislature never had in their contemplation such a case as the present. But if your contention is correct, then the case of *Dennis v. Tovell* (L. Rep. 8 Q. B. 10; 27 L. T. Rep. N. S. 482) was ill decided. There this court was compelled to hold that sect. 74 applies to cases of damage done to a pier by a vessel through inevitable accident caused by stress of weather.] The present case is distinguishable from *Dennis v. Tovell* in this, that the vessel here was not under the control of any one at the time the damage was done. [BLACKBURN, J.—The vessel was clearly not a derelict; and I do not think that the fact of having been grounded makes a difference. I shall be very glad if a court of error can put a different construction on the 74th section from that which we have felt bound to put upon it; and for that purpose we will give the defendants leave to appeal if they wish to do so.] *Rule refused.*

Attorneys for defendants, *Johnson and Weatherall*, for *Hessell, Sanderland*.

COURT OF COMMON PLEAS.

Reported by H. F. POOLEY and JOHN ROSE, Esqrs., Barristers-at-Law.

Nov. 10 and 13, 1873.

JOLLIFFE AND ANOTHER v. WALLASEY LOCAL BOARD.

Obstruction to tidal river—Negligent exercise of statutory powers—Omission to indicate obstruction by sufficient buoy—Notice of action.

By a local Act the defendants were authorised to construct in conformity with certain deposited plans, "and upon the lands delineated upon the said plans," a pier or landing stage, "together with such other works and conveniences in connection therewith," as they should from time to time think fit. Before the landing stage was commenced plans of the proposed works were to be deposited at the Admiralty for approval. The local Act was to be executed "subject to the powers and provisions" of the Public Health Act 1848, sect. 139 of which requires notice of action "for anything done or intended to be done" under the provisions. The defendants deposited plans (differing in extension from the plans under the Act) which received the approval of the conservators of the river, representing the Admiralty, and constructed the landing stage in conformity therewith. The landing stage was a floating one, and was moored by anchors lying in the bed of the river. The position of the anchors was indicated by a buoy, which, being carried down by the tide, became concealed from view. One of the anchors becoming displaced, stove in and swamped a vessel of the plaintiffs which was lawfully navigating the river.

Held (1), that the anchor, although placed where it was for the benefit of the public, was an obstruction which the defendants could not have created without statutory authority, and was a nuisance to the river; (2) that the defendants were guilty of negligence in their management of the buoy, but (3) that inasmuch as the plans had received the approval of the Admiralty, such approval was tantamount to the sanction of the Act, so as to entitle the defendants to statutory notice of action.

Notice of action must be given in a case of non-feasance, just as much as in a case of misfeasance.

Per Denman, J., Reg. v. Russell (6 B. & C. 566) is overruled by *Reg. v. Ward* (4 Ad. & E. 384.)

This was an action for obstructing a navigable river, whereby a vessel of the plaintiffs was swamped.

The declaration stated that the defendants had constructed, and were in possession, and had the management of a certain landing stage, called the New Brighton Landing Stage, upon a certain public navigable tidal river, and defendants sunk, placed, and kept, in and upon the bed of the said river, at a part thereof where it was navigable, a certain anchor of the defendants, attached by a cable to the said landing stage, which said anchor was covered with water and wholly concealed from view, and in such a position and at such a depth, that vessels in navigating the said river, and passing in and along and over the said place where the said anchor was so sunk and placed as aforesaid, without having notice of the said anchor so being sunk and being in the said place, would be and were in great danger of striking against the same, and of being thereby damaged, and while the said anchor was so sunk,

C. P.]

JOLLIFFE AND ANOTHER V. WALLASEY LOCAL BOARD.

[C. P.]

Ac., no notice was given nor any proper precaution taken by the defendants to guard against the said danger to vessels lawfully navigating the said river, and passing in, along, and over the said place where the said anchor was so sunk, and by means of the premises a vessel of the plaintiffs, while lawfully navigating the said river and passing in, along, and over the said place, struck against the said anchor and was swamped.

The second count charged that the anchor became in a dangerous position, whereby vessels navigating the river and passing over the place where the anchor was sunk were in danger of striking against the same, whereof the defendants had notice, yet the defendants wrongfully and negligently allowed the said anchor to be, and kept the same for a long and unreasonable time in, the said dangerous position.

The third count charged that by the Wallasey Improvement Act 1864, it was enacted that the defendants, subject to the provisions of the said Act and the statutes incorporated therewith, might construct certain works according to certain deposited plans, and among the said works a certain pier or landing stage at New Brighton, with all such jetties, Ac., and conveniences, as the defendants should from time to time think fit, and that previously to commencing the said pier, the defendants should deposit plans at the Admiralty Office for approval, and should not extend or alter the said works without the like approval, and that the defendants did deposit such plans, whereto the approval of the Admiralty was signified, yet the defendants did not construct the said pier in accordance with the said approval and the said Act of Parliament, but so that the same deviated from the line or situation thereof shown on the deposited plans, beyond the limits of deviation shown on the said plans, without the defendants having obtained such like approval to such deviation, and by reason of so doing placed and kept the anchor as in the first count mentioned, and omitted to give notice and to take precaution as in the first count mentioned.

The fourth count charged the same matter as the third count, omitting all mention of the approval of the Admiralty Office.

The material pleas were Not guilty by statute 11 & 12 Vict. c. 73, s. 139, a public Act; and 21 & 22 Vict. c. 63, s. 4; 27 & 28 Vict. c. 117, s. 2, and 30 & 31 Vict. c. 132, s. 5.(a)

(a) The following are the material parts of the enactments referred to in the plea:

11 & 12 Vict. c. 63 (the Public Health Act 1848), s. 139: "No writ shall be sued out . . . for anything done or intended to be done under the provisions of the Act, until the expiration of one month next after notice in writing . . . clearly and explicitly stating the cause of action . . . and every such action shall be brought or commenced within six months next after the accrual of the cause of action."

21 & 22 Vict. c. 117, (the Wallasey Improvement Act 1864), s. 4: "This Act shall be executed by the Local Board according to the powers and provisions of the Public Health Act 1848, and of the several Acts supplemental thereto, or otherwise relating to the public health, and from time to time in force within the limits of this Act."

27 & 28 Vict. c. cxviii, s. 2: "This Act shall be executed by the Local Board, subject to the powers and provisions of the Public Health Act 1848."

30 & 31 Vict. c. cxviii, (the Wallasey Improvement Act 1867), s. 5: "This Act shall be executed by the Local Board, with the powers and indemnities, and according to the provisions of the Public Health Act."

And to the first count that the defendants did what was complained of by virtue of their powers under the Wallasey Improvement Act 1864, and the Acts incorporated therewith.

The cause came on to be tried before Kelly, C.B., at the Liverpool Summer Assizes 1871, when a verdict was found for the plaintiffs by consent for 1000*l.* (the full amount claimed), subject to be reduced or vacated, and instead thereof a verdict for the defendants, or a nonsuit, to be entered according to the decision of the court upon the following case (stated by an arbitrator (Mr. Higgin, Q.C.)); the court to be at liberty to draw inferences of fact.

CASE.

1. The plaintiffs are the owners of steam-tug boats plying for hire within the port of Liverpool, and were on the 15th June 1870, the owners of a certain steam tug boat called the *Lioness*.

2. The defendants were possessed of a certain pier, bridge, and landing-stage at New Brighton, which said bridge at one end thereof was and is attached to the said pier, and at the other end thereof was and is attached to the said landing stage, which said landing stage and bridge rose and fell, and still rise and fall, with the tide. The said pier was and is constructed of piles screwed down into the soil of the river Mersey between high and low water mark, and the whole of the said pier was and is above low water mark of ordinary spring tides. The said bridge did not and does not rest upon or touch the soil or waters of the said river Mersey, and the greater part thereof in length was and is above low water mark of ordinary spring tides; the remaining part thereof was and still is suspended to the said landing stage below low water mark of ordinary spring tides, and the whole of the said landing stage which was and still is moored by anchors fixed into the bed of the river, floated and still floats upon the waters of the said river below low water mark of ordinary spring tides, and certain anchors which moored the said landing stage were and are still fixed into the bed of the said river outside the line of the said river, and below low water mark of ordinary spring tides. The river at the *locus in quo* runs north and south, and the landing stage, which is 204ft. long and 30ft. 6in. wide, was and still is moored in the said river lying north and south.

3. 5 & 6 Vict. c. 110, 21 & 22 Vict. c. 63, 27 & 28 Vict. c. 117, 30 & 31 Vict. c. 132, and all other Acts relating to the port of Liverpool and to the Mersey Dock and Harbour Board, a copy of the plans deposited under 27 & 28 Vict. c. 117, a plan of the said pier, bridge, and landing stage, showing the low water mark of the river at ordinary spring tides, and also the true position of the old and now disused slip as distinguished from its false position as shown in the parliamentary plan, a general plan showing the whole of the bridge, landing stage, and approaches, and a plan of the mooring of the said landing stage, signed by Admiral Evans, acting conservator, are to be taken as part of the case.(a)

(a) The following are the material parts of the Acts referred to:

5 & 6 Vict. c. cx. By sect. 1 the conservancy of the Mersey, "as the same is vested in Her Majesty in right of Her Crown and of Her Duchy of Lancaster, or in the Lord High Admiral or commissioners for executing the office of Lord High Admiral, but not further or otherwise," is vested in three commissioners, who by sect. 2

4. [This paragraph, having set out in full the appointment of Admiral Evans as Acting Conservator of the river Mersey, under the powers and for the purposes of 5 & 6 Vict. c. cx., proceeded as follows:—"The plans for the construction of the said pier, bridge, and landing-stage, as also the plan showing the mode in which the landing-stage was to be moored, were all of them duly approved by the commissioners for the conservancy of the river Mersey, and by the Lord High Admiral or the commissioners for executing the office of Lord High Admiral of the United Kingdom, on the 1st Nov., 1865."]

5. No such notice as mentioned in 5 & 6 Vict. c. cx., s. 6, was sent to the clerk of the peace for the county of Chester and borough of Liverpool, and no Parliamentary plans were deposited with the clerk of the peace for the borough of Liverpool, nor was any notice given to him. Though Parliamentary plans were deposited with the clerk of the peace for the county of Chester, no notice was deposited therewith.

6. The only mooring anchor which is important in this case was laid out with an iron chain from the south end of the said landing-stage, in a southerly direction, in a part of the bed of the river Mersey, below low water mark of ordinary spring tides, and over which vessels navigating the said river used and had a right to sail, and where vessels navigating the said river used and had a right to bring up and anchor.

7. The said anchor was a mooring-anchor, with one fluke and an arm at the end of the anchor-shaft, running at right angles to the said fluke, and which, when the said fluke was properly imbedded in the bed of the said river, rested upon the bed of

may exercise all jurisdiction exercisable by the Admiralty, and by sect. 3 may appoint an acting conservator "for the purposes of the Act."

Wallasey Improvement Act 1864 (27 & 28 Vict. c. cxvii.), sect. 7: The local board . . . may make and maintain in the line . . . defined on deposited plans, and upon the lands delineated in the said plans . . . a pier or landing stage at New Brighton . . . together with all such jetties, explanders, landing places, toll gates, or bars, and other works and conveniences in connection therewith, as the local board shall from time to time think fit. . . Sect. 8: Previously to commencing the pier or landing stage the local board shall deposit at the Admiralty office plans . . . of the said landing stage and works connected therewith for the approval of the Lord High Admiral of the United Kingdom or the commissioners for executing the office of Lord High Admiral, such approval to be signified in writing under the hand of the Secretary of the Admiralty, and such pier or landing stage shall be constructed only in accordance with such approval. . . Sect. 15: The local board in the construction of the pier or landing stage may deviate laterally from the line . . . shown on the deposited plans to the extent of the limits of deviation, and may deviate from the lands shown on the deposited sections . . . as regards the pier and landing stage, not exceeding five feet.

Wallasey Improvement Act 1867 (30 & 31 Vict. c. cxviii.), sect. 24: In connection with their ferries, the local board from time to time may erect and provide such warehouses, sheds, and other buildings, works, and conveniences as they think necessary for the loading and unloading of animals and goods. . .

The state of things shown by the plans was as follows: The pier only was executed upon the lands delineated on the Parliamentary plans. The landing stage, bridge, and moorings were executed in conformity with the Admiralty plans, and did not extend beyond the limits fixed by them. The Admiralty plans extended beyond the limits of deviation prescribed by sect. 15 of the Act of 1864. Lastly, the buoy was marked upon the

the said river, and to the ring at the end of the shank was attached a long piece of light iron chain, having at the end of it a piece of timber, intended to act as a buoy, but which piece of timber, by reason of the strength of the current of the river, was carried below the surface of the water, and in no respect indicated the position of the mooring-anchor below, except at and about dead high and low water of the tides. The said piece of timber was wholly insufficient to indicate the position of the anchor, and the defendants were guilty of negligence in not placing a buoy of sufficient size and dimensions over the anchor to resist the current of the ebb and flow of the tides, so as properly and efficiently to indicate the position of the anchor below.

8. The defendants frequently, and as often as they deemed necessary, with a long rope, each end of which was attached to a boat, swept over the whole of their mooring anchors, including the mooring anchor in question, in order to ascertain whether the said anchors were in their proper places and undisturbed, and this they had done two or three days before the occurrence hereinafter mentioned.

9. The defendants were not guilty of any negligence in the mooring anchors they used, in the mode of laying them down, or in the means they adopted to ascertain from time to time whether they were undisturbed, and in doing what is complained of, acted in the *bona fide* belief that they were acting under the powers given them by their Act of 1864, and the Acts incorporated therewith.

10. The plaintiffs did not give the defendants any notice of action.

11. Early in the morning of the 15th June 1870, the plaintiffs' steam tug boat *Lioness* anchored 400 or 500 yards to the south and east of the said landing stage, and in about four hours afterwards, having lifted her anchor, the tide being an ebb tide and near low water, she struck against the arm of the said mooring-anchor, which went through the bottom of the said steam tug boat *Lioness*, and there and then sank her, and caused her considerable damage. She was afterwards raised, taken in dock, and repaired.

12. The said mooring anchor, by some means unaccounted for and unknown to the defendants, had been lifted from the bed of the said river, and the arm of the said anchor, instead of resting in a horizontal position upon the bed of the said river, had assumed an upright position, and penetrated the bottom of the steam tug boat.

13. The plaintiffs were guilty of no negligence whatsoever in navigating the said steam tug boat, in anchoring, or in raising the anchor, but in all respects navigated and managed the said steam tug boat in a lawful, careful, seamanlike, and proper manner.

14. There was no floating landing stage at the *locus in quo*, or at or in connection with the old slip, but the present floating landing stage is the only one which has ever been placed in that part of the river Mersey.

15. The question for the opinion of the court is whether the plaintiffs are entitled to recover from the defendants upon the facts as stated in this case. If the court should be of opinion in the affirmative, then the verdict is to stand, but the damages are to be reduced to the sum of 550*l*. If the court should be of a contrary opinion, then the verdict which has been entered for the plaintiffs is to be vacated,

C. P.]

JOLLIFFE AND ANOTHER V. WALLASEY LOCAL BOARD.

[C. P.]

and instead thereof a verdict or nonsuit is to be entered for the defendants.

Signed, W. H. HIGGINS.

Nov. 10.—*Aspinall Q.C. (Leofric Temple Q.C. with him) for the plaintiffs.*—First, the defendants had no right to construct the landing stage in the channel of a navigable river. They had no power either by statute or common law so to do; secondly, assuming that they had such a right, then they having anchors in the fairway of a navigable river, were bound to take precautions so as to prevent damage being caused by them to passing vessels, and the defendants have been expressly found guilty of negligence in this respect; thirdly, no notice of action was necessary.

I.—By 27 & 28 Vict. c. cxvii s. 7, the defendants are empowered to construct "a pier or landing stage at New Brighton," with adjuncts. But this floating landing stage is out of the limits prescribed by the plans and sections referred to in the statute. The plans show no floating stage at all, but only a fixed pier. And this stage is not within the provision as to "landing places," which does not relate to a construction as large as the principal work. [BARRT, J.—One cannot call it an "erection" any more than one would call another floating ship in the river by that name. This stage does not occupy any fixed place on the land, but moves with the tide.]

II.—Independently of statutes this is a nuisance:

Hart and Hart v. Mayor of Albany, 9 Wendell, 672, per Sutherland J., p. 684;
White v. Crisp, 16 Ex. 312.

[DENMAN, J., referring to *The Mayor of Colchester v. Brooke* (7 Q. B. 339). *The Free Fishers v. Gann* (11 H. of L. C. 192; 35 L. J. 29, C. P.; 12 L. T. Rep. N. S. 159) went further still, while confirming the court in the case of the *Mayor of Colchester v. Brooke* (sup.)] It did. So also

White v. Phillips, 15 C. B. N. S. 245;
Brown v. Mallett, 5 C. B. 599.

An anchor without a buoy to mark its position is more likely to be dragged up by the cables of vessels near than an anchor having a buoy. In the Black Book of the Admiralty (published by the Master of the Rolls), p. 111, it is said that "Two ships or more lying in a haven at scant of water, and one of the anchors lying too near another ship, the master of the said ship ought to say, 'Master, take up your anchor, it is too near us and may do us harm.' . . . And if they lie dry in a haven they ought to set marks and buoys at their anchors that may plainly be seen above the water." [BARRT, J.—That passage seems only to apply to two vessels having a foul berth from having anchored too close together.] If they "lie dry in a haven," they ought to buoy the anchor; where the ship is afloat she herself acts as a buoy by indicating the position of the anchor at which she rides. [BARRT, J.—Do you contend that the Black Book is an authority for saying that whenever a ship takes ground at anchor she is bound to buoy it? Yes, whenever the ship herself has ceased to be a buoy. In the *Laws of the Sea* (edition of 1705), p. 142, article 15 is of the same tenor with the passage from the Black Book, and the observation is that the Ordinances of Wisbury require masters to put out buoys to warn others where their anchors lie, on pain of making satisfaction for whatever damage may happen for want of them, for anchors hid

under water may do a great deal of mischief at ebb and low water. So in Hule, De Portibus Maria, p. 85, "The leaving of anchors in the ports without buoys or marks, whereby ships or vessels may strike against them and be spoiled," is mentioned as one of the "nuisances that are common to all men that have occasion to come, go, or stay at ports." An obligation lies on every one who has a thing which is reasonably liable to become dangerous to take reasonable precautions to protect persons from it.

III. As to notice of action. The right to such notice is contained in 11 & 12 Vict. c. 63, s. 139 (The Public Health Act). No doubt the defendants are a local board. In their plea they refer to 21 & 22 Vict. c. 63, s. 4; 27 & 28 Vict. c. cxvii, s. 2. But it does not follow that what is done under the local Act is done under the Public Health Act, so as to make the notice of action prescribed by the latter statute necessary. The Public Health Act (see 30 & 31 Vict. c. cxxxii, s. 5), is only in force in Wallasey township so far as relates to particular limits. And the anchor and chain at least were outside those limits. The act of negligence consists in not guarding the anchor; but that is not something done in execution of the Act. And no amount of *bond fide* belief that they were acting under the powers of an Act of Parliament will protect the defendants, if they were in fact doing something altogether beyond the powers of the Act. They had, as it were, executed the Act, and this omission to place a proper buoy was a distinct act of negligence five years afterwards. [DENMAN, J.—Their Act empowers them "to make and maintain" the works.] Assuming, however, that this nonfeasance comes within the provision as to notice under the words "thing done or intended to be done" as defined in *Newton v. Ellis* (5 E. & B. 115), there the defendant was actually doing the works authorised, and while doing them omitted to light them; whereas here the works had been long since done (see as to this the judgment of Coleridge, J., in *Newton v. Ellis*.) [BARRT, J.—Suppose a drain made twenty years ago falls in for want of repair, would notice of action be needed? No, for there would be mere nonfeasance.]

Sir John Karslake, Q.C. (R. G. Williams and Douglas Walker with him) for the defendants.—First, the defendants had a right, under the Act, to put the stage on the foreshore, and also the floating dummy, with a connecting bridge. [He reviewed the Acts in question.]

Secondly, they were entitled to notice of action. On the statement in the case the anchor in its proper position could not be a nuisance at all, and it is not found that the anchor itself is a nuisance. Assume the defendants had gone beyond their power, they would still be entitled to notice of action, the only good of which is when powers are exceeded *bond fide*. [The learned counsel read paragraphs 8 and 12 of the case as to the cause of accident.] The plaintiffs argue that it is an act of omission, and, therefore, that the Act does not apply. But the Act complained of is the negligently omitting to put a better appliance to show where the anchor was. A buoy has been placed and maintained, but the arbitrator says that the buoy is not so good as it might be, so that the defendants are guilty of negligence; and, although it may be described as

omission, yet it is within the observations of Lord Campbell, C.J., in *Newton v. Ellis* (sup.): "I am of opinion that the defendant was a person acting under the direction of the Local Board." Sect. 139 of the Public Health Act 1848 is to be read into the local Acts. The defendants will then be protected; although what is complained of was an act of omission:

Newton v. Ellis, 5 E. & B. 115;
Davis v. Curling, 8 Q. B. 286;
Wilson v. Mayor, &c., of Halifax, L. Rep. 3 Ex., 113;
 17 L. T. Rep. N. S. 660;
Seimes v. Judge, L. Rep. 6 Q. B. 724; 24 L. T. Rep. N. S. 934.

Nor was the putting down of the anchor in itself a nuisance. It is an open question whether the owners of a ferry might not put down such an anchor, independently of the Act. It is not necessarily a nuisance to do such a thing: (*E. v. Russell* 6 B. & C. 566) [KEATING, J.—Do you contend that the public have not a right to every portion of a navigable river?] According to *E. v. Russell*, this right may be infringed without creating a nuisance. Nor is the anchor here found to be a nuisance. [KEATING, J.—Would it be necessary to find such a thing? Is it not an undoubted nuisance to place any obstruction in any water which ships usually navigate?] The defendants had done nothing to the anchor to make it dangerous; they had swept a day or two before the accident, and found all right, and afterwards the anchor went wrong from some unknown cause, for which the defendants cannot be held responsible: (*White v. Phillips*) (sup.). [KEATING, J.—The fact of the precautions taken show their own opinion of their liability.] Everybody must have known of the anchor. The plaintiffs passed over the anchor, expecting to find it properly placed; it had been properly placed, but the accident arose from its having been displaced. [DENMAN, J.—But as an anchor is liable to be displaced, an anchor ought to be moored, and the not mooring it would seem to be negligence. KEATING, J.—You are inviting us to say that the boy would not have prevented the accident.]

Aspinall, in reply.—As a matter of fact, not only the anchor, but even the landing stage, extends beyond the prescribed limits within which the local board has authority to construct works. The meaning of limits of deviation is that the works may or may not extend within them, according to circumstances, but may not extend an inch beyond them. By 27 & 28 Vict. c. cxvii, s. 2, the board has authority only to construct works upon the lands delineated upon the said plans. It has been suggested that the landing stage was a "convenience," but whatever it is, it is one of the "works" under the Act, and these may be constructed only on the "lands" prescribed by the Act. [BART, J.—It may be that "works" includes pier, landing stage, and reservoir. DENMAN, J.—If you may take the strict grammatical view, your argument is strong; but looking to the way in which Acts of Parliament are drawn, is it not more probable that the words are added loosely on purpose to make a working scheme?] The whole river Mersey is delineated on the plans. Is it as arguable that the works may extend over the whole river, as that the narrow construction of the words should prevail? Every plan contains such delineations, for the purpose of illustration, but nothing more. The board might have had power conferred upon them to occupy the whole river, but they have not got it. 5 & 6 Vict. c. cx, from

which the Conservators of the Mersey derive their powers, was much pressed upon the arbitrator, and he probably thought that this enactment was incorporated in the Wallasey Improvement Acts, whereas it is not. [KARSLAKE observed that he did not rely upon this statute, and that it had not been noted in the margin.]

Our. adv. ult.

Nov. 13.—KEATING, J.—We have carefully considered this case, which, no doubt, is of considerable general importance. It is also of peculiar local importance, both to parties using this ferry and landing-stage, which is the subject of the action, and to all the inhabitants of Liverpool. The plaintiffs complain that while they were lawfully navigating this water where they might lawfully navigate it, while they were exercising an undoubted legal right, their vessel struck against the stock of an anchor, placed there by the defendants, which went through the bottom of the vessel, and caused them very considerable damage.

Now, it appears from the facts in the case, that the defendants are the Wallasey Local Board, and as such local board have, by virtue of several Acts of Parliament, been allowed to engage in the transport of passengers by a ferry upon the Mersey, and to procure boats and other articles and appliances for the purpose of conducting that ferry. Such was the state of things up to the Act of 1864 (27 & 28 Vict. c. cxvii). What led to the passing of that Act was that it was found that the landing place already erected was inconvenient, and therefore it was sought by the defendants to obtain powers from Parliament to construct a ferry and landing stage for the purpose of facilitating the embarkation and the landing of passengers at New Brighton. Accordingly the Act of 1864 was obtained, and under that Act a pier and landing stage was constructed. The pier was constructed as a solid structure, but from the pier there ran a bridge to a landing place, which was a structure floating upon the river, and that landing place was so made under the powers of the Act of 1864.

But the plaintiffs contend, first, that in the construction of the landing stage the defendants exceeded the powers of this Act; that they constructed the landing stage in a way not authorised, and partly in a place not authorised, and then, for the purpose of securing the landing stage, threw out a certain cable from the part not authorised, to which cable was attached the anchor which caused an undoubted injury to their vessel.

Upon the question whether these works were authorised, although the Act is by no means perfectly clear, I think it right to deliver the opinion which I have come to, which is, that the Act did authorise these works. The plans are before us, and there is no doubt as to the mode in which this landing stage was constructed. Mr. Aspinall has argued upon the plans at great length and with great ability, and has pointed to certain limits of deviation in the Parliamentary plans, and I think he is right in saying that the Legislature did not authorise expressly any structure beyond certain red lines. Now the northern part of the landing stage is within these lines, and Mr. Aspinall does not, as I understand, contend that that portion of the landing stage was not authorised by the Act. But the southern part is beyond them, and the difficulty arises with reference to that part of the landing

C. P.]

JOLLIFFE AND ANOTHER v. WALLASEY LOCAL BOARD.

[C. P.]

stage. Now the landing stage, as it has been constructed, and with respect to a part only of which a doubt has arisen, is made under sect. 7 of the Act of 1864. [The learned judge read the section.] Under this section, in my opinion, the local board is undoubtedly confined to "lands" within the limits of the plans, with reference to any permanent structure which they erected; for I think that the words "upon the lands delineated in the said plans" override all the subsequent words in the section. [The learned judge having observed that the conservators of the Mersey represented the Admiralty office, then read sect. 8 and proceeded.] It appears that plans were deposited in fact, and that the approval of the Admiralty was in fact obtained to plan B which, it is admitted, faithfully represents the state of things as it now exists—represents the landing stage as it was afterwards constructed, and the anchor as afterwards laid in the bed of the river. In every respect it represents the works which received the approval of the Admiralty under sect. 8. Now, what is the meaning of these two sections? I think the intention of the Legislature was, "We will deal with the taking by the local board of any lands which it may be necessary to schedule in the book of reference; but in the construction of the landing stage there may arise something that will interfere with the navigation of the river, and therefore we will require that the plans shall be approved by the Admiralty, and that the works shall be executed according to their approval. It was intended, that is, that everything connected with keeping the water way clear should be left, as it was left, in the best possible hands, in the hands of the Admiralty, or of the Conservators of the river. Their approval draws with it the sanction of the Legislature, as much as if the works which they have approved had been originally authorised by the Act itself. I am not quite clear upon the meaning of the Act of Parliament, but I think that the landing stage and the moorings have thus become legalised structures.

But even assuming this to be so, Mr. Aspinall contends, and I think properly, that the local board were bound to exercise their powers with due care; and he says that as the arbitrator has found that the laying down of insufficient buoys was an act of negligence, for which the defendants are to be held responsible, I think that they are so responsible, and would be so responsible even if the anchor had in the first instance been legally placed where it was. As a matter of fact, looking to the whole of this case, I come to the conclusion that the negligence complained of was negligence causing the accident in question. Taking the whole finding of the arbitrator together, my impression is that the negligence which the arbitrator meant to find here was a negligence contributing to the accident, and therefore I think that that would give the plaintiffs in this case a cause of action against the board.

There remains the question whether notice of action was requisite; and I must say, for myself individually, that I very much regret that the case should be decided on any such point; but the point is raised in the case, and we are bound to consider it. I am of opinion that the defendants were entitled to notice of action under the Public Health Act 1848, sect. 139. But the ques-

tion arises chiefly under subsequent Acts under which the landing stage was constructed. Does the Act of 1848 extend to them? That chiefly depends upon sect. 7 of the Act of 1864. But it is material to consider the objects of the Act of 1864, and look to the recital in the preamble of that Act. [The learned judge read the preamble.] The Legislature then, having recited these objects, goes on to enact that the Act shall be carried out "subject to the powers and provisions" of the Public Health Act 1848. I think that these words are quite large enough to take in sect. 139 of the Act of 1848, which is a "provision" of that Act, and a most important one. All the reasons for sect. 139 would be reasons for extending its operation; it would be just as much wanted in working the latter as in working the former Act. But Mr. Aspinall says that the local board are limited to the Wallasey districts. I think, however, that the intention of the Legislature was to make the construction of the works a workable scheme in all its parts, and it could not be worked in all its parts if it were confined to the limits that Mr. Aspinall would assign.

But there still remains the question—argued at great length—whether the acts complained of were acts that could be done within the meaning of the statutes stated to authorise them, so as to entitle the board to notice of action. Now the arbitrator has found a *bond fide* belief in the defendants in this respect. The finding is as express as it can possibly be, and if it were necessary, I would say that we are not bound by it. But I see no reason to differ in the slightest degree from the propriety of that finding. It is said, however, that the provisions as to notice of action do not apply to a nonfeasance. I think that the cases of *Wilson v. Mayor of Halifax* (L. Rep. 3 Ex. 113), *Davis v. Curling* (8 Q. B. 286), *Newton v. Ellis* (5 E. & B. 115; 24 L. J. 337, Q. B.), and *Selmes v. Judge* (L. Rep. 6 Q. B. 724) establish the exact contrary. But the defendants are not driven to a case of dry nonfeasance. The case for the plaintiffs is, not that the defendants have omitted to set up a buoy, but that they have set up a buoy which proved ineffectual. That is, they inefficiently did that which they were bound to do, and the arbitrator has found that they have done it negligently. This is an act which, if they did, and intended to do, as the arbitrator finds, in the belief that they were complying with their Act, comes within the statutory protection. Notice of action indeed is always required where something has been done which ought not to have been done; otherwise no notice would be necessary, for there would be no action. I cannot help repeating my regret that the point should have been taken, and the case decided upon it.

BRETT, J.—I apprehend that the plaintiffs shape their case in one of two ways. First, they say that the defendants had placed an unauthorised structure in a tidal river, that is to say, in a public highway, so as to become an obstruction and a nuisance to the highway, whereby, without any negligence on their own part, the plaintiffs suffered damage. And this no doubt is a valid cause of action. But the plaintiffs go further, and say that even if the obstruction were authorised by Act of Parliament, yet if they did place the obstruction in the river, the defendants were bound not to do something which they have done, or to do

something which they have not done, so that the plaintiffs are entitled to recover. The defendants reply that the obstruction was not unlawful, but authorised by Act of Parliament; and therefore, they say the first cause of action necessarily fails. If they are right of course it does. They also say that even though the arbitrator has found negligence he has not found that the injury complained of was caused by that negligence. Lastly, they say that even though they are liable either on the first ground or the second, they are entitled to a notice of action, which it is admitted was not given, and that therefore the plaintiffs cannot recover. Now if the court thinks that notice of action was required, it is not necessary to decide the first question at all; but that question is of the greatest importance to all the inhabitants of Liverpool, and I think the court ought to state what opinion it has formed upon it; either that it is clear, if it be clear, or, if otherwise, that it is a matter of doubt. It is so important that this ferry should be maintained, that if it is clear that this floating landing-stage is beyond the powers of the Wallasey Board, or even if it is doubtful whether it is beyond their power or not, they and the parties interested ought to know it, so that a remedy may be applied. It is for that reason, and that reason only, that I think we ought to give our opinion upon the first point.

And now with regard to that first point, it must depend entirely upon the construction of the statute, and unless the statute gives the defendants authority, I take it to be clear that they could not place in the river Mersey this permanent obstruction. Unless that is done by authority from Parliament, it seems clear to me that it is an unlawful obstruction of the rights of the public, and a nuisance. In order to construe this Act of Parliament, which is by no means a clearly worded one, I think it necessary to consider in the first place, what was the state of things before it, and what it was that was required. The defendants, for their own private benefit, and for the public benefit also, had become the purchasers, under a former Act, of this ferry. This is a peculiar ferry. It consists of carrying people from Liverpool to New Brighton, and *vice versa*, a distance of some four miles or more, I should think, in steamboats, and landing them at Liverpool, and landing them at New Brighton. I think the preamble of the Act shows that the conveniences for landing the public at New Brighton were out what they ought to have been on the passing of their Act of 1864, that they were not what was desirable, and the Act upon the face of it shows that what was required was a new ferry or landing stage. Now, in order to erect that landing stage it is obvious, if they were to erect or construct a landing stage, the defendants would require Parliamentary powers, because this landing stage, to be of any use as a ferry landing stage in that place, must be constructed on some land which would belong to private owners. It must necessarily in that place, as it seems to me, be constructed on a part of the foreshore, between high and low water-mark, which either belonged to the Crown or the lord of the manor. But to take the pier or landing stage to the edge of low water would not make a sufficient landing place in that river, where there is such a rise and fall of the tide. If the pier or landing stage, or any part of it necessary for the purpose of landing was taken into the river below low water mark, the question of taking other

people's land did not arise. If there was a permanent structure laid below low water mark, it would be upon land which, I apprehended, did not belong to anybody, at all events not in the sense in which the foreshore or other lands belonged, and if what was done as a part of the whole landing was not fixed into the bed of the river at all, obviously the question of taking land did not arise, and the only question upon the navigable part of the river would be, whether the rights of the public were to be, or not to be, obstructed. It is therefore with regard to that state of things that this Act of Parliament was passed.

The Act of Parliament contains first of all the enactment in words, and then by reference it brings in the deposited plans. The deposited plans might, one would think, show the mode in which the permanent structure was to be made; and with regard to any land which was to be taken for the purpose of the permanent structure, one would expect it to have lines of deviation in the ordinary way. But it does not at all follow that when they came to deal with the mere obstruction to navigation, they would be laying out the plans which were to be followed with regard to a matter floating on the river, or even with regard to the driving of piles into the bed of the river, in which land nobody was interested; and it would not signify to anybody whether that land was used, unless the using it became an obstruction to the navigation of the river. And therefore, I think, it may be well anticipated that these plans would deal with only what was to be done by way of permanent obstruction, and would not deal with that which was done by way of floating obstruction. All must depend upon the construction of the statute. By sects. 7 and 8, the local board "may make or maintain in the line or situation, and according to the levels defined on the deposited plans and sections, and upon the lands delineated in the said plans, and described in the books of reference thereto, the following works." Now, if all after that had related to permanent structures, or if it had been clearly shown that the word "works," and all that precedes it, was to be applicable to all that comes after it, I should have felt very great doubt whether the word "floating stage" could be added; but the word "works" seems to me to be capable of being applied to the more permanent works which would require the taking of other people's lands. There are more things than one required to be constructed as a permanent work. There is to be a pier or landing-stage, which, taking the plans into account, was clearly a construction upon other people's land, and there is to be a reservoir, which is a matter which we have not had to deal with in this case; but which, I think, was another permanent work to be done on other people's land, and must have been required to be shown in some deposited plans. The Act says that the board have power "to construct a pier or landing-stage at New Brighton, together with all such jetties, &c., as the board shall from time to time think fit." It seems to me that this contemplates not merely works which were then in the minds of the defendants, nor merely works which were shown upon the deposited plans, but works which were not then in their minds, which might from time to time become necessary as conveniences, not as parts of these works, but as conveniences in connection with them.

C. P.]

JOLLIFFE AND ANOTHER v. WALLASEY LOCAL BOARD.

[C. P.]

And when you think what it was that was required, this view seems to be strengthened. Here, according to the deposited plans, is this fixed pier, which is in fact itself a jetty, which according to the deposited plans is carried out to low water mark and a little beyond, and I am inclined to think that at one time the defendants did not contemplate making the adjuncts to it which they afterwards did. But this was to be taken out into the Mersey. Now we know what sort of a river that is; the bed alters, not only from year to year, but from month to month, and from week to week. Everybody must know that even though steamers might come to the foot of that fixed pier or landing stage at the time it was constructed, although they might come there at any height of the water, still in such a river as that it must be subject to the possibility, nay, to the probability, that at any time that might be silted up so that the boats could not come to the pier; and if they could not come to the pier at low water, the inconvenience to a large body of people became at once monstrous; and that it had been. As everybody who knows Liverpool knows, up to the time of the passing of this Act of Parliament, although there used to be formerly a landing pier, which ran out at low water, yet at spring tides and different conditions of the river, it could not reach far enough, and people were obliged to get out of the steamboats into flat bottomed boats, and so were carried, with great danger, to the landing place. Therefore, it seems to me what the Legislature contemplated was further conveniences—no part of the original plans—which were to be dealt with from time to time.

Still, the defendants were not to have absolute power to deal with the Mersey according to their views of the convenience of the public with reference to this landing stage; the rest of the public and those who frequented the Mersey were to be considered also; and, accordingly, the powers of sect. 7 were given to them subject to the control mentioned in sect. 8. At the first blush sect. 8 would seem to be somewhat against what I have said, because it runs: "Previously to commencing the pier or landing stage," the matter is to be laid before the High Admiral, or the person acting for him at Liverpool; but I think that must be read subject to what I have said, and that the meaning is "previously to commencing a pier or landing stage at the beginning, and previously to commencing the works which are to be done from time to time as the necessity arises, previously to doing any work which it may be necessary to do from time to time, the plan of that work is to be deposited at the Admiralty office, and the Admiralty is to pass its judgment upon it." That would give the necessary protection to all the public. That being the true meaning, it would come to this: whether it does not give the defendants power to do any work, with the consent of the Board of Admiralty, which it does not seem to me to give anywhere. It must be to do work which may fairly be considered as a convenience in connection with the pier or landing stage at New Brighton.

Now, what was it that happened? According to the original plan, no doubt there was to be a permanent pier or landing stage going down somewhat below low water. Before that was actually constructed, it seems to me that

it became obvious to the defendants that that was not the best plan, and thereupon they abandoned the permanent pier; they did not take it down to low water mark, they made a bridge which might be thrown over from that pier to a floating landing stage, and, having constructed the floating landing stage, they moored it below low water mark, and threw the bridge from that permanent pier on to the floating landing stage. It has been remarked, as Mr. Justice Keating has pointed out, that the floating landing stage is not to the north or to the east to go beyond the line of the permanent pier, as at first projected; and he has in part grounded his judgment upon that fact. I, of course, in what I am now about to say, seeing that he has partly grounded his judgment upon that fact, speak with the greatest possible hesitation, but, as I said, I feel bound to give my opinion—I feel bound to say that in my judgment, even if it had gone beyond these lines, as long as it could fairly be said to be a convenience attached to this landing place, and has the assent or the consent of the Admiralty, and also of the conservators, it would be within the Act. I, therefore, have come to the same conclusion, not absolutely for the same reason, as my brother Keating, that the floating landing stage, and the mooring of it, being undoubtedly capable of being considered conveniences in connection with the pier or landing stage, and having been approved by Admiral Evans, who was acting for the Admiralty and for the conservators, it being found that it was approved by the conservators, and their agents, and by the Admiralty—the floating landing stage and its mooring, although obstructions to the navigation of the river, were constructions authorised by this Act of Parliament. It seems, therefore, to be clear to me that the plaintiffs cannot succeed upon the first cause of action.

But then comes the question whether, assuming this landing stage and its moorings to be within the authority of the Act, there is nevertheless a cause of action which the plaintiffs can maintain. I think it is true that they were bound to exercise due care in the way in which they did that which they were authorised to do. Whatever my own private opinion may be as to the particular finding which has been found by a most able arbitrator, and by an arbitrator most able in this matter of seamanship, if it may be so called, I should not think of sitting on any private view of my own as against the real spirit of his finding, but he has found there was negligence in the defendants in not placing a different kind of buoy to notify the position of one of the anchors. He has found—I take it to be, the real meaning of his finding, because otherwise his finding would have been obviously futile—that there was no negligence of any kind in the plaintiffs. He has therefore found that the defendants had either done something negligently which they were bound to do with reasonable care, or that they had negligently omitted to do something which they ought to have done, and that this has been the cause of injury to the plaintiffs. That seems to me to be, under the ordinary rules, a cause of action under which the plaintiffs would be entitled to recover.

Then comes the question, whether the plaintiffs are prevented from recovering by not having given notice of action. That again depends

C. P.]

JOLLIFFE AND ANOTHER v. WALLASEY LOCAL BOARD.

[C. P.]

on the construction of the Acts of Parliament, and wherever there is to be a construction of Acts it is impossible to say that the matter can be without difficulty. The floating landing stage is either placed as it is without any authority at all, or it is placed as it is under the authority of the Act of 1864. It is found as a fact that the floating stage and anchor were both established by the defendants under a *bond fide* belief that they were acting under the powers of that Act. The first question then is, whether if the thing be done under such *bond fide* belief, any notice of action is to be given to the defendants by this Act. That is said first to depend upon whether sect. 139 of the Public Health Act 1848 is not incorporated in it, and whether it can be applied to anything which is *bond fide* supposed to be done under the Act of 1864, or indeed to anything which is actually done under that Act. This depends upon the construction of sect. 2 of the Act of 1864. [The learned Judge read the section.] I understood Mr. Aspinall to say that no powers could be given to the local board under the Public Health Act except such powers as they would have to execute within the Wallasey district. It must be obvious, I think, that in constructing the pier, in dealing with the landing stage, they are executing this Act, because it is only by executing this Act that they can do these things. It is no doubt an anomalous state of things that the Wallasey Board should be given this ferry at all; but it is done. It was done by a former Act of Parliament, and their powers are increased under this; and when they are constructing and maintaining the landing stage at New Brighton, and when they are carrying out everything which this Act authorises, it seems to me impossible to say that they are not "executing" the Act. The real question seems to be, is sect. 139 a "provision" of the Public Health Act 1848? Undoubtedly it is, and a provision of the most important kind; and therefore it is within the terms of this section that what they do in order to execute this Act is to be subject to that provision. But the cases go further, and say that it is not only what is done under the Act but what is done under a *bond fide* belief that the Act is being executed, that is to be protected; and the protection is hardly wanted unless they have gone beyond the Act. But then Mr. Aspinall takes two objections. He says, even supposing that that is a provision which is applicable, yet it is not applicable to this case, because here it is a mere nuisance. As I understand the former decisions, they come to this, that whenever you sue in tort for either a breach of duty or for an omission to perform a duty properly, either case is within the meaning of a clause requiring notice of action. In *Newton v. Ellis* (*ubi. sup.*) Coleridge, J. says, "This is not a case of not doing. The defendant does something, omitting to secure protection to the public." And Erle, J. says, "The cause of action is making the hole, blended with the not putting up a light." It is said by Kelly, C.B., in *Wilson v. Mayor of Halifax* (L. Rep. 3 Ex. 119; 17 L. T. Rep. N. S. 600), "It is now settled by authority that an omission to do something that ought to be done in order to the complete performance of a duty imposed on a public body under an Act of Parliament, or the continuing to leave any such duty unperformed, amounts to an act done or intended to be done within the meaning" of the clauses

requiring notice of action. I cannot conceive words which would more completely control the present case. See also the remarks of Byles, J. in *Davis v. Curling* (*ubi. sup.*) Then it is said that as the omission is to mark an anchor which was placed entirely beyond their authority under the Act, the negligence of omitting to give notice with regard to something which they had no right to do, does not come within the statute. That is, as I understand it, to say that a negligence upon a negligence deprives a party of his right to notice of action. But all the conduct of the defendants, whatever it is which gives rise to the cause of action, was conduct which they *bond fide* believed to be authorised by the Act. I think that the plaintiffs do not maintain their first cause of action; that they might have maintained their second cause of action if they had given notice; but inasmuch as they have not given notice, they cannot maintain the second cause of action any more than they can the first. I further think that even though they could have maintained the first cause of action as well as the second, yet that for want of notice they could not maintain either.

DENMAN, J.—The cause of action here is not buoying the anchor, and it has been contended for the plaintiffs that the defendants had no authority to put down the anchor at all. To this the defendants have replied, even if they had no such authority, they are still not to be held liable, on the ground that what they did was for the benefit of the public, and for this they cite *R. v. Russell* (6 B. & C. 566). Now I had long understood that *R. v. Russell* was practically overruled, and I am of opinion that *R. v. Ward* (4 Ad. & E. 384) does practically overrule it. Since the date of *R. v. Ward*, no case following *R. v. Russell* can be found. Without statutory authority, therefore, there was no right to put an anchor where this anchor was put. But the plaintiffs say that, even if there were statutory authority, it has been negligently exercised, and the arbitrator has found negligence in fact, so that the substantial question in the case is whether or not notice of action was requisite, that is, whether section 139 of the Public Health Act 1848, can be taken to apply. I think that notice of action was required; and the cases have been so fully gone into both during the argument, and by my learned brethren, that I think it is quite unnecessary to add anything to that part of the case, except to say that I entirely concur that here a notice of action was required. But from the importance of the case, I think it right to say also, that although sections 7 and 8 of the Act of 1864, are not very clear, they are, in my judgment, quite clear enough to show that the act done in placing the anchor at the bottom of the river was done under the authority of those statutes. The words of sect. 7 are not very artificial, because they raise a considerable doubt as to whether the first user of the word "works" might not be held to overrule the subsequent user of the same word; and if so, whether the whole work must not be taken to have been done on the lands delineated on the plans. But a sufficient answer, I think, has been given to that by my brother Brett when he severs the word "works" from the word "conveniences;" and I think, taking the whole of the Acts and clauses together, that "conveniences in connection therewith" are not necessarily conveniences upon

AMERICAN REFS.]

THE BARK IRMA.

[AMERICAN REFS.]

any lands delineated on the plans in the same strict sense in which permanent works must be so held to be confined. This view is strengthened by looking at the whole of the statutes together, and by seeing what powers the Board took under the Act of 1858, as well as that of 1864. It must be remembered that this is a ferry to be worked by steamers running between Liverpool and New Brighton, and some stress must be laid on sect. 37 of the Act of 1858 which, after sect. 36 had given the power for the first time to leave or purchase the ferry, confers upon the board the power to hire and maintain steam-vessels, &c., so that they were a board with the power given them, and the duty imposed upon them of working the ferry to and fro. Then from sect. 7 of the Act of 1864 an intention is gathered from the plans deposited of having certain permanent works, a portion of them between high and low water mark, and a portion below low water mark; whereupon sect. 8 comes, and not only gives the Admiralty a veto upon the pier or landing stage or the works connected therewith, but orders that the local board shall deposit plans at the Admiralty office "of the works connected therewith." Those works were to be works to enable the board to work the ferry to and fro, and it does in fact appear from the case that the Admiralty had before them plans not only of a solid structure upon certain delineated lands, or on the part expressly delineated below low water mark, but that they had before them this very scheme, and that they sanctioned it as a useful mode of carrying out the operations of the Act; and that being so, and the question being one on which we may draw inferences of fact, I come to the conclusion that this was, in the strictest sense of the word, a convenience in connection with the landing stage at New Brighton; that it was a work which was convenient for the carrying on of the very duty which the board had to perform, and consequently, that the putting down of the anchor, which I take to have been an essential part of the floating stage itself, was an act which the statute had authorized. Then, having committed some act of negligence in the course of buoying that particular anchor, I think that they are entitled to notice of action, and that therefore on these two grounds our judgment must be for the defendants.

Judgment for defendants.

Attorneys for plaintiffs: *Chester, Urquhart, Bushby, and Mayhew, for Wright, Stockley, and Beckett, Liverpool.*

AMERICAN REPORTS.

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK.

Reported by R. D. BENEDICT, Proctor and Advocate.

THE BARK IRMA.

Bottomry—Priority—Non-liability of master.

In the absence of any special agreement to that effect, the master of a ship does not incur any personal liability to repay to a bottomry lender the sum borrowed by him on bottomry, where the bottomry bond becomes due by the safe arrival of the ship, and the ship and freight prove insufficient to discharge it in full.

The implied contract of the master, arising under

the general rule of the maritime law, out of an advance of money for the ship, is extinguished when a lawful contract of bottomry has been made and the debt has been put at risk.

The contract of bottomry, which is not only a contract of great sanctity, but also of great peculiarity, is not a mere agreement for security.

The reasons for the presumption of liability on the part of a master to seamen and to material-men, fail in case of bottomry.

The master of a ship, although an agent of the owner, is also, in a certain sense, a public officer.

Presuming a master to have a lien upon his ship for wages and disbursements, he is entitled to payment out of the proceeds of the ship in priority to a bottomry bondholder, provided that he the master has not personally bound himself by the bond.

This was an application to the District Court, for an order to determine the priority of payment of the respective demands against the proceeds of the bark *Irma*, which were insufficient to satisfy all claims. Several libels had been filed against the vessel, but the only libels which are at present material are those filed by Timothy Darling and Co., holders of a bottomry bond upon the said ship, to recover the amount of the bond, and by Cummings, the master, for his wages and disbursements, and by the mate and pilot of the said vessel to recover their wages.

The bond had been signed by the master abroad, but although binding the ship, it contained no covenant making him, the master, personally liable. The master by his libel claims a lien for his wages and disbursements. The libels were not put in issue, and to save expense this application was made to the court to settle the priorities before proceeding with the suits. The facts and arguments are sufficiently noticed in the opinion of the court.

BENEDICT, J.—These are two causes which have been brought before me on an application for an order determining the priority of the respective demands in the distribution of the proceeds of the vessel, which are insufficient to pay all the claims against her. The only question which calls for any particular examination, has arisen between the libellants, Timothy Darling and Co., whose libel is filed to recover the amount of a bottomry bond executed by Cummings, as master of the vessel, and Cummings himself, who has filed his libel to recover a balance due to him for his own wages, and for advances of wages made by him to the crew. If the demand of Cummings be paid out of the proceeds of the vessel, in preference to the bottomry bond, the remainder will be insufficient to pay the bottomry bond in full, and therefore the bottomry lenders contest the right of the master of the vessel to priority over the bottomry bond.

The position taken is, that the master is personally liable to the bottomry lender for the sum borrowed, and, supposing that he has a lien for his demand, he cannot be paid in preference to the bottomry bond, when such payment will create a deficiency in the bond, which he is liable to make good. The question raised is one which has seldom arisen, owing doubtless to the fact that in very many, if not in most, cases of bottomry, the master binds himself personally for the debt, by means of a special covenant inserted in the bond, and is not, therefore, in a position to dispute his liability for any deficiency that may

[AMERICAN BETS.]

THE BARK INMA.

[AMERICAN BETS.]

arise from the distribution of the proceeds of the ship. But, in this instance, the bottomry bond contains no such covenant, and the master denies any liability whatever to the bottomry lenders for any part of the bottomry loan. I am therefore called on to determine the question of law, whether, in the absence of any special agreement to that effect, the master of a ship incurs any personal liability to repay to the bottomry lender the amount borrowed on bottomry, when the bond becomes due by the safe arrival of the ship, and the proceeds of the ship and freight prove insufficient to discharge it in full.

In considering this question, I am not required to speak of the liability of the ship master for neglect or malfeasance, nor of a case where the bottomry bond proves invalid, or when no risk has ever attached, or where the stipulated voyage is not performed, or where the ship and freight is not abandoned to the bondholder, nor yet of a case where the bond is executed by an owner of the ship. What I have occasion to say is, therefore, intended to refer to the case here presented, where it is sought to hold the master personally liable for the loan, where the bond is a valid bottomry bond executed by the master, as such, in a foreign port, for a voyage which has been duly performed, and where the ship and freight are applied, so far as they will go, to the payment of the bond, and where the master has made no special agreement, to be responsible for the loan. Upon this question I remark—first, that the bottomry lender, in order to establish a personal liability on the part of the master, cannot resort to the general liability, which the master of a ship is presumed to incur for debts contracted and advances made in behalf of the ship. The implied contract of the master, arising under the general rule of the maritime law, out of an advance of money for the ship, is extinguished when a lawful contract of bottomry is made and the debt has been put at risk. All other obligations merge in the new contract, which places the lender in a new and different relation to the vessel, and it is to the rights and obligations arising out of the contract of bottomry alone that the lender must thereafter look.

The contract of bottomry, which is not only a contract of great sanctity, but also of great peculiarity, is not a mere agreement for security. "It is neither a sale, nor a partnership, nor a loan properly speaking, nor insurance, nor a compound of different constructions—*sudique collatis membris*; but it is a contract having a specific name—*un contrat noumme*—and a character peculiar to itself." (Esmerigon, *Contrat à la grosse*, ch. 1, s. 2.) When once the bottomry risk has attached, the creditor becomes a bottomry lender, and nothing else. "He who lends money on bottomry, makes a contract, which is to be followed out in all its remedies as such:" (Curtis, J., 1 Cr. C. C. 351; *The brig Ann C. Pratt*, *Brady v. Bates*, 9 Met. 250; *The Ann C. Pratt*, 18 How.) The holders of a bottomry bond are therefore not holders of a mortgage, and the rules applied in cases of mortgage have little or no application here.

But although the only contract, upon which these bottomry lenders can rely, is the contract of bottomry, it does not follow that they have not by that contract the personal liability of the master upon the safe arrival of the ship, notwithstanding

the circumstance that the instrument given to bind the ship does not expressly provide for any personal liability of the master. A personal liability on the part of the master in case of the safe arrival of the ship may form part of a valid contract of bottomry, as has often been held where that liability had been stipulated for in the bottomry bond. The question here is whether such a liability does not, by implication of law, constitute an element in every such contract, as, for instance, it does in the contract with the seamen. These bondholders maintain that such a personal liability is implied by the maritime law, and that it can be resorted to, at least to make good any deficiency after exhausting their remedies against the vessel and freight. In support of this position, the words of Lord Tenterden are cited, when he says the remedy of the lender on bottomry is "against the master or the ship" (Abbott on Shipping, 5th ed., p. 156), and also the statement in Kent's Commentaries (3 Kent, p. 355), that "for the repayment of a sum borrowed on bottomry the person of the borrower is bound as well as the property charged." These two citations from the high authorities named will be found on examination not to be to the same point. The borrower alluded to by Chancellor Kent is not the master, but the owner of the ship, as the context shows. On page 350 the master will be found spoken of as distinguished from the "borrower." So understood, the citation has no direct bearing on the question under discussion; and as to the remark of Lord Tenterden, it must be understood as referring to such a bond as he describes in a subsequent paragraph, and sets out at length in his appendix, which contains a special covenant on the part of the master: (Abbott on Shipping, p. 160.) Reference is also made to the general principle of the maritime law, according to which the master of a ship is presumed to bind himself personally in every contract made in behalf of the ship, as showing the existence of such a liability in the contract of bottomry. But, if such were the rule in all other cases, it would afford little reason for supposing the liability to exist in a contract of bottomry, for "bottomry is a contract resembling nothing, and being consistent with nothing but itself" (Curtis, J., 1 Cr. C. C., p. 350), and I am of opinion that the reasons on which the general rule rests will be found to be, for the most part, wanting in the case of bottomry. Take, for instance, the reasons which led to the personal liability of the master to the crew. The master is personally liable to the crew, for sailors, because of well-known traits, must have every security possible, to prevent them from losing their wages and becoming objects of charity. They naturally look for their wages in the first instance to the master, who commands them during the voyage, who provides them their food, who cures them when sick, and punishes them when they disobey, and from long usage he has thus become personally bound for their wages. Another instance is the personal liability of the master for the bills of material men and for advances of money. Obligations of this class derive their distinctive character from the fact that they are generally made in foreign ports, where they are to be discharged, and where the owners are not, and it is therefore permitted to look to the master who is present, leaving him to reimburse himself from the owners when he returns home. Considerations of this character, coupled perhaps

AMERICAN REFS.]

THE BARK IRMA.

[AMERICAN REFS.]

with the fact that in the earlier history of navigation as well as afterwards on the revival of commerce in the middle ages, the master almost invariably was an owner unless he was a slave, led to the establishment of the presumption of personal liability on the part of the master in contracts made for the ship as a "usage and custom of the seas." But it will be difficult to find in the maritime law any trace of such presumption in cases of bottomry; and the considerations which press in favour of it, on other occasions have in such contracts little force. The lender on bottomry is not ignorant and poor like the sailor. He becomes beneficially interested in the voyage. His loan is never to be repaid in the foreign port where it is effected, but on the contrary, is payable where the owners are supposed to be or to have funds, and the ship is specifically bound. No necessity, therefore, exists for the personal responsibility of the master.

Furthermore great injustice must follow if such a personal responsibility on the part of the master be attached by the law to the contract of bottomry, because the master is without remedy over against the owners of the ship for any sum thus extracted from him, notwithstanding the fact that the owners receive the benefit of the loan. This results from the character of the transaction, and the nature of the liability on the part of the shipowner which grows out of it. The owner of a ship is indeed said to be liable for a bottomry bond, as well as the ship, if the ship arrive safe, but this is not a liability arising from a contract of the owner made by the hand of his agent, the master, with the bottomry lender. The master of a ship, although an agent of the owner, is also in a certain sense a public officer. "The master of a ship is not an ordinary agent, but one of a special kind—*qui generis*," (Sir R. Phillimore, *The Thetis*, 3 Mar. Law Cas. O. S. 357; 22 L. T. Rep. 77.) "He is a known and public officer." (See Laws, Art. 2, Of the Masters of Ships.) "The rights and duties springing out of the position of ship master are of a public character." (Bedarride, *Com. de Code*, Liv. 2, Tome 2, Art. 359.) "The master of a ship has a threefold responsibility, to the owners, to the freighters, and to society—the State. (Boulay Paty, vol. 1, 383.) "Though he (the master) receive a salary, yet he is a known and public officer." (Molloy, Book 2, Ch. 11, s. 2.) The contract of bottomry, when made by the master, is made by him to a certain extent in an official capacity. He does not, in a transaction of that character, act simply as agent of the owners, but as master of the ship. It is not within the scope of the shipmaster's authority, as the agent of the owners, to bind them personally as his principals by a bottomry contract. The owners are liable when the vessel comes to them safe, but not because of the acts of their agent in borrowing money for them. There is an original liability to the holder of the bottomry bond, arising out of their possession of the property bound for the loan, namely, the ship and freight. This peculiarity in the liability of the shipowner, growing out of bottomry, is pointed out by the Supreme Court of the United States in the case of the *Virgin*, where the court says: "In England and America the established doctrine is that the owners are not personally bound, except to the extent of the fund pledged which has come into their hands. To this extent indeed they may correctly be said to be

personally bound, for they cannot snubtract the fund and refuse to apply it to discharge the debt. But in this case the proceeding against them is rather in the character of possessors of the thing pledged than strictly as owners." (*The Virgin*, 5 Pet. 538, 554.) The later authorities in England and America are to the same effect: (*The Brig Ann C. Pratt*, Curtis J. 1 Curtis's C. C. p. 350; *Stainbank v. Fenning*, 11 C. B. 51; 15 Jur. 1082.) Not only is such the law in England and America, but the same law exists upon the Continent. By the German Mercantile Code, which, in respect to such a subject, may be presumed to state the rule of the maritime law, as understood throughout a large part of Europe, it is declared (Art. 680, 7th part), that the bottomry creditor can enforce his claims only to the extent of the bottomried objects after the arrival of the vessel: (see Maritime Legislation by Wendt, Appendix, p. 254.) The maritime law as administered in France appears to be the same.

If then the owners of a ship are not rendered directly liable, by a contract of bottomry made by the master, they cannot be rendered indirectly liable through a liability on their part to the master for any sum exacted of him by reason of the contract. And if the master be without remedy over against the owner of the ship, it is not to be supposed that he can be held personally liable, and thus compelled to bear without recourse the burden, not only of a loan effected solely for the benefit of the shipowner, but also of the maritime interest, and that, too, when he is compelled by the responsibility of his office to effect the loan, whether willing or not to assume such a burden. The unjust effect of such a rule warrants the supposition that it does not exist in the maritime law. Aside from its injustice, there is reason against it, founded in public policy, for to make the master by operation of law liable for the payment of the bottomry bond, or even for the deficiency after the ship and freight are exhausted, is to offer him an inducement to lose the ship, inasmuch as her safe arrival will cast upon him a responsibility which he escapes if she does not arrive. A rule which would in any case place the interest of the mariner in opposition to the welfare of the ship would be contrary to the whole spirit of the maritime law.

These considerations, which are of a nature entitling them to much weight in determining a question of maritime law, appear to me sufficient to warrant a rejection of the doctrine contended for by this bottomry lender, and I find no adjudged case which impels me to a different conclusion. No case has been cited by the advocates where the doctrine in question has been sustained, and I find a decision to the contrary in the English Admiralty, where the same question arose, and in the same way, and where the determination was that the master of the ship had not ceded his prior right against the ship by taking up money on bottomry. Dr. Lushington says: "Here the master has not bound himself personally to pay the bond; his covenant in the bond is that he is master, and therefore he has authority to charge the barque, cargo, and freight, and that the barque, cargo, and freight shall at all times after the voyage be liable to the payment of the money. He has not, therefore, incurred that personal liability which a master giving a bottomry bond generally incurs in express terms." (*The Salacia*, 1 Mar. Law. Cas. O. S. 261; 1 Leach. 548.) Many

remarks will be found scattered through the other cases in the English Admiralty which I have above cited looking in the same direction: (See also *The Edward Oliver*, 2 Mar. Law Cas. O. S. p. 507; *The Jonathan Goodhue*, Swabey, 524.) It may, therefore, be said that the authorities in the English Admiralty are adverse to the position here taken by the bondholder. The continental writers are directly opposed to such a position. Thus Emerigon (*Traité de Contrats à la grosse*, ch. 7, sect. 12, cl. 4) says, "If in the bottomry bond the master has bound himself and his goods (of which I have seen a thousand examples), he is held personally liable, in spite of the fact that he acted in the known capacity of agent, because he has rendered himself bound for the bond, and the lenders have trusted his credit. If then the vessel arrives safely, they may compel the master himself to pay the principal and the maritime interest which he has in his own name promised to pay. But, if he has contracted only in the capacity of captain, the lenders in case of the safe arrival of the ship, will be limited to an action *in rem* against the vessel and freight, without recourse to the owners who abandon the property, or to the master who, having contracted only in a qualified capacity, is not responsible for the unfortunate result of the voyage." Emerigon cites the Ordinance in his support. Later continental authority is to the same effect. Bedarride declares that the master cannot be held personally liable for the payment of a bottomry bond which he has signed in his capacity as master for the necessities of the ship (*Com. de Code*, Liv. 2, tit. 9, s. 931), and again (sect. 935) he says, "On principle, therefore, the master borrowing money on bottomry contracts no personal obligation, neither on the part of the owner nor with the lender, but with this exception, that it is always lawful for the captain to bind himself directly and personally." The German Mercantile Code, already referred to, restricts the personal liability of the master on a bottomry contract to those cases where the master has arbitrarily changed the voyage, or arbitrarily deviated, or has improperly assumed new sea risks, and then gives him the opportunity to relieve himself, by proving that the non-payment of the bond has not been caused through the change of voyage, or through the deviation, or through the new sea risks: (Art. 694, Part 7: see Maritime Legislation by Wendt, Appendix, p. 257.) And the 18th Admiralty Rule of the Supreme Court of the United States clearly recognises a similar rule of law (a). Indeed, the 18th Admiralty rule goes far to compel the determination of this court in this case adversely to the bottomry lenders upon the question under consideration, although this libel is not in conflict with the rule.

My conclusion, therefore, is that in the present case no personal liability for any part of the loan has attached to the ship master; and the bottomry lender and the master must, therefore, in respect to

order of payment, upon this motion, be declared to be subject to the general rule by which wages are entitled to be paid in preference to a bottomry bond. But this is upon the assumption that the master has a lien upon the ship as averred in his libel. The present being a motion founded upon the respective libels alone, for the simple purpose of determining at this period of the controversy the question of priority, in order to save expense, the right to a lien is not put at issue. If it is intended to question that right, an issue must be formed by answer or exception, upon which a decree may be rendered.

Upon this motion the order will be that in the distribution of the proceeds in the registry, any decrees that may be entered upon the libels before me will be satisfied out of the proceeds in the following order:—First, the wages decreed the mate; next, the pilotage decreed to Eugene Gallagher; next, the sum decreed Cummings, the master; next, the sum decreed Timothy Darling upon the bottomry bond. The priority of the other demands arising thereunder need not be determined, as the demands above mentioned will absorb the whole fund.

COURT OF ADMIRALTY.

Reported by J. F. ASHALL, Esq., Barrister-at-Law.

Nov. 13 and 14, 1873.

THE PROSPERO PALASSO.

Damage to cargo—Onus of proof—Bill of lading "shipped in good order and condition"—"Quantity and quality unknown"—Effect of.

In a suit against shipowners for damage to cargo the onus is upon the plaintiff to show in the first instance that the goods were shipped in good order and condition before they can call upon the shipowners to show excuse for the injury done to the goods.

A bill of lading stating that goods were shipped in good order and condition, but also containing an endorsement by the master, "quantity and quality unknown," does not admit, as against the shipowners, that the goods were shipped in good order and condition.

Evidence of the condition of goods on delivery tending to show that the damage sustained could not be accounted for by any damage existing at the time of shipment, and that such damage, had it existed, must have been noticed by the master or officer in charge of the ship at the time of shipment, will not, where goods are shipped under a bill of lading endorsed "quantity and quality unknown," satisfy the onus cast upon plaintiffs seeking to recover against shipowners for damage to the goods. Positive evidence of the condition of the goods when shipped must be given.

This was a case of damage to cargo instituted under the 6th section of the Admiralty Court Act 1861 on behalf of Messrs. G. König and Co., merchants, London, against the vessel *Prosperino Palasso*, her tackle, apparel, and furniture, and against Guiseppe Lavarello of Genoa, in the kingdom of Italy, the owner of the vessel intervening. The *Prosperino Palasso* was an Italian vessel, of which no owner or part owner was at the time of the institution of the cause domiciled in England or Wales. In the months of January and Feb. 1873 Messrs. E. B. Liddell and Co., of Alexandria

(a) The 18th rule of practice for the District Court in Admiralty cases is as follows:—In all suits on bottomry bonds, properly so called, the suit shall be *in rem* only against the property hypothecated, or the proceeds of the property in whosever hands the same may be found, unless the master has without authority given the bottomry bond, or by his fraud or misconduct has avoided the same, or has subordinated the property, or unless the owner has, by his own misconduct or wrong, lost or subordinated the property; in which latter cases the suit may be *in personam* against the wrongdoer.—Ed.

[ADM.]

THE PROSPERINO PALASSO.

[ADM.]

shipped on board the said vessel then lying at Port Said, in Egypt, 5630 ardebs of cotton seed (about 704 tons), in pursuance of a charter-party entered into between themselves and the master of the ship. The persons constituting the firm of Messrs. E. B. Liddell and Co. were identical with the members of the plaintiffs' firm. The charter-party was in the usual form, and contained this stipulation: "The merchants engage to provide mats and the ship the necessary wood for dunnage." The master received and accepted the cotton seed so loaded to be carried on board the said vessel on the terms of three bills of lading, signed by the master, and delivered by him to Messrs. E. B. Liddell and Co. The wording of these bills of lading was as follows:

Shipped in good order and well conditioned by E. B. Liddell and Co., Alexandria (Egypt), in and upon the good ship called the *Prosperino Palasso*, whereof is master for this present voyage Agostino Della Casa, and now riding at anchor in the port of Port Said (Egypt), and bound for Hull, 5630 ardebs cotton seed, being marked and numbered as in the margin, and are to be delivered in the like good order and well conditioned at the aforesaid port of Hull (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the sea, rivers, and navigation of whatever nature and kind soever, save risk of boats so far as ships are liable thereto excepted), unto order or to assigns paying freight for the said goods at the rate of (19s.), say nineteen shillings sterling in full per ton of 20cwt. delivered with £10 gratuity. Other conditions as per charter-party dated London, 25th Oct. 1872, with prime and average accustomed. In witness whereof the master or purser of the said ship hath affirmed to three bills of lading all of this tenor and date the one of which three bills being accomplished, the other two to stand void. Dated in Port Said (Egypt) 4th Feb. 1873. 490 dunnage mats. Fifteen working days remain for discharging.

Across these bills of lading the master wrote the words "*ignora quantita e qualita*," and after so doing signed the bills of lading.

The vessel sailed from Port Said on her voyage for Hull on 5th Feb. 1873, and arrived in Hull on the 2nd May 1873, and when she had discharged her cargo was found to be heated and damaged.

The plaintiff's petition after setting out the above facts continued as follows:

6. The said cotton seed was not delivered to the plaintiffs according to the terms of the said bills of lading in as good order and condition as it was in when it was shipped on board the said vessel at Port Said as aforesaid; but, on the contrary, the same was delivered to the plaintiffs in much worse order and condition and greatly damaged.

7. Such non-delivery as aforesaid to the plaintiffs of the said cotton seed in as good order and condition as when it was shipped was not occasioned by any of the perils or causes in the said bills of lading excepted.

8. The plaintiffs paid to the master of the said vessel the freight and gratuity due according to the terms of the said bills of lading, and did and were ready to do all things necessary to enable the plaintiffs to have the said cotton seed delivered to them in as good order and condition as it was in when shipped at Port Said as aforesaid.

9. By reason of the premises the plaintiffs lost a great part of the value of the said cotton seed, and were put to great expense in and about keeping, warehousing, and improving the condition of the said cotton seed, and in and about having the same surveyed.

The defendant's answer, after denying the 6th, 7th, and 9th articles of the petition proceeded as follows:

3. As to the 5th article of the said petition, he says that the *Prosperino Palasso* duly arrived at Hull on the 2nd May 1873, and after her arrival she, by order of the plaintiffs, remained in the roads, with the cotton seed in the petition mentioned, until the 10th day of the said month, when she went into the Victoria Dock.

4. The deterioration and damage, if any, to the cotton

seed in the said petition mentioned, were occasioned by the character and quality of the said cotton seed when shipped on board the *Prosperino Palasso*, and by the inherent qualities of the said cotton seed, and by the dangers and accidents of the sea, rivers, and navigation, or by some or one of such causes, and not by any breach of contract on the part of the defendant.

5. Save as appears by the last preceding article, the defendant admits the truth of the allegations in the 8th article of the said petition.

On this the plaintiffs concluded the pleadings.

The cause came on for the examination of witnesses, and for hearing on Nov. 13th and 14th 1873. In a similar case (a) tried immediately before the present, the plaintiffs (who were the same as in this case) had produced evidence to show that the damage had been occasioned by reason of the ship being improperly dunnaged, but had failed to establish by positive evidence that the cargo had been shipped in good order and condition, and consequently that case had resulted in a decree for the defendants. In consequence of this result it was suggested on the part of the plaintiffs that in the present case evidence should first be given to establish the condition of the cotton seed when shipped, and that the court should upon that evidence express its opinion as to whether the plaintiff had established a *prima facie* case, before hearing other evidence on the part of the plaintiffs; such other evidence being for the purpose of showing that the injury to the cotton seed was such as would have been caused by heating, from some portions of the cargo becoming wetted by salt water coming in contact with it through insufficient dunnage; if the plaintiffs failed in establishing the good condition of the seed when shipped, the other evidence would be unnecessary, upon the authority of the *Ida* (b).

(a) A case entitled *The Po*.

(b) *THE IDA*.—This was also a case of damage to cargo. The plaintiffs and shippers were the same as in the *Prosperino Palasso*; the ship was also an Italian vessel. The facts stated in the pleadings in the two cases were identical, changing only the names of the ship, defendant, master, and the quantity shipped, and the same charges were made and the same defenses raised in the same words. The same witnesses were called as to the condition of the seed when shipped, but the evidence of the witness Liddell was as follows: "The cargo was shipped as far as I know in good condition. No complaint was made by the master. The weather was fine during the loading of the vessel. We do not attend to the preparation of the ships for the cargo. We provide the mats, and expect the ship to provide wood for dunnage. There is no difficulty in getting wood in Alexandria, nor stone ballast." Cross-examined: "Alexandria is 120 miles from Port Said. This ship came from Port Said. I never saw this ship, her captain or crew. I saw samples of the cargo, but nothing more of the cargo. My knowledge of the weather depends on the daily reports, I being at Alexandria. I had the reports and letters from Port Said about this cargo, but they are not here. The samples I got at Alexandria are not here. We do not keep the samples after the ship is despatched. We received samples every day of the day's work. The average of cargoes of that season were worse than usual."

Evidence was also called by the plaintiffs for the purpose of establishing that the damage of the ship, both permanent and temporary, was insufficient, part being sand, and more wood being required; and that in consequence thereof the sea water had come in contact with and damaged the cargo; that the damage done was such as would result from sea water; that sand ballast was likely to absorb the water, and injure the cargo. The defendants called evidence to show that the ship was properly dunnaged, and that the injury to the cargo resulted from the heating of the cargo by its inherent vice, except in such places where the salt water

[ADM.]

THE PROSPERINO PALASSO.

[ADM.]

This was assented to by the Court.

Butt, Q.C. and *Cohen* appeared for the plaintiffs.
Milward, Q.C. and *Clarkson* appeared for the defendants.

had come in actual contact with it, and that this last damage was occasioned by the escape of water.

Butt, Q.C. and *Cohen*, appeared for the plaintiffs.

Milward, Q.C. and *Clarkson*, for the defendants.

Aug. 2, 1873.—*SIR R. PHILLIMORE* commented on the evidence as to the damage, found, as a fact, that it was insufficient, and proceeded: There still remains an important question whether this insufficiency of damage did or did not lead to the mischief done to the cargo. The bad state of the cargo when it was delivered must have arisen from one of two causes. Either from the greenness of the seed at the time when it was put on board the vessel, or from sea water coming through and affecting the seed at the bottom of the vessel, and so affecting the cotton seed which was on the sand. It was contended on the one side that there was sufficient evidence in this case, to show that the seed was shipped in good order and condition, on the bill of lading, and the bill of lading does say that it was "shipped in good order and well conditioned," and it is signed by the master; but also what is not stated in the petition appears on reference to the original document. There was written across that "ignoro quantitas & qualitas"—that is to say, in other words, the captain distinctly averred that he was ignorant of the quantity and quality of seed so put on board his vessel. It might be a question perhaps whether by "qualitas" was intended the same thing as "order and condition," or whether it was only intended to say that the captain made no admission with respect to the particular quality of the seed that was put on board; but, assuming it to be the same thing as good order and good condition—which, upon the whole, I think the court ought to assume, having reference to the cases which were referred to, a good deal in argument, viz., *Jessel v. Butt* (L. Rep. 2 Ex. 267) and the earlier case of *Hendson v. Perry* (3 Taunt. 305), in which the reporter expressed the decision of the court in a very summary and pithy manner, viz., as follows: "On this day the court declared that the words 'contents unknown'—which, I think, must be taken on the whole to be pretty much the same as 'ignoro quantitas & qualitas'—rendered the bill of lading no declaration of what the chests of dollars contained; it was therefore no evidence at all." Chief Justice Mansfield had previously said, in the course of the argument, "If the master qualifies his acknowledgment by the words 'contents unknown,' he acknowledges nothing"—I say, assuming the words to be the same as "good order and condition," there is other evidence in the case with respect to the condition in which this cotton seed was laden on board the vessel, and that evidence was furnished by Mr. Liddell, who was one of the plaintiffs, and was examined. He was a merchant, carrying on business in Alexandria and also in London, and he said, in answer to a question whether the cargo was shipped in good order and condition, that it was, and he gave as the ground of his opinion that he knew it was from the samples which he had seen of it at Port Said. It is very true that his personal knowledge seems to have been founded on that fact; but I am of opinion myself upon the whole that that furnishes the court with sufficient *prima facie* evidence, at least, that the seed was shipped in proper condition. This is evidence, of course, that may be very easily rebutted on the other side; but the question is, has it been so? If it has been rebutted at all, it must be by the opinion of the witnesses who saw it in its blackened and burnt and bad condition, no other evidence having been produced before the court on this point. [His Lordship then commented on the evidence given by the defendants for the purpose of showing that the damage was occasioned by salt water shipped by perils of the sea and by the greenness of the seed when shipped, found as a fact that the sand ballast got wet by salt water at the bottom and sides, and that the water got into the ship by her being thrown on her beam ends and by her straining in severe weather and continued.] The question of course arises, how did the water get wet? It was very strongly urged for the defendants that the lower part of the sand was quite dry. I am not quite so certain that this is proved in every

The following evidence was produced on behalf of the plaintiffs:

Edward B. Liddell, examined by *Butt*, Q.C.:

I am a member of the plaintiffs' firm, carrying on business at Alexandria. Our firm is largely engaged in the purchase and export of cotton seed from Egypt. Cotton is there grown in pods, and before it is gathered the pods burst open, and the white cotton and the seeds appear mixed together. Cotton cannot be gathered until the pod is burst. The bursting of the pod indicates ripeness. The seed is separated from the cotton by a machine called a cotton gin. If the cotton and the seed were mixed it would be almost impossible to separate the seed from the cotton; the seed would be all crushed in the process of ginning. If the seed can be extricated from the cotton at all it follows that it must be ripe, as otherwise it would be extremely difficult, in fact practically impossible to separate them by ginning. All seed coming from Egypt is ginned before it comes. The cotton seed is conveyed from the interior to the ports of loading principally by rail, sometimes by boat. At the ports of loading the cotton seed is stored in our own warehouses, either at Port Said or at Alexandria, which are about 125 miles apart. At Port Said the ships lie a short distance from the wharf. The seed is sent on board the ships in sacks by means of covered barges, holding from 20 to 40 tons each. From the warehouse to the barge the seed is carried in sacks on camels or mules. On board the ship it is shot out of the sacks into bulk. It seldom rains at Port Said, but if it does cotton seed is never loaded during the rain. When a cargo is being loaded we always take samples of it. This at Port Said is done in the ordinary course of business by my agent there. [Milward, on the witness admitting that he had never seen the samples drawn at Port Said, objected to these last two answers, on the ground that the witness never having seen the samples drawn, could only have derived his knowledge from hearsay. The court sustained the objection.] In the course of my business I got samples of all shipments at Port Said sent to my office in Alexandria. [Milward objected to this answer on the ground that the witness not having seen samples drawn could not say that the packets of seed which he received were samples of shipments. The objection was overruled on the ground that the evidence being merely as to the custom of trade was admissible.] The ordinary course of business is to have a large basket, into which a sample is put out of each barge-load shipped, and when the whole is shipped a sample is taken out of this basket, or perhaps two or three samples, in the course of the loading, and the samples are sent to Alexandria. Sales by sample are common in the trade, and the sales are effected by the samples so taken. In the course of business I receive a number of samples purporting to be samples of cargoes loaded at Port Said. Amongst others I received some seed purporting to be a sample of the cargo of the *Prosperino Palazzo*. [Objected to, but allowed.] That seed was in perfectly sound condition, and was ripe. In my experience such seed as that would not heat from its own inherent nature. I have never seen sound seed heat from its own inherent greenness or vice. If sound seed I mean seed that has not been damaged by external causes. Seed gathered in ripe would heat from its own internal qualities. Damaged seed will also heat of itself. From my experience of

respect, but if it were so I find a solution of the difficulty, I trust, in Dr. Voelcker's (a chemist called by the defendants) evidence. He said if the seed had damaged a portion of the cargo it would set the boat going in another part of that cargo, which was not so damaged and in that part he should not expect to see salt; and in answer to a question put by me he said, "If the seed got wet and the seed was warm, the seed would draw up the water through the mats." Upon the whole the result of the evidence in my mind is that the defendants have not shown that the great amount of damage to her cargo was caused by the excepted perils in the bill of lading or by the improper condition of the seed when put on board. I must, therefore, make the usual reference to the registrar to determine what quantity was affected in consequence of the imperfect damage to which I have adverted, and the registrar will make his report accordingly.

Solicitors for the plaintiff, *Thomas and Holmans*.

Solicitor for the defendant, *Thomas Cooper*.

[ADM.]

THE PROSPERINO PALASSO.

[ADM.]

cotton seed I do not think that a cargo of cotton seed shipped green, that is, sorpis, would heat from its own inherent vice to an extent of 10 per cent.; still less to 20 or 30 per cent. If a cargo of unsoaked seed or some barge loads of unsoaked seed were shipped so unsoaked that it would tend to heat materially, that would be apparent to the eye; even a small quantity would be apparent. No experience of cotton seed is required to say whether it is damaged or not. The cotton seed produced in bags (marked Nos. 1 and 3) is sound. Judging from its appearance, feel, and taste, this could not have been shipped in a green unripe state. This bag of seed produced (marked No. 3) is damaged, as I should judge, by salt water. This bag (No. 4) I should judge was damaged by heat. I consider that the heating of this seed was not caused by its being shipped green; it does not present the appearance that seed shipped green would have presented. There is no difficulty in detecting the difference. I have never known green cotton seed shipped, and consequently never knew of cotton seed heating from being shipped unripe.

Cross-examined by Milneard, Q.C.:

I do not think unripe cotton seed can be procured for shipment. It may be got out of the pod, but the cotton could not be ginned unless perfectly ripe, and there would be no use in gathering it. It may be unsoaked, nevertheless. It may be damaged in transport to the place of loading in course of shipment. I have not known it shipped when damaged. I have not got here the sample which purported to come from the *Prosperino Palazzo*. It was destroyed at the end of the cotton season in March or April. My agent at Port Said, who has charge of the shipments at that place is alive.

Evidence was then given identifying the four bags of samples referred to as having been taken out of the *Prosperino Palazzo* on her arrival in this country.

Cohen for the plaintiff.—The onus does not lie in this case upon the plaintiff as to the condition of shipment; if the court holds that that onus is on the plaintiff, no effect will be given to the words in the bill of lading, "shipped in good order and condition." No doubt the words "*ignoro quantita e qualita*" are important, but some meaning must be given to both sets of words. The effect of both sets is that the master represents that the cargo appeared to him, using the judgment of a person of ordinary care and skill, to be in good order and condition, but by adding the words "*ignoro quantita e qualita*" he declines to warrant its weight or condition. He says, "it is apparently in good condition, but may have defects which I cannot detect." According to *The Freedom* (ante, Vol. 1, p. 28; L. Rep. 3 P. C. 594, 600; 24 L. T. Rep. N. S. 452) it is sufficient to show that the goods were delivered in worse condition than they were when shipped. [Sir R. PHILLIMORE.—Then the condition in which they were shipped must be proved in the first instance by the plaintiff.] It lies upon the plaintiff to show that the goods were delivered in worse order than when shipped, but they need not establish the actual condition at the port of shipment. It is enough to prove facts which show that the damage to the goods discovered on delivery was such that they could not have been shipped in a condition likely to produce that damage without being noticed by the master. The condition of these goods on delivery was such that if they had been shipped in a condition likely to produce such damage the master must have noticed it. Moreover, goods shipped in a condition which would have produced such injury before delivery would have been still more damaged than these were. Hence the master, having represented by his bill of lading that the goods were shipped in good order and condition,

cannot by inserting words as to ignorance of their condition relieve himself from his former representation, namely, that the goods were *prima facie* in good order when shipped. Then if we have proved that they were in bad order when delivered, we have given *prima facie* proof that they were in worse order than when shipped, which is all we need prove to entitle us to call upon the other side to prove excuse.

Milneard Q.C., for the defendants.—This point has already been decided in the *Ida* (see note, ante p. 159). The plaintiff must prove positively that the goods were in good order and condition when shipped, and of this there is no evidence.

Sir R. PHILLIMORE.—The court has been requested by counsel on both sides to consider the case as it now stands, and to express an opinion on the effect of the evidence now before it. I am of opinion, as I expressed more at length in the *Ida* (see note ante p. 159), that the law requires the party complaining that his goods have been damaged by the fault of those who undertook to carry them, to establish the order and condition in which the goods were put on board the ship by proper evidence. The question as to what evidence will establish that proof must depend upon the circumstances of each case. In the present case the proof which is offered to the court is, first of all, the bill of lading, in which the goods are stated to be shipped in good order and condition, but on the margin of which the master has inserted the words "*ignoro quantita e qualita*." In the case of the *Ida* (ubi sup.) I expressed my opinion that those words must be considered to have the same meaning as "quantity and quality unknown," and that by appending these words the master cancelled any admission he would otherwise have made as to the quality and condition of the goods when shipped. I am of opinion, therefore, that the bill of lading in this case does not furnish the proof which the law requires from the plaintiffs as to the state of the goods when put on board. The other proof furnished is of a very circuitous character, consisting of evidence of the state of samples of the cargo on arrival in this country, and not of the condition of the cargo when shipped at Port Said. If I am called upon to express my opinion at this stage of the case I must pronounce that the plaintiff has not proved the order in which these goods were shipped at Port Said, and, therefore, the defendant has a right, in default of other evidence, to be dismissed from the suit with costs.

Milneard, Q.C.—Then I must ask what course the plaintiffs propose to take.

Butt, Q.C.—I have no further evidence on this point. I can produce evidence which will show that the damage might have been produced by another cause, viz., by sea water getting at the cargo and heating it through defective dunnage, but after your Lordship's decision that would be useless.

Sir R. PHILLIMORE.—Then I must dismiss the suit with costs.

Solicitors for plaintiffs, *Thomas and Hollams*.
Solicitor for defendants, *Thomas Cooper*.

[ADM.]

THE PIERRE SUPERIORE.

[ADM.]

Dec. 9 and 18, 1873.

THE PIERRE SUPERIORE.

Damage to cargo—Jurisdiction—Admiralty Court Act 1861 (24 Vict. c. 10, sect. 6).—“Goods carried into any port in England or Wales”—“Ship calling for orders—Goods delivered at foreign port.

When a foreign ship carrying cargo, acting in pursuance of the contract of freightage, which gives the option of several ports of call, English and foreign, puts into an English port of call for orders, she carries her cargo into the English port within the meaning of the Admiralty Court Act 1861 (24 Vict. c. 10), sect. 6; and though she be ordered to a foreign port, and there discharge her cargo, the Court of Admiralty has jurisdiction to entertain against her a suit by the assignees of the bills of lading of the cargo, for damage to cargo, and to arrest her on her return to this country.

This was a cause of damage to cargo instituted under the 6th section of the Admiralty Court Act 1861 (24 Vict. c. 10), against the Italian ship *Pierre Supérieure*, and her owners intervening. The plaintiffs were Messrs. Gladstone, Wyllie, and Co., merchants, of London, and Messrs. merchants, of Hamburg. The defendants appeared under protest, and filed the following petition on protest:—

(1.) By charter-party, dated London, the 30th March, 1872, and Genoa, the 6th April, 1872, between the defendant and Ferdinand Schiller, for self and partners of Messrs. Borrodale, Schiller, and Co., of Calcutta, merchants and freighters, it was mutually agreed that the above named ship should, with all convenient speed, having liberty to take outward cargo and passengers from Europe to a port on the way for owners' benefit, sail and proceed thence to Aklat for orders to load at either Aklat, Bagoon, or Haimein, and there load for the agents of the said freighters, a cargo of rice in bags, which the said freighters bound themselves to ship, and being so loaded, should proceed therewith to Belle Isle, Scilly, Queenstown, or Falmouth, at the option of the master for orders, whether to discharge at a good and safe port in the United Kingdom or on the Continent between Havre and Hamburg, both ports inclusive, or so near thereto as she might safely get, and deliver the same in any dock freighters might appoint, agreeably to bills of lading, on being paid freight as therein mentioned; the master to sign bills of lading at any current rate of freight required, without prejudice to such charter-party, but not under chartered rate.

(2.) Pursuant to the said charter-party, the said ship proceeded to Rangoon, and there loaded a cargo of rice in bags, for which the master of the said vessel signed and delivered a bill of lading, in the words and figures following, that is to say:

“Shipped in good order and well-conditioned by Gladstone, Wyllie, and Co., in and upon the good ship or vessel called the *Pierre Supérieure*, whereof is master for the present voyage Consignee, and now riding at anchor in the Rangoon river, and bound for Belle Isle, Queenstown, or Falmouth, for orders to discharge at a port in the United Kingdom or on the Continent, between Havre and Hamburg, both inclusive, 5000 bags of rice, each 210lb. nett, 3300 bags, each 195lb. nett, being marked and numbered as per margin, and are to be delivered in the like order and condition, at the aforesaid port of call, as ordered (all and every the dangers and accidents of the seas, rivers, and navigation of whatever nature or kind soever excepted), unto order or its assigns, he or they paying freight for the said goods at the rate of 3l. 15s. (three pounds fifteen shillings sterling) per ton of 20 cwt. nett weight, with averaging accented. In witness whereof the master or purser of the said ship hath affirmed to three bills of lading, all of the tenor and date, the first of which bills being accomplished, the others to stand void. Dated in Rangoon, this 26th day of March, 1873.—F. COMBUSTIERE.”

(3.) The said ship sailed with the said cargo from the Rangoon, and her master, in the exercise of his said op-

tion, proceeded therewith to the said port of Falmouth for orders, and there received orders from the plaintiffs, or their agents, to proceed with the said cargo to Bremen, which is a port on the Continent between Havre and Hamburg, and to discharge the said cargo at Bremen.

(4.) The said master accordingly sailed from Falmouth in the said vessel with the said cargo to Bremen, and there delivered the said cargo.

(5.) The said vessel, after having discharged her said cargo of rice at Bremen, left Bremen on a second voyage for Cardiff, to load coals there, and subsequently arrived at Cardiff, where she has been arrested by the plaintiffs in this suit.

(6.) The plaintiffs allege themselves to be assignees for valuable consideration of the said bill of lading, and allege that the said cargo of rice suffered damage in the said vessel, and they have instituted this suit, as such assignees, for the recovery of losses, which they allege themselves to have sustained by negligence or misconduct, or by breach of duty, or by breach of contract, on the part of the master or crew of the said vessel.

(7.) Save as aforesaid, the said cargo of rice was never brought into any port in England or Wales.

(8.) The defendants submit that the said cargo of rice was not carried into any port in England or Wales, within the true intent and meaning of the 6th section of the Admiralty Court Act 1861, and that by reason thereof this honorable court has not jurisdiction to entertain this suit.

The plaintiffs now moved to reject this petition on protest, on the ground that, under the circumstances therein stated, the court had jurisdiction.

Dec. 9.—*Bull, Q.C. and Cohen*, for the plaintiffs, in support of the motion.—To sustain the protest it must be made out by the defendants that the words of the Admiralty Court Act 1861 (24 Vict. c. 10), sect. 6, “any goods carried into any port in England or Wales in any ship,” mean goods “imported into,” or “finally discharged in,” this country. It is clear that this cargo was carried into Falmouth, within the literal meaning of those words, and hence to oust our right of remedy here the defendants must show that the words have a more restricted meaning. The owner, consignee or assignee of any bill of lading of any goods so carried have, under the section, the right to proceed in this court for damage done to the goods, or for breach of contract, provided the owner of the ship be not domiciled in this country. We are assignees of the bills of lading, and the ship is the property of a Genoese. This right may, by sect. 35 of the same Act, be exercised either in personam or in rem. The right of proceeding in rem is a power given to prevent the defeat of the ends of justice by reason of no person being resident in England or Wales who would be liable to be sued in an action at common law. If the defendant was in this country there would be no difficulty in suing him, but as he is not here, the only question is, whether there can be a proceeding in rem. There is undoubtedly jurisdiction in some court; does the Act give this court jurisdiction? The point has already been decided. In *The Bahia* (Bro. & Lush. 61), the ship only came into an English port by accident, and it was there argued that the action was for a breach of contract, and that to give the court jurisdiction, the contract must be performable in England; that is to say, that the words “carried into,” mean “carried under a contract into” England or Wales. This argument was rejected and the jurisdiction upheld. Here, although the place of delivery, as eventually ordered, was not in England or Wales, still the goods were carried into Falmouth under a contract, the ship going there for orders, in pursuance of the terms of the charter-party and bill of

ADM.]

THE FIVE SUPERIOR.

[ADM.]

lading. This is a remedial statute, and the defendants should be called upon to show why the court should not uphold a jurisdiction which its plain words give. No argument as to the inconvenience of upholding this jurisdiction is here applicable. It must be assumed that the ship has been guilty of a breach of duty, and if the court has once had jurisdiction, the ship can be arrested at any time. Her cargo belonged to one person, and when she went to Cardiff she was going to land; hence no third person is inconvenienced by her arrest. Moreover, the same argument would equally apply to all cases of proceeding *in rem*, as in collision, salvage, and other causes, and yet it is not raised. The inconvenience is really balanced by the advantages on the other side. The question has in fact been decided in the recent cases arising out of the Franco-German war:

The Teutonia, ante, vol. 1, pp. 32, 214; 24 L. T. Rep. N. S. 521; 26 L. T. Rep. N. S. 48; L. Rep. 3 Adm. & Ecc. 304; L. Rep. 4 P. C. 171;
The Patria, ante, vol. 1, p. 71; 24 L. T. Rep. N. S. 849; L. Rep. 3 Adm. & Ecc. 436;
The Heinrich, ante, vol. 1, p. 79; 24 L. T. Rep. N. S. 915; L. Rep. 3 Adm. & Ecc. 424;
The Wilhelm Schmidt, ante, vol. 1, p. 62; 25 L. T. Rep. N. S. 34.

The Act applies mainly to foreign ships, and its spirit and policy is to give reciprocity of remedy, which would not exist if its meaning were to be thus restricted.

Milward, Q.C. and Clarkson, for the defendants, in support of the protest.—Before this court can have jurisdiction, the ship must be bound for some port of delivery in this country. There must be an intention to deliver here. A mere accidental plying into an English port will not give jurisdiction. Where ship, contract, and place of delivery are all foreign, the mere accident of a call for orders can give no jurisdiction. The real question is, whether the cargo was carried into port *animus remanendi*. If a master carries into a port in England, with the intention of keeping the goods there wrongfully and against the terms of his contract to carry elsewhere, there is no doubt jurisdiction; but if his sole intention in coming into port is to wait for orders, having the right to do so under his contract, without acting wrongfully towards the cargo, no jurisdiction can accrue, however long he stays, because he cannot be said to be doing anything wrongful within the jurisdiction. In *The Patria* (ante, vol. 1, p. 71; 24 L. T. Rep. N. S. 849; L. Rep. 3 Adm. & Ecc. 436), the master committed a breach of contract by refusing to proceed on his voyage whilst in an English port, whilst here there was no refusal. They are not suing for an act done at Falmouth, entering which port must be considered a mere step in a foreign voyage by a foreign ship. The tort here, if any, was committed under a foreign flag abroad, and in violation of a foreign contract, so that to uphold the jurisdiction the court must hold that the British Legislature can give jurisdiction over foreigners. The ship could have been sued at Bremen. [Sir R. PHILLIMORE.—By general international law she could be sued in the competent courts of any country whose port she entered.] Even if the ship had been ordered to London, it would have been illegal to arrest in Falmouth, because the carrying into that port was not a carrying into an English port within the meaning of the statute. The right of arrest does not arise

until arrival at the port of delivery. The statute is intended to provide a remedy where British subjects are sufferers, not foreigners; to compel foreign ships coming into the jurisdiction, to give a remedy for breach of contract with British subjects.

But even if the words, "goods carried into any port," have a more extensive meaning than goods carried into a port for delivery, that meaning will only include goods carried into a port for the purpose of being done something with, which gives a right of action. *The Bahia* (Bro. & Lush. 61) decides that goods must be carried into a port where the goods are dealt with, as at the termination of a voyage, or where the shipowner commits a tort, which gives a right of action. [Sir R. PHILLIMORE.—In *The Patria* (ubi sup.), and the other Franco-German war cases, the goods were not brought into port for the purpose of delivery. There was a refusal to proceed during war risk.] In those cases, that very refusal was a breach of duty. In *The Bahia* (ubi sup.), the wrong complained of was the refusal to carry on, and the shipowner had thereupon the right to make the port in which the ship then was the port of delivery, and this founded the jurisdiction. In *The Ironsides* (6 L. T. Rep. N. S. 59; Lush. 458; 1 Mar. Law Cas. O. S. 200), it was decided that there was no jurisdiction, because the goods were not carried into port in the ship; that is, because there must be an actual carrying into port by the ship entering into the contract. In *The Danzig* (9 L. T. Rep. N. S. 236; Bro. & Lush. 102; 1 Mar. Law Cas. O. S. 392), however, Dr. Lushington held that "carried into" meant "carried or to be carried into," and that the court had jurisdiction over a claim for non-delivery of goods which had been wrongfully thrown overboard. This is inconsistent with the former case, and the question, owing to the difference of decision, is so far open, that it is practically *res aena*. Then the evil which the statute sought to remedy was the inability to proceed against foreign shipowners whose ships in the performance of their contracts brought goods to this country. The master it was useless to sue; the owners could not be sued because not here. The statute gave power to proceed against the ship, and so provided a remedy for the evil; and this is sufficient to satisfy the terms of the statute. If it is held to extend further, there will be great inconvenience. In the case of a general ship, the action of one shipper might delay the goods of all the rest at the port of call. The reasonable construction of the statute is, that the word "port" in the statute must mean the port of delivery named in the contract, or the final port of delivery in fact. Would the court have jurisdiction over a foreign ship loaded by a foreigner in America for a port on the Continent, merely because the ship came by accident, such as stress of weather, into an English port? In such a case the ship could be proceeded against in the foreign port, and there would be no hardship that the Legislature intended to remedy by this Act. Here the ship is foreign; the master may call either at an English or a French port for orders; the contract for delivery is inchoate; there is no contract to deliver at a particular port until orders given; orders are given to deliver at Bremen, and are accepted; then the shipowner is under a contract to deliver at Bremen, a foreign port; the contract must then be considered as if it had stipulated in the first in-

[ADM.]

THE PIERRE SUPERIORE.

[ADM.]

stance that delivery should take place at Bremen; that is to say, a contract to be entirely performed abroad. [Sir R. PHILLIMORE.—At the same time the ship calls at Falmouth, in obedience to her contract. She was not there by accident. All that the plaintiffs need contend is, that a ship which, in pursuance of her contract goes into an English port for orders, submits to the jurisdiction.] The ship was not bound to call at an English port; she could call at one of several ports: there was no compulsion by the contract. [Sir R. PHILLIMORE.—

—She did arrive at Falmouth in the execution of her contract, and that is an English port. The question is, does the Act apply under those circumstances?] Putting into a port of call cannot give jurisdiction over a foreign contract.

Butt, Q.C., in reply.—If the owner of the ship were in this country, there would be no difficulty in suing him at common law; and if these goods were carried into an English port within the meaning of the Act, he would be sued *in personam* in this court. Then all the arguments as to inconvenience would fail. Can it be said that the doing of an act which compels the shipowner to enter an appearance in this court, which he would have to do at common law, if by chance in this country, is such an inconvenience as can be used as an argument against a jurisdiction. It is not pretended that the act creates a maritime lien; it only gives the power to compel appearance by a proceeding *in rem*. If the ship had left the English port and had been sold to a third person, the plaintiff could not have arrested her. But here she still belongs to the same owners, and they being liable for a breach of contract, may they not be made answerable through their ship, even when she is on a new voyage. If the owner had been on board the ship and had landed here, he could have been summoned, why not the ship? This cannot be called a foreign contract; the plaintiffs are British subjects; the contract is in the English language, and under it the ship calls for orders at an English port. *The Bahia* (*ubi sup.*) is an *a fortiori* case, as there it was never contemplated by the contract that the master should come into an English port at all.

Curr. ado. vult.

Dec. 18th.—Sir R. PHILLIMORE.—This is a motion to reject a petition on protest. A suit was instituted for damage to cargo on behalf of certain consignees against the vessel *Pierre Supérieure*, whose owners are foreigners. They have appeared under protest, and set forth their defence in the petition. The petition states that the ship was chartered in March and April 1872 to take an outward cargo from Europe to a port in the East Indies, and there to land a cargo of rice, to "proceed thither to Belle Isle, Scilly, Queenstown, or Falmouth, at the option of the master for orders, "whether to discharge at a good and safe port in the United Kingdom, or on the Continent between Havre and Hamburg." The ship proceeded to Rangoon and loaded the cargo; and the master signed and delivered a bill of lading to Gladstone, Wyllie, and Co., in which the vessel is described to be bound for the places mentioned in the charter party. The bill of lading and charter party are in English, and the freight is to be paid in English money. The vessel sailed from Rangoon to Falmouth, and then received orders to go to Bremen, which is between Havre and Hamburg, and there discharged her cargo. She sailed from

thence to Cardiff on a new voyage, and was then arrested on this suit.

The contention on behalf of the protestors, which was very ably conducted, proceeded upon two grounds. The first and principal ground was, that the words in the statute (24 Vict. c. 10, sect. 6), "Any goods carried into any port in England and Wales in any ship," must mean carried in for the purpose of delivery in that port. The second ground, which was, I think, more reluctantly put forward, was, that the goods must at all events be carried into a port, which from circumstances became the final port; or, according to a different form of the same proposition, that the goods must be carried into a port, in which port a wrong was done to the shipper. It is proper here to observe that the petition on protest does not allege that whatever damage was done happened after the vessel had left the English port and was on her way to Bremen. It is obvious that the second proposition of the counsel for the protest cannot be reconciled with the first, inasmuch as the second admits that circumstances may happen which found the jurisdiction, although the goods are not carried into the port of discharge mentioned in the charter party or bill of lading.

Various cases have been decided by my immediate predecessor upon this point, and also by myself; and in the arguments addressed to the court upon former occasions, as upon the present, the principal topic has been the inconvenience which would result from the plain and literal construction of the words of the statute, which it cannot be denied are in favour of the jurisdiction of the court. And I must here remark that the large and descriptive words are not narrowed or restricted by any subsequent proviso, though it seems that when a restriction is intended to be imposed, as in the case of the domicile of the defendant, it is plainly expressed. If the words are plain and unambiguous, I do not think myself at liberty to consider the argument from inconvenience, although it is very possible that a full investigation into this topic would show that the inconveniences are balanced by contrary advantages.

In *The Bahia* (Bro. & Lush. 61), the ship carrying the cargo was bound for Dunkirk. She put into the port of Ramsgate, and the master refused to proceed to Dunkirk, or to give delivery at Ramsgate, and the court held that it had jurisdiction. In *The Patria* (Law Rep. 3 Adm. & Ecc. 436, 459), I referred to that case, and upon its authority decided one portion of the case then before me, and from that judgment there has been no appeal. Also in *The Patria* the vessel was bound for a port in Germany, and put into Falmouth from accidental circumstances, and the master refused to proceed further, on the ground of French cruisers. I held that the jurisdiction of the court was founded under the statute. It is true that in both these cases the ship had not left the English port in which she was arrested. In the present case she has deposited her cargo, alleged to have been damaged, in the foreign port, and is seized on her return to this country for a new cargo. But it is to be observed that it is not averred in this case that the shipper has had recourse to the tribunals of Bremen. If he has, as he alleges, sustained an injury for which the owner of the ship is liable, it is still unredressed;

[CHAN.]

Es parte NYHOLM; Re CHILD.

[CHAN.]

and I have already observed upon the pervading English character of the transaction. It becomes unnecessary to refer to the other German cases arising out of the recent war. It appears to me that the principle of these decisions must govern my judgment in the present case, more especially as the vessel had come into an English port in compliance with the terms of the charter-party, and that there was thereby a partial fulfilment of the contract; and the order which she received there might have been to discharge in the English port, and perhaps in that particular port.

On the whole, having regard to the particular circumstances which I have stated, and being unable to distinguish this case in principle from those which have been already determined on this point, I see no adequate reason for not following the plain words of the statute, and I must overrule the protest and direct the party to appear absolutely, with costs.

Solicitor for the defendants, *Thomas Cooper*.

Solicitors for the plaintiffs, *Fritchard and Sons*, agents for *Bateson and Co.*, Liverpool.

COURT OF APPEAL IN CHANCERY.

Reported by R. STUART HOWE and H. PEAT, Esqrs.,
Barristers-at-Law.

Dec. 9 and 12, 1873.

(Before the LORD CHANCELLOR (Selborne) and Lord Justice JAMES.)

Es parte NYHOLM; Re CHILD.

Shipping law—Charter party—Lien for freight—Part payable on signing of bills of lading—Bankruptcy of charterer—Disclaimer of contract.

By a charter-party, after providing that the freight was to be at certain specified rates, it was agreed that 250*l.* should be advanced in cash on signing bills of lading and clearing at the custom house of the port of shipment, and the remainder on a true and faithful delivery of the cargo at the port of discharge; and that for the security and payment of all freight, dead freight, demurrage, and other charges, the master or owners should have an absolute lien and charge on the cargo.

The loading of the ship was completed, and the ship was cleared, but she never started on her voyage, nor were the bills of lading signed.

The charterer filed a liquidation petition, and the trustee under the liquidation disclaimed all interest under the charter party.

Held (affirming the decision of the Chief Judge in Bankruptcy), that the shipowner was not entitled to a lien in respect of the 250*l.* agreed to be paid in advance, inasmuch as the ship had never earned freight; the compensation to which the shipowner was entitled for the loss sustained by reason of the charterer's default was not freight, and the 250*l.* did not come within the lien given by the charter-party.

This was an appeal from a decision of the Chief Judge in Bankruptcy, affirming a decision of the Judge of the Manchester County Court.

The facts, which will be found more fully stated in the judgment of the court, were shortly as follows:

Messrs. Child, Mills, and Co., merchants, of Manchester, entered into an agreement by charter-party with one Nyholm, the owner of the Danish brig *Værring*, by which it was agreed that the

vessel should take a general cargo to Lagos, on the west coast of Africa, and should bring back a cargo from Lagos, at 77*s.* 6*d.* per ton for freight and hire, the payment of which was to be made as follows: 250*l.* to be advanced in cash on signing bills of lading and clearing at the Custom House, Liverpool, and the remainder on delivery at the port of discharge.

After the vessel was loaded, but before she sailed, Messrs. Child, Mills, and Co. filed a petition for liquidation, and the trustee under the liquidation disclaimed the charter party.

The bills of lading were not signed, the 250*l.* payable in advance not having been forthcoming.

Nyholm claimed a lien on the cargo for freight and demurrage, but his claim was disallowed, both by the County Court Judge and by the Chief Judge in Bankruptcy.

He now appealed from the decision of the Chief Judge, but on the appeal restricted his claim to a lien for the 250*l.* payable in advance.

Cohen (of the Common Law Bar), and F. Thompson, for the appellants.—We were ready and willing to sign the bills of lading at the time when the trustee under the liquidation disclaimed the contract. Therefore the 250*l.* had become payable as a sum certain, and was immediately recoverable, notwithstanding the disclaimer of the contract, and we are entitled to a lien on the goods for the amount:

Poynter v. James, 2 Mar. Law Cas. O. S. 450; 15

L. T. Rep. N. S. 669; L. Rep. 2 C. P. 348;

Black v. Ross, 2 Moore P. C. C. N. S. 277;

Small v. Montez, 9 Bing. 574.

It is true that this 250*l.* is not a sum in respect of which the usual lien for freight would have arisen, but we claim the lien under the clause in the charter-party which gives us an absolute lien on the cargo for the payment of all freight, dead freight, demurrage, and other charges, and when that clause is read in connection with the preceding clause, which provides that 250*l.* is to be paid in advance, that sum clearly comes within the words of the clause giving us an express lien, as that sum is in the preceding clause expressly stated to be payable as part of the freight. This contention is supported by what Lord Kingsdown says in *Kirchner v. Feuss* (12 Moo. P. C. 391): "No doubt parties who have superseded by a special contract the rights and obligations which the law attaches to freight in its legal sense may, if they think fit, create a lien on the goods for the performance of the agreement into which they have entered, and they may do this either by express conditions contained in the contract itself, or by agreeing that in case of failure of performance of that agreement, the right of lien for what is due shall subsist as if there had been an agreement for freight. But in such case the right of lien depends entirely on the agreement." They also referred to:

Gülksen v. Middleton, 2 C. B. N. S. 134;

Byrne v. Schilder, ante, vol. 1, p. 111; 45 L. T. Rep. N. S. 211; L. Rep. 6 Ex. 319;

The Norway, 2 Mar. Law Cas. O. S. 17, 168, 254; 12

L. T. Rep. N. S. 57; R. & Lush 377, 384;

Watson and Co. v. Shankland, ante, p. 115; L. Rep.

2 Sc. App. 304;

Denoon v. The Home and Colonial Assurance Company, ante, vol. 1, p. 349; 26 L. T. Rep. N. S. 625;

L. Rep. 7 C. P. 341;

Hicks v. Shield, 7 Ell. & Bl. 633, 638;

Andrew v. Moorhouse, 5 Taunt. 445;

Tinsall v. Taylor, 4 Ell. & Bl. 219.

[CHAN.]

Ex parte NYHOLM; Re CHILD.

[CHAN.]

Dec. 12.—The COURT intimated that they would not call upon

Swanston, Q.C. and *Winslow* who appeared for the respondent, and

Lord Justice JAMES delivered the following written judgment of the court.—This is an appeal from the decision of the Chief Judge in Bankruptcy, affirming the decision of the County Court judge of Manchester.

The circumstances are shortly these: The appellant is the owner of the vessel called the *Vaering*. The bankrupts, or quasi-bankrupts, entered into an agreement with him for the chartering of his vessel. The particular language of the charter-party relied on, I shall refer to later. One of the terms of the charter-party was that 250*l.* should be paid in advance on account of freight when the bills of lading were signed and the ship cleared. The cargo was put on board, and the mate's receipts given for it. The ship was cleared at the Custom House, and the captain was ready and willing to sign the bills of lading in exchange for the 250*l.* The 250*l.* was not, however, forthcoming, and the bills were consequently not signed. The allegation in the affidavit avers that no bills of lading had been tendered to him for signature. The charterer became insolvent. The trustee gave notice that he abandoned all interest under the charter-party. Conflicting claims were made to the cargo, and an order was made by the County Court judge for taking it from the ship, and selling it, and bringing the proceeds into court, except some parts that were given over to some owners, and an issue was directed by the County Court judge as follows: "Whether H. C. Nyholm had on the 10th April, or the 25th April 1873, being the date of the final discharge of the cargo and goods laden on board the Danish brig *Vaering*, under a charter-party dated the 6th Nov. 1872, and made between H. C. Nyholm and the above-named debtors, a complete or some lien and charge on the cargo and goods so laden on board the vessel, or some part thereof, for damages, freight, demurrage, detention, and other charges, or some of them." The learned judge of the County Court decided that issue in the negative. That decision was affirmed, and from that affirmation the appeal has been brought before us.

It was admitted in the argument that the claim must be confined to the 250*l.* It was not contended that there was any such lien by the ordinary mercantile law. It was also admitted that the ship had not commenced her voyage, and had, in fact, elected to free herself from the charter-party by reason of the insolvency and default of the charterers, and therefore that no freight, properly so-called, had been earned or commenced to be earned, and consequently that there was nothing in respect of which the ordinary mercantile lien for freight would arise. But the claim was raised on what was alleged to be the peculiar language of the instrument. The clauses referred to for that purpose are the clauses for payment, "In consideration whereof and of everything hereinbefore mentioned, the said Child, Mills, and Co., of Manchester, do hereby promise and agree to load and receive," and so on, "and pay or cause to be paid as freight for the use and hire of the vessel in respect of the said voyage out and home, at and after the rate of 77*s.* 6*d.* per ton of 20 cwt., if she went to some particular port, and something

different if she went to any other port," the payment of which is to become due and be made as follows: 250*l.* to be advanced in cash on signing bills of lading and clearing at the Custom House, Liverpool, less 5 per cent. for all charges, insurance thereon included. Such money as the master may require for the ordinary disbursements of the vessel at Lagos, on the west coast of Africa, to be advanced free of interest and commission, or other charge, and the remainder on a true and faithful delivery of the cargo at the said port of discharge." Then there is another clause: "It being agreed that for the security and payment of all freight, dead freight, demurrage, and other charges, the said master or owners shall have an absolute lien and charge on the said cargo, or goods laden on board." It was contended first, on the principle of the cases as to concurrent acts, that the 250*l.* became payable as a sum certain under the contract as soon as the captain was ready and willing to sign the bills of lading, and that that, therefore, constituted a sum certain immediately and still recoverable as such, notwithstanding that the whole contract was determined and the voyage put an end to. If it were necessary to decide that point there would be very great difficulty in applying the principle of the cases referred to to the case of the payment in advance, or at a particular stage, of an instalment of one entire consideration for one complete voyage or other service, where the complete voyage or other service had never been performed, and was on the non-payment entirely given up. But, assuming even that it were so, how does it become freight for which the nautical lien arises? It was admitted that it would not be ordinarily so, but it was contended that the lien was created by the express clause of lien. The express clause is, however, for freight, dead freight, demurrage, and other charges. It is not dead freight nor demurrage nor other charge, and it is not freight in the ordinary sense of the word. But the contention was that the word "freight" here was not to be read in the ordinary sense, but that the clause was to be read in connection with the previous clause as to the payment of freight. The 250*l.*, it is said, is there expressly stated to be payable as part of the freight, and the freight is to be paid as follows: 250*l.* in advance. Therefore it was contended that the clause of lien was to be read thus: "for freight, which word is to include the 250*l.* hereinbefore made payable in advance, and hereinbefore spoken of as a part payment of freight." There is some ingenuity, but, in our judgment, no substance, in this contention. It would be an unwarranted thing to lay hold of a particular form of expression in one part of a charter party or other instrument, in order to give to plain unequivocal language in another part of the instrument a meaning different from its ordinary meaning. The ship never earned freight, and never began to earn freight. That it was prevented from doing so by the default of the other party entitles the owner to full compensation for all the loss sustained thereby, but the compensation is not freight, and the nautical lien for freight does not extend to such compensation. The order of the Chief Judge is right, and the appeal will therefore be dismissed with costs.

The LORD CHANCELLOR (Selborne) concurred.

Appeal accordingly dismissed with costs.

Solicitors: Field, Ince, and Co., for Bateson and Co.; Phelps and Sidgwick.

V. C. M.]

CLOVER v. ROTDON.

[V. C. M.]

V. C. MALINS' COURT.Reported by T. M. CANNON and F. GOULD, Esqrs.,
Barristers-at-Law.

Thursday, Dec. 18, 1873.

CLOVER v. ROTDON.

*Association—Registry of ships—Certificate of merit
—Bona fide opinion—Laches—Injunction.*

The defendants were an association for the registry of iron ships, and classed the ships in a register of merit according to the reports of their own surveyors. A list from the register might be obtained by anyone.

The plaintiffs were members of the association and the owners of a ship which in 1870 was ranked in the highest class in the register. The plaintiffs in 1870 made an alteration in the ship, and submitted her to the defendants' inspection, who not approving of the alteration, entered in the register, "class suspended 1871," and refused to restore the previous first-class entry unless some further alteration was made. The advisability of the alteration was a matter of opinion, as since the alteration the vessel was classed in the highest rank at "Lloyd's" (London).

The plaintiffs continued to use the vessel, but it was proved that her value had been depreciated in consequence of the entry in the defendants' register.

On a bill being filed by the plaintiffs in Nov. 1873 to restrain the defendants from disposing of any copies of their list containing the words "Class suspended 1871."

Held, on motion, that the plaintiffs were not entitled to relief, first, because the entry was the bona fide opinion without notice of the society to whose judgment the plaintiffs had submitted the vessel; secondly, because of their laches in applying to the court for relief.

This was a motion by the plaintiffs to restrain the defendants, the chairman and committee of an association called The Underwriters Registry for Iron Vessels, from printing or disposing of any copy of their list of iron vessels having the words "class suspended 1871," placed opposite or so as to apply to the plaintiff's ship, the *Tyne Queen*.

The defendant's association was formed at Liverpool about the year 1862, the purpose of the association being to keep a registry of all iron vessels classed according to their quality. The committee published annually on behalf of the association a list of iron vessels for the use of their subscribers, a copy of which, however, any person might obtain by paying the annual subscription of 2s. 6s.

A vessel considered by the surveyors of the association as satisfactory was classed by them under the term of "twenty years red." This was the highest classification, and entitled the owner to a red certificate.

The following is an extract from the rules of the association:—

2. The committee propose to class ships on their general merits, having special reference to the quality of the materials, to the character of the workmanship, to the arrangement and size of the parts where the principal strains are experienced, and to the equipment, a system of classification which is considered preferable to one based mainly on tables of scantling.

3. The committee continuing the classification adopted by the Liverpool Underwriters' Association for the last six years will class in red for periods varying from two to twenty years, all iron vessels whether steamers or sailing

ships, which have been or may be submitted to the inspection of the surveyors of that association or of this committee during construction, and be built and completed to their satisfaction.

7. A thorough survey will be required once in every four years for vessels with a certificate for twenty years. When vessels are abroad at the time they become due for survey, they must be thoroughly examined on their return to the United Kingdom. The surveyors are at all times to have free access to examine vessels holding a certificate from this committee, and in case of defects reported by them not being made good, the classification of the ship shall be revised.

10. Vessels due for periodical survey which leave the United Kingdom without being duly surveyed and passed by the surveyors to this registry will have their class suspended until such survey has been properly made. Notice of suspension of class will be given in the first monthly supplement issued after the sailing of the vessel. Vessels remaining abroad for two years after they become due for periodical survey will have their class suspended until they have been re-surveyed.

The *Tyne Queen* was built in 1865, and was submitted to the inspection of the surveyors of the association during construction, and was built and completed to their satisfaction, and was thereupon entered in the highest class as "twenty years red," and a red certificate was given. The plaintiffs purchased the vessel in 1870, and having determined to have her lengthened they entered into a contract for the purpose, the contractors for the work having the option to execute it in such a manner as to entitle the ship either to be retained in the highest class in the Liverpool registry, or to be classed $\frac{A}{2}$ at Lloyd's (London). The bill stated that the said class $\frac{A}{2}$ at Lloyd's was considered fully equivalent to the class "twenty years red," in the Liverpool registry. The contractors elected Lloyd's classification, but executed the alterations in such a satisfactory manner that the vessel was classed $\frac{A}{1}$ at Lloyd's (London), a higher classification than $\frac{A}{2}$. The vessel was not at this time withdrawn from the Liverpool registry, where for some little time longer she continued to appear as belonging to the highest class, viz., "twenty years red."

In November 1871, the plaintiffs added to the "awning" or "spar" deck over the engine-room, so as to make it cover in the whole length of the main deck. This alteration was approved by the surveyors of Lloyd's, but the surveyors of the Liverpool registry objected to it, and in the following publication of their list of iron vessels for the year from September 1872 to August 1873, the vessel appeared with the following words printed in the margin under the figures "twenty red," "class suspended, 1871."

The managing owners of the vessel, Messrs Girvin and Slater, having applied for an explanation of this, they received from the secretary of the Liverpool registry, a letter dated 2d Sept. 1872, informing them that on certain alterations being made in the vessel under the inspection and to the satisfaction of the surveyors of the registry, the committee would be ready to reinstate her to her former class.

Messrs. Girvin and Slater replied as follows on the 3rd Sept. 1872: "We are in receipt of your favour of yesterday, and as it will not be in our power at present to comply with the request contained therein for the continuation of the (s.s.) *Tyne Queen* in your book of classification, we have to request that you will in the meantime withdraw the vessel altogether therefrom."

V. C. M.]

CLOVER v. ROYDON.

[V. C. M.]

Paragraph 18 of the bill was as follows: "The said request to withdraw the said vessel entirely from the said register is in accordance with the constant practice of the said association, in fact, in their present list of steamers published in Sept. 1873 no less than twelve different vessels are marked in the said list as having been withdrawn by the owners, and the plaintiffs show that it is the absolute right of the owners of any ship in the said list to have it withdrawn therefrom and so marked in such list or to have it entirely withdrawn."

Further correspondence ensued, but the association still declined to remove the words "class suspended" from the register, stating in one of their letters that "until the cause for suspension of class has been removed to their satisfaction, the committee will be unable to insert the words 'withdrawn' by request of owners."

The plaintiffs filed their bill on the 19th Nov. 1873, stating in addition to the above facts, that the book being commonly referred to by insurance brokers, and underwriters and shippers, for the purpose of ascertaining the merits of the various vessels in the list, the words "class suspended" would not only injure the vessel for selling purposes, but also prejudice the plaintiffs in effecting insurances on the vessel, and diminish the amount of freight which they could otherwise earn by her. It appeared that the alterations required by the committee would cost about 200*l*. The alterations required were for the further strengthening of the vessel on account of the alterations previously made with regard to which different views prevailed between the defendant's association and Lloyd's. The value of the vessel was stated to be about 25,000*l*.

The case now came on on motion for injunction.

In answer to paragraph 18 of the bill above set out the secretary of the association by his affidavit stated as follows:

"The nature of the entry referred to in the 18th paragraph . . . when a ship has been withdrawn and which entry the plaintiffs desire to have substituted for the entry 'Class suspended 1871,' in the said register is as follows:

[in red.] withdrawn by owners.

Such entry in the opinion of the committee contains a representation that the ship has not forfeited her class at the time of withdrawal and to have substituted that entry in the case of the *Tyne Queen* in lieu of the entry 'Class suspended 1871,' would, in the opinion of the committee, have misled underwriters into supposing that the cause of the suspension of the certificate had been removed since the date when the entry 'Class suspended 1871' occurred in the registry, and before the time when the requested entry 'Class withdrawn by owners' was inserted, and for that reason the committee declined to make the required alteration."

The vessel had been used by the plaintiffs since the suspension of her class and it was proved that the effect of the entry complained of had had an injurious effect upon the character of the vessel.

Glasco, Q.C., W. F. Robinson, and R. G. Williams (Common Law Bar) for the plaintiffs.—The words "class suspended" are calculated to injure the character of the ship, for they will be understood by the public as meaning "untrustworthy," but the vessel is classed *A1* at Lloyd's. It is said no

legal right is threatened, but our right is to use the ship free from any imputation on its merits. The defendants are a self-elected body. The fact of suspension which appears on the register is only half the truth, as the reason of the suspension is not given. They cited

Dixon v. Holden, L. Rep. 7 Eq. 488; 20 L. T. Rep. N. S. 357;

Springhead Spinning Company v. Riley, L. Rep. 6 Eq. 331; 19 L. T. Rep. N. S. 64;

Clerk v. Freeman, 11 Beav. 112.

Cotton, Q.C., Cohen (Common Law Bar), and *F. Thompson* for the defendants.—We need show only that the committee have acted *bona fide* in making the entry, which is their candid opinion, and which it is their duty to publish. There is no violation or threatened violation of any legal right. The words complained of do not mean "unseaworthy." The standard of merit required may be high, but the plaintiffs have previously had the benefit of it, and must take also the correlative disadvantage. In *Springhead Spinning Company v. Riley* the question was as to jurisdiction, and there was a criminal offence. In *Dixon v. Holden* the statement was false and libellous. We admit that if the defendants' act was libellous, or would give rise to an action, the court would interfere, but no action would lie in this case. They referred to

Starkis on Libel, 3rd edit. pp. 41, 42;

Pater v. Baker, 3 C. B. 868; 11 Jur. 370; 16 L. J. 124, C. P.

Glasco, Q.C. replied, and referred to

Evans v. Harlow, 5 Q. B. 624; 13 L. J. 130, Q. B.; 8 Jur. 571.

The VICE-CHANCELLOR said that the plaintiffs had proved that the vessel was a first-class vessel, registered at Lloyd's as *A1*, and that the alteration which had been made in her was not calculated to weaken her, but that the entry in the defendants' registry was calculated to injure her, and had done so. But everyone entering the association must know that the committee were to exercise their own discretion as to the class in which they would place a vessel in their register. The plaintiffs had already submitted the *Tyne Queen* to the inspection of the society, and had, in his Honour's judgment, bound themselves to admit the society's right to form its own opinion as to her merits. The whole book was a matter of opinion, and if in the honest exercise of their judgment the committee thought that the vessel did not come up to their standard, they had a right to enter that in their books. But what was the meaning of the entry "class suspended?" Did it mean any more than that at present the society had not made up their minds as to how the vessel was to be classed? If that were so they had a right to enter that. There was no malice, no want of truth or plain dealing on the defendants' part. No doubt the plaintiffs had sustained injury, but it was through their own mistaken view. If they had been willing to expend 200*l*. on a ship which was worth 25,000*l*., she would have remained on the register under her former classification as "twenty years red." But considering that her class had been suspended in 1871, that she had been used since, and the evil had only just been found out, his Honour was of opinion that the plaintiffs were barred from relief by lapse of time, if by nothing else.

Motion refused.

Solicitors: *G. L. P. Egge and Co.*, for Garnett and Turbat; *Field, Roscoe and Co.*

V.C. B.]

LONDON AND PROVINCIAL MARINE INSURANCE COMPANY v. SEYMOUR.

[V.C. B.]

V.C. BACON'S COURT.Reported by the Hon. ROBERT BUTLER and F. GOULDS,
Esq., Barristers-at-Law.

Wednesday, Dec. 10, 1873.

LONDON AND PROVINCIAL MARINE INSURANCE
COMPANY v. SEYMOUR.*Fraud—Action at law on policy of insurance—
Relief in equity—Cancellation.*

The defendants brought an action at law against the plaintiffs on a policy which, with another policy, had been effected by gross fraud. There being several actions arising out of the same transaction, all the actions but that of the defendants were stayed, and a special case was agreed upon, and judgment was to be delivered of law upon the facts stated and found.

The facts showed gross fraud on the part of the plaintiffs at law, and judgment was given against them.

Held, that the defendants at law were entitled to a decree in equity for cancellation of both the policies.

THE bill in this suit was filed against George Seymour and certain shippers and other persons interested in two policies of insurance effected with the plaintiff company by Seymour, and the relief sought by the amended bill at the hearing, was that the policies might be cancelled so far as concerned the plaintiffs.

The policies, which were effected upon certain goods which were shipped on board the British vessel *Peterhead*, were dated the 3rd Dec. 1862, and the 10th Dec. 1862, and were for the sums of £3000 and £3000 respectively.

At the time the policies were effected, a state of war was existing between the United States of America and the Confederate States. At this time the ports of the Confederate States were blockaded by the United States, but the mouth of the Rio Grande, which divided Texas from Mexico, was not included in the blockade, and neutral commerce with the port of Matamoras, which was on the Mexican side of the Rio Grande, was, with the exception of contraband of war, entirely free.

The goods covered by the policy were shipped by various persons, and comprised, besides innocent articles, certain articles contraband of war, and were, as it afterwards appeared, intended from the beginning to go to Matamoras, not to be disposed of there as part of the merchandise of such port, but for the purpose of being transhipped to Texas, and delivered to the Confederate Government.

The plaintiffs were not aware when they subscribed the policies of the nature of the goods intended to be covered by the policies, but it was represented to them that no contraband of war would be allowed to be carried on board the vessel.

The vessel sailed from London in Jan. 1863, and on her way was captured by a vessel of the United States, and the vessel and cargo were condemned and forfeited.

The defendants thereupon commenced an action at law against the plaintiffs on the policy of the 10th December 1862, in the Court of Common Pleas, and other actions also were brought against the underwriters. In November 1863, an order was made staying all the actions except one, and the action ultimately proceeded with was that by

the defendants against the plaintiffs on the policy of the 10th December 1862. The original bill in this suit was filed on the 31st January 1866, praying that the last-named policy might be cancelled, and the defendants restrained from proceeding with the action, but the bill was amended on the 19th February following, stating further as follows: That the said action came on for trial in the sittings after Michaelmas Term 1866, when a special case was ordered to be stated for the opinion of the court, and that by the order it was directed that the facts found in the special case might be used in the suit in Chancery. The amended bill also stated that an action was pending against the underwriters on the policy of the 3rd December 1862. The amended bill prayed that both the policies might be cancelled so far as concerned the plaintiffs.

The special case was argued in Trinity Term 1872, when judgment was given for the defendants in the action.^(a)

Kay, Q.C. and A. G. Martin for the plaintiffs.—The court will entertain this suit, though there is an action at law with a complete defence. The only remedy in such a case as this is to file a bill to set the policy aside. The court will take the verdict of the common law court, and if the court is satisfied with the result of the action on one policy it will stay proceedings on both by ordering them to be given up. They cited

De Costa v. Scamiret, 2 P. Wms. 109;

India and London Life Assurance Company v.

Dalby, 4 De G. & Sm. 462;

British Equitable Assurance Company v. Great

Western Railway, 10 L. T. Rep. N. S. 426; 38 L. J.

132 Ch.; s. o. on app. 20 L. T. Rep. N. S. 422; 38

L. J. Rep. 314, Ch.;

Travill v. Baring, 4 De G. J. & Sm. 318; 10 L. T. Rep.

N. S. 215;

Hoare v. Bremridge, L. Rep. 8 Ch. 22; 27 L. T. Rep.

N. S. 583;

Whittingham v. Thornburgh, 2 Vern. 206.

Little, Q.C., De Gez, Q.C., Heath, Dundas Gardiner, Westlake, and Linklater for the defendants.—There is no necessity for a double litigation. The only question is whether the means of this court are greater than those of a court of law, but the constituted proceedings at law are amply sufficient. There can be no object in cancelling a policy after a verdict against it in an action. In *De Costa v. Scamiret* it does not appear that any action had been brought. They cited

Ochsenbren v. Popelier, L. Rep. 8 Ch. 695; 28 L. T.

Rep. N. S. 56.

Kay, Q.C. was not called upon to reply.

The VICE-CHANCELLOR.—I thought that a man who had been defrauded had a right to come to this court to be relieved. This is an attempt to confuse the plain equity of the case by referring to the action at law. There was an agreement for a special case, and that judgment should be delivered upon the facts. Those facts show as gross a fraud as could be expressed in words. I cannot hesitate to make the decree for cancelling the policies.

Plaintiffs' solicitors, *Walton, Bubb, and Walton*. Defendants' solicitors, *Travers, Smith, and De Gez; Phelps and Sidgwick; Elmslie, Forsyth, and Co.; Linklater and Co.*

(a) For a report of the hearing of the special case, the material facts of which are incorporated in the statement in this report, see *Seymour v. London and Provincial Marine Insurance Company* (ante, vol. 1, p. 423; 41 L. J. 193, C. P.); affirmed, 42 L. J. 111, C. P.; 37 L. T. Rep. N. S. 417.

V.C. B.]

BAXTER v. CHAPMAN AND OTHERS—HATHERING v. LAING.

[V.C. B.]

Tuesday, Dec. 16, 1873.

BAXTER v. CHAPMAN AND OTHERS.

Bill of exchange—Bills of lading—Acceptance—Misrepresentation.

The U. Bank presented a bill of exchange to B. and Co., the drawers, for their acceptance, accompanied by a ticket representing that the bank held bills of lading to cover it. B. and Co. thereupon accepted the bill relying on the statement that the bank held bills of lading which both parties thought to be genuine. The bills of lading had been forged by the drawer of the bill of exchange.

Held that B. and Co. were not entitled to demand from the bank genuine bills of lading before paying the amount of the bill of exchange.

THE bill in this case was filed to obtain a declaration that the plaintiffs were not liable in equity on a bill of exchange for 5832l. 4s., which had been accepted by them, unless the defendants or some of them handed over to the plaintiff's genuine bills of lading of certain bales of cotton, and to restrain a threatened action at law against the plaintiff's on the bill. The facts were as follows: The plaintiff Baxter carried on the business of a merchant and commission agent in New York, under the firm of A. Baxter and Co., and carried on the same business with the two other plaintiffs, Steedman and Coates, at Liverpool, under the firm of Baxter, Steedman, and Coates. The defendant Chapman was the registered public officer of the Union Bank of London, and the other defendants were the firm of F. Schuchardt and Son, G. B. Shute, who carried on business in New Orleans as an exporter of cotton to England, and the bank of New Orleans.

In May 1870, Shute having arranged with the plaintiff Baxter that he would consign to the plaintiffs Baxter, Steedman, and Coates, certain cotton, by the ship *William Cummings*, shipped 350 bales accordingly, and sent to Baxter, Steedman, and Co., the invoice and a letter as follows:

New Orleans, 26th May, 1870.

Messrs. Baxter, Steedman, and Co., Liverpool.

Dear Sirs,—I have much pleasure in handing you the inclosed invoice of 350 bales, per *William Cummings*, and beg your kind protection of my draft for the advance of 5832l. 4s.—Yours truly,

GEORGE B. SHUTE.

The bill was drawn by Shute on the plaintiffs at sixty days sight, and was dated 25th May 1870. The bill was sold by Shute to the New Orleans Bank, who received what purported to be, and what they believed to be, the bills of lading of the cotton.

The bill of exchange was indorsed by the New Orleans Bank to the defendants Schuchardt and Son, their agents, who forwarded it, and the supposed bills of lading, and also a letter by which the bales of cotton had been hypothecated to meet the bill, to the Union Bank of London, where they arrived about the 12th June 1870. The Union Bank sent the bill to their agents at Liverpool, in order that they might get it accepted by the plaintiffs. The Union Bank had attached a ticket to the bill of exchange as follows:—"The Union Bank of London holds bills of lading for 350 bales cotton, per *William Cummings*."

The plaintiffs accordingly accepted the bill of exchange on 13th June 1870, believing that the Union Bank held genuine bills of lading, and the bill remained in the possession of the Union Bank.

The *William Cummings* arrived at Liverpool at

the end of July 1870, and on the plaintiffs being applied to by the Union Bank to know whether they were desirous of retiring the bill, their brokers sent to the Union Bank the customary undertaking that on receiving the bills of lading they would hold them and the property therein represented in trust to secure the payment of the bill. It was subsequently discovered that the supposed bills of lading held by the Union Bank were forgeries, the genuine bills of lading being held by a firm of J. N. Beach and Co., who were also correspondents of Shute, and who claimed to hold them against another bill of exchange drawn upon them by Shute.

The plaintiffs on their bill of exchange becoming due refused to pay the amount to the Union Bank except on receiving in exchange the genuine bills of lading; and on the Union Bank threatening to bring an action against them for the amount, they filed their bill in Aug. 1870, stating, in addition to the above-mentioned facts, that Shute had no authority to draw bills upon them except against bills of lading, and praying as above.

Benjamin, Q.C. and W. F. Robinson, for the plaintiffs.—The question is merely between the plaintiffs and the New Orleans Bank. The plaintiffs accepted the bill only on the representation that the Union Bank held bills of lading for the cotton. We do not put the case on the ground of guarantee or warranty, but merely on the ground of a statement of fact. They referred to

Leather v. Simpson, ante, vol. 1, p. 5; L. Rep. 11 Eq.

298; 24 L. T. Rep. N. S. 326;

Gomperts v. Bartlett, 2 Ell. & Bl. 840.

Kay, Q.C., Jackson, Q.C. and Stevens, for the defendants, were not called upon.

THE VICE-CHANCELLOR said that unless there was a representation by the Union Bank that they held good bills of lading, the plaintiff's case must fail. He was of opinion that the plaintiffs had failed to show such a representation as was necessary to found their argument. The case was that of an ordinary mercantile transaction in good faith as between the plaintiffs and the Bank, and was covered by the authorities referred to. The bill must be dismissed.

Plaintiffs' solicitors, Field, Roscoe and Co., for *Baxter and Co., Liverpool*.

Defendants' solicitors, Lyne and Holman.

Dec. 12 and 13, 1873.

HATHERING v. LAING.

Broker's lien—Mate's receipt—Endorsement—Bills of lading—Hypothecation.

C. and Co. were cotton brokers in Bombay, who used to buy and ship cotton for H. and Co., retaining the mate's receipts for the cotton until the payment of their charges. C. and Co. having purchased and shipped for H. and Co. a quantity of cotton, took receipts from the mate in the name of H. and Co., which were endorsed to them by H. and Co.

H. and Co. obtained from the captain of the ship, to whom C. and Co. gave no notice of their lien, bills of lading for the cotton which were hypothecated to a firm of bankers who also had no notice of C. and Co.'s claim:

Held, that C. and Co.'s lien was gone when they had shipped the cotton; that the bankers' security

V.C. B.]

HATHESING v. LAING.

[V.C. B.]

was not affected, nor the captain chargeable with default.

The plaintiffs were a firm of cotton brokers carrying on business in Bombay under the name of Currumchund Fremchund, and the principal defendants were a firm of merchants (who also carried on business in Bombay under the name of Harbord and Co., and in London under the name of Harbord, Wilkinson, and Co.), the Comptoir d'Escompte de Paris, which was a corporation of bankers carrying on business in Bombay, Paris, and London, and James Laing and Mary Gourley, the owners of the steamship *Alabama*. The bill prayed a declaration that the plaintiffs were entitled to have delivered to them certain bales of cotton comprised in two mate's receipts, or to a lien on the cotton for the purchase money, or that the defendants Laing and Gourley were liable to make good to the plaintiffs the value of the cotton, and an injunction restraining the delivery of the cotton to the Comptoir d'Escompte, the present holders of the bills of lading therefor.

The bill stated as follows:

For some time previous to the month of May 1870, the plaintiffs used in the course of their business to purchase in Bombay cotton for Harbord and Co, the course of business being that the plaintiffs should pay for the cotton and have it delivered to themselves and load it on board ship at Bombay, taking the usual receipts for the cotton from the mate or officer in charge of the ship, which receipts were retained by the plaintiffs and taken by them to the firm of Harbord and Co., in order that the receipts might be endorsed to the plaintiffs by the firm of Harbord and Co., without the firm of Harbord and Co. at any time having possession of them. The plaintiffs so kept the receipts in order that they might preserve their right to the possession of the cotton, and the receipts so kept and endorsed to them were retained by them till the cotton represented by the receipts was paid for by Harbord and Co. Upon such payment the receipts were handed over to Harbord and Co., in order that they might present them to the captain of the ship and obtain bills of lading which they could not get without the receipts.

In the beginning of the year 1870, the plaintiffs having received orders from Harbord and Co. to purchase for them a large quantity of cotton, such cotton was purchased by the plaintiffs' agent, Currumchund, and according to the usual course of business between the plaintiffs and Harbord and Co., it was loaded on board the *Alabama*, then commanded by Captain Bland. Amongst the cotton were two lots of eighty and eighty-two bales, the subject of the suit, for which receipts were given to Currumchund by the mate of the ship. The receipts were taken in the name of Harbord and Co., and were taken by Currumchund to Harbord and Co., and were without his parting with the possession of them, handed to Harbord and Co., who endorsed them and handed them back to Currumchund as the plaintiffs' agent. A few days after the endorsement of the receipts, Harbord and Co. requested the plaintiffs, or Currumchund, to give up the receipts for the eighty and eighty-two bales, in order that Harbord and Co. might get from the captain of the ship bills of lading for the cotton, but they refused to do so without first receiving payment for the cotton. The bill then stated, that upon such refusal, Har-

bord and Co. induced the captain of the ship improperly to sign and hand to them bills of lading for the cotton, represented by the mate's receipts. The bill of lading was dated 30th May 1870.

The bill stated that the plaintiffs' solicitors, on the 13th June 1870, by a letter, demanded from the captain bills of lading, to be signed by him, for the eighty and eighty-two bales, but he refused, on the ground that he had already signed and delivered other bills of lading for the same cotton to Harbord and Co.

The bills of lading which had been signed by the captain, and delivered to Harbord and Co., were hypothecated with the Comptoir d'Escompte de Paris, as security for advances made by them to Harbord and Co.

The *Alabama* sailed from Bombay on the 13th June 1870, and arrived at Liverpool in August following.

The plaintiffs filed their bill on the 16th Sept. 1870, and prayed as above.

There was no question that the Comptoir d'Escompte de Paris had made their advances on the bills of lading, without notice of any other claim.

The affidavit of Currumchund and another stated as follows:

Par. 10. The said cotton mentioned in the said set of bills of lading and mate's receipts, so produced and marked as aforesaid was shipped by the direction of me, this deponent, as moonish and agent for the said firm of Currumchund Fremchund, in the name of the said firm of Harbord and Co.

Par. 11. In accordance with the usual course of business, the said receipts, marked respectively B and C, were taken by me as the agent of the said firm of Currumchund Fremchund to the said firm of Harbord and Co., and without my parting with or quitting possession of the same, the said receipts were indorsed by the said firm of Harbord and Co., as appears from the said receipts, and immediately after such indorsement the said receipts were handed back to and retained by me as the agent of the said firm of Currumchund Fremchund.

Par. 12. A few days after the said mate's receipts were so indorsed and handed back to me as aforesaid, the said firm of Harbord and Co. requested me to give up the said receipts, in order that the said firm of Harbord and Co. might be enabled to obtain bills of lading for the same from the captain of the said ship, but I refused to deliver up the said mate's receipts without first receiving payment for the said cotton, as I did not wish to let the said firm of Harbord and Co. have possession of the same without the usual payment.

Evidence of two Bombay merchants, as to the custom of Bombay, was produced as follows:

We say that, according to the usage and custom of merchants in Bombay, such mate's receipts represent the property in the goods therein specified, and are always negotiable in the Bombay market, and are sold and pledged, and pass the property in such goods, in the same manner as bills of lading. And that captains or masters of ships are bound to have the mate's receipts returned to them before they sign any bill or bills of lading for the goods mentioned in such mate's receipts.

The evidence of Capt. Bland was, that he never signed any bills of lading the mate's receipts for which were not before him, and that no document demanding bills of lading on behalf of the plaintiffs had ever been delivered to him.

Edlis, Q.C. and Moreshead, for the plaintiffs.—According to the custom of Bombay, the mate's receipts are considered, to a certain extent, as the title deeds of the property, and are negotiable. If they never left our hands, the captain could not properly sign bills of lading—the production of them is a condition precedent to the signing of the

V.C.B.]

HATHESING v. LAING.

[V.C.B.]

bills of lading. We are at least entitled to come upon the owners of the ship. They cited

Craves v. Ryder, 6 Taunt. 433;
Ruck v. Hatfield, 5 B. & A. 632;
Schuster v. McKellar, 29 L. T. Rep. O. S. 225; 7
 K. & B. 704; 26 L. J. 281, Q. B.;
Turner v. Trustees of Liverpool Docks, 20 L. J.
 300, Ex.; 6 Er. 543;
Evans v. Nicholl, 3 Man. & Gr. 614.

Key, Q.C. and B. D. Rogers, for the Comptoir d'Escompte.—We are purchasers for value without notice. Where there has been a fraud upon the shipper, such as by stealing the bills of lading, it may be that they cannot be indorsed so as to give a good title; but this is a case of the shipper himself parting with the bills of lading. That is the distinction between this case and *Gurney v. Behrendse* (3 Ell. & Bl. 634). Harbord and Co. were the only persons who could give a bill of lading. No fraud committed by persons other than them and their indorsees could affect the indorsees' title. They cited

Pense v. Glesher, 2 Mar. Law. Cas. O. S. 394; 15
 L. T. Rep. N. S. 6; L. Rep. 1 P. C. 219;
Cornage v. Thompson, 5 Moo. P. C. 165.

Miller, Q.C. and E. Beaumont, for the ship-owners.

Buckley and H. Giffard for other parties.

Eddis, Q.C. in reply.

The VICE-CHANCELLOR.—This case is very important, if the several topics which have been urged have any application to it, or ought to regulate the decision; but, in my opinion, it can be disposed of upon much shorter grounds, and for the consideration of those legal grounds, I turn first to the bill itself, and I there find that the course of business between the plaintiffs and the firm of Harbord and Co. was, that the plaintiffs should purchase and pay for the cotton, and have it delivered to themselves. [His Honour then went on to describe the course of business between the plaintiffs and Harbord and Co., and continued.] That is the course of trade as it is described, and that as I read it is, that the plaintiffs were brokers for Harbord and Co., and bought on behalf of Harbord and Co., the cotton in this case, which they had a right to retain until they were paid their charges, which charges included the amount that they had laid out for their principals, and that that would give them a lien is beyond all doubt; but any other title than that of lien is not pleaded and cannot, according to the circumstances of the case, exist. If the value of the cotton, after the plaintiffs had bought it for Harbord and Co., had increased, no matter to what extent, can it be doubted that Harbord and Co., upon this statement of the course of business, would have been entitled to the increase, upon paying the price contracted for? If there had been any diminution in the value, the plaintiffs would have suffered no part of the loss occasioned by that diminution. Brokers they were according to their own statement—brokers with a lien, and brokers generally, if not always, have a lien upon the goods which they purchase for their principals, and the possession of which they retain. Other rights than that they do not allege they have, and it would be inconsistent with every fact of the case to suppose they had any other right. Then they go on to say, "Among the said cotton were two lots of eighty and eighty-two bales," and so on; and, in accordance with the usual course of business,

"they were respectively put on board the said ship." Whatever their possession was, their right being only to a lien, that lien was discharged as to the possession of the property in the bales of cotton when they put them on board Harbord's ship. There is no question about stoppage *in transitu*. They were Harbord and Co.'s goods from the beginning, subject to Harbord and Co. paying the price; they were by Harbord and Co.'s agents, the brokers, put on board Harbord and Co.'s ship, and a receipt was taken from the mate in the name of Harbord and Co. The bill states it distinctly, and the affidavit, if anything, more so. [His Honour then read par. 10 of Curramchund's affidavit, and continued:] That is to say, the lighter coming alongside Harbord and Co.'s ship, delivers the goods on to the ship, and takes a receipt, describing the things which have been so delivered to or on account of Harbord and Co. The broker's lien was then gone. I am at a loss to see that they had any other lien or right, or that they can by any perversion of terms be called vendors. If they were vendors to anybody, they were vendors to Harbord and Co., through their agency, and there were no other vendors, properly speaking, in the case. [His Honour then read from pars. 11 and 12 of Curramchund's affidavit, and, referring to par. 11, continued.] Now, the bill does not state when that was done, nor does the affidavit state when that was done, and when that was done appears to me to be a point of vital importance in this case, because from the statements and from the nature of the transaction, it is quite clear that the plaintiffs thought that the mere possession of the receipts was nothing. The possession of the receipts by them was simply an act of agency, and in proper course the receipts ought to have been handed to Harbord and Co., and so the plaintiffs thought. They felt they had parted with their lien; that the receipts held by them were good for nothing, for they were Harbord and Co.'s receipts, and, therefore, they procured an indorsement to be made upon them.

What is the effect of that indorsement? It is a transfer of the right which Harbord and Co. had by virtue of the delivery of the mate's receipts to the plaintiffs, and it is upon that that they claim. Upon that the whole of their complaint against the present defendant [i.e., the Comptoir d'Escompte] is founded. It is the indorsement on the receipts, and the possession of the receipts, upon which they found their claim, nor could they claim otherwise, for in everyone of the cases that have been referred to, in which the mate's receipts are mentioned, they are mate's receipts taken by the true owner of the property, in order that his right to and possession of that property may not be questioned or disturbed by the fact of his having deposited the goods on board somebody else's ship. All that the skipper has to do, under those circumstances, is to satisfy himself that the receipt expresses no more in quantity and description than the goods which are then received by him. Having done that, he has discharged his duty; he has given vouchers which prevent him ever thereafter saying he did not receive the bales of cotton. That is the extent of his liability, and if he discharges himself from that liability, the possession of the mate's receipts by somebody else than Harbord and Co., does not signify at all, and as between himself and Harbord and Co., it is not necessary even to produce them. The goods were

V.C. B.]

HATHESING V. LAING.

[V.C. B.]

delivered as Harbord and Co.'s goods; he acknowledged the receipt of them for Harbord and Co., and gave it to the man who came alongside, that he might carry it to whomever it belonged. It went into the hands of the plaintiffs, and it was held by them to be of no earthly use to them until they got a transfer of Harbord and Co.'s rights.

Now, in my opinion, it would add greatly to the perils of the sea and the perils of commerce, if I were to hold, in opposition to every principle which regulates such transactions in this court, that they acquired that title, which they say they had acquired by means of indorsements, of which they gave no notice to the captain or to anybody else, until after it was too late for the captain to do anything for them. Without such notice being given, I am of opinion that their right cannot avail against the rights which the defendants acquired through the bills of lading. See to what mischief it might lead, without saying at the present moment a word about the custom—what difference is there between the mate's receipts, taken as the plaintiffs took them, and any other *chuse in action*, or any other chattel? A book debt, a policy of insurance, or anything else, may be well assigned in equity, but the assignment is of no avail except notice is given to the person who is to be charged with it. The captain, from the time he receives the goods, is chargeable with those goods. If he has no notice that any other owner in the world exists but the man in whose name he has given the receipt, what liability does he incur when he either transfers or assigns the bills of lading, or pays a debt, or anything else to the person who, as far as he is concerned, is the sole owner? It is the universal principle, and in my opinion it is directly applicable to the transaction in this case. If I were to consider that that principle required any support from the facts of this case, nothing can by any possibility be stronger than they are. Here is a captain, sailing from the port of London, going to Bombay for the first time, knowing nothing about local customs, but knowing very well what his duty as skipper is; he is for fourteen days in the port of Bombay, half of which time is occupied in delivering the cargo that he brought there and the other half in taking in the new cargo. During that time, as I gather, a great many things were done. The plaintiffs here say that for 965 bales they got bills of lading, and yet upon none of those occasions, when those bills of lading were applied for, was any notice given to the captain, or any intimation to him that they had a claim upon those goods. They were assignees, it is said, by the indorsement. Surely, for the common protection of innocent persons in mercantile transactions, it was incumbent upon them to give him notice. They saw him sign bills of lading daily; they knew he might sign a bill of lading at any time, and there was not the slightest intimation or notice given to him at any time until, according to their statement, the 13th June, a date which I will mention on the subject hereafter. The bill of lading bears date the 30th May. On the 30th May, when the goods were in the possession of the captain, he, upon the request of the only person he knew of in the transaction, at the place of business of Harbord and Co., the proper place for the transaction of such matters, is called upon to sign, and he does sign, a variety of bills of lading, 965 bales being comprised in those bills. Now the captain's account of what he did upon that is very clear, and I shall mention it a little

hereafter when I come to deal with the evidence, but looking at the case only as a matter of law, what is there to induce me to say that by the transfer by Harbord and Co., by indorsement, of the mate's receipts, no notice having been given to the captain, he is in the slightest degree in default. I can apply no principle to the case as the plaintiffs themselves state it.

Then the evidence is not to be disregarded, and the evidence stands thus: With the mate's receipts in their possession, the plaintiffs' agents go to Harbord and Co. to desire them to indorse the notes; I have already said to what end the indorsements were required. The mate's receipts, if they were the things that had the effect the plaintiffs here contended for, no indorsement in the world would make good. Then between the 30th May and the 13th June the ship was loaded. There is no pretence that any application was made to Capt. Bland till the 13th June, and upon that there is a conflict of statement. During that period the bills of lading were signed, and the ship sailed, I suppose, on the 13th June. Then the evidence on the part of the plaintiffs is, that having these notes so indorsed, they never parted with the possession of them. That expression is not satisfactory, since they were getting these other bills of lading signed. Considering the nature of the transactions, the hurry with which they were performed, as appears by Capt. Bland's evidence, his sole business being to see that he did not incautiously or improperly sign bills of lading, the business of Harbord and Co. being that they should produce mate's receipts for the goods for which they required bills of lading, he says, that he never signed any bills of lading for which the receipts were not before him. Upon comparing the evidence I cannot hesitate to say that I adopt and believe what Captain Bland says upon this subject, and it is perfectly consistent with the plaintiffs' case, that although they did not part with the possession, the mate's receipts were before Captain Bland at the time. [Then referring to the conflict of statement as to the demand made upon Captain Bland to sign a bill of lading to the plaintiffs, his Honour said that upon the evidence he must adopt Captain Bland's statement. Then referring to the evidence of the Bombay merchants as to the custom of Bombay, his Honour continued:—]

But that must be read with the proper understanding of the custom. They represent what? Not that the holder of the note, but that the person in whose favour the note is made, is entitled to the possession of the goods in question. But is that a custom I can adopt? Is it a local custom you can fix upon a captain from Stepney who saw Bombay for the first time in his life in 1870? That may be a custom between the parties concerned, but even taking it in the terms they express it, there is not a word about indorsing the mate's receipts, nor any suggestion that the indorsement, if it is of any use at all, does not create a new title, of which title notice must be given. They go on to say what is clear [i.e. as to the captain's being bound to have the mate's receipts returned to them before signing bills of lading]. Why should I adopt that? It cannot be true. Suppose a mate's note to be lost, are the goods the captain's, so that he cannot be called upon to sign a receipt?

V.C.B.]

ATTORNEY-GENERAL v. TERRY.

[ROLLS.]

If the captain satisfies himself that the goods are on board, then the mate's receipts become to him a matter of perfect indifference. He is told, and he knows they are the goods of Harbord and Co., therefore he signs the bill of lading. [Then referring to the custom of the brokers to retain the mate's receipts by way of lien on the goods shipped by them in the name of a firm, his Honour continued:] The custom cannot override the plain well established law, which is, that to assert a lien you must be entitled to possession. Capt. Bland did not, as he says, sign the bill of lading without seeing the receipt, and if he had signed it without seeing the receipt at the instance of the plaintiffs, I think he would have been perfectly justified, and that nobody would have had any right to complain. Well, if that be so, and that is the law and conclusion to be drawn from the facts, what case is there as far as the Comptoir d'Escompte is concerned? In the most ordinary course of trade, without notice, I can see nothing which could at all affect the validity of the security in their hands.

But then come the owners, and they are sought to be made liable upon the authority of *Schuster v. McKellar*. *Schuster v. McKellar* does not furnish the slightest foundation for any such contention. In *Schuster v. McKellar*, the owners had given directions to the captain to do what he did in storing the goods at Calcutta, and it was by his unjust interference that he was made liable. The question was put to the jury, and it was found by the jury against the owner, and the judges were of opinion that that was properly so found, and they saw no reason to disturb it, it being a question of fact, and the law applicable to it being the result of the facts. But it has no kind of application to the present case, and so far from being any authority for it, in that case the only question that was considered was, whether *Schuster* who had shipped the goods was the real owner of the goods. Then, having sent the goods on board the particular ship, and having taken a mate's receipt, which was an acknowledgment that the goods were his and that the skipper held them for him, he is afterwards induced to part with the receipt for a short time. Then he gets them back, but Cole persuades the captain to sign the bill of lading. He had no more right than I have, or anybody else has, either with regard to the bill of lading or any other transaction to assign or give away another man's property. But in all the cases that Mr. Eddis referred to, the validity of the mate's receipts was only in question because they were title deeds held by the owner of the goods. Here the plaintiffs never were the owners of the goods in the true sense, they were not their goods, they were not cotton merchants, but they were cotton brokers, and they thought they had a right to retain these goods until they were paid their purchase money, but they have parted with it, and they try to perfect their title by getting Harbord and Co. to endorse the receipts to them. Now I observed that the time when that transaction took place was of most vital importance. The plaintiffs have brought their case into court without saying when that took place, and that it might take place afterwards is perfectly clear, and thereby a very gross fraud might be committed if I yielded to the claim that the plaintiffs have made.

In my opinion there is no ground whatever upon

which the suit can be sustained against the Comptoir d'Escompte, or the owners of the ship. The other parties who appear are merely ornamental parties. Therefore I must dismiss the bill with costs against the defendants whom I have mentioned, and they must also pay the costs of the other parties.

Plaintiffs' solicitor, E. M. Hors.

Defendants' solicitors, Lyne and Holman; Loose, Nelson, and Jones.

ROLLS COURT.

Reported by G. WALBY KIRK and H. GOSFORTH, Esqrs.,
Barristers-at-Law.

Dec. 9 and 10, 1873.

ATTORNEY-GENERAL v. TERRY.

Navigable river—Erection of piles in bed of river by wharf owner—Obstruction—Nuisance—Injunction.

An information was filed by the Attorney-General at the relation of the Mayor and Corporation of Sandwich to restrain by injunction the defendant, who was the owner of a wharf abutting on the river Stour, a public navigable river forming the harbour of Sandwich, from erecting a structure, having its foundation in the bed of the river, which interfered with the navigation:

Held, that no person has a right to put an obstruction in the bed of a navigable river, although at the time it may not be a nuisance.

Held, also, that the erection of the structure was a nuisance to persons using and navigating the river; that the erection being for the purposes of the defendant's trade, it was too remote a benefit to the public to say that the encouragement of the trade of a single individual was a benefit to the public; and that the injunction must be granted. The question whether erections made in a harbour are a nuisance or not depends on whether, upon the whole, they produce public benefit, not giving to the words "public benefit" too extended a sense, but applying them to the public frequenting the port. The benefit to the public must be a direct benefit.

Re v. Russell (6 B. & C. 586) disapproved of. (a)

(a) The case of *Re v. Russell* has been twice called in question within a short period. In the case of *Jolliffe v. The Watsoy Local Board* (ante p. 140), Deaman, J., said, "I have long understood that *Re v. Russell* was practically overruled, and I am of opinion that *Re v. Ward* (4 Ad. & Ell. 381), does practically overrule it. Since the date of *Re v. Ward* no case following *Re v. Russell* can be found." Hence it may be taken for granted that *Re v. Russell* was no longer cited as of authority: (See also *Re v. Betts*, 16 Q. B. 1023.)

The right of the public to the free passage over a navigable river has always been most strenuously upheld by the courts of this country, and even was one of the rights expressly reserved by Magna Charta. Even the right of fishing was not allowed to interfere with the right of navigation, and many statutes were passed suppressing fisheries which obstructed navigable rivers: (see 25 Ed. 3, ch. 4, c. 4; 45 Ed. 3, c. 2; 1 Hen. 4, c. 12; 4 Hen. 4, c. 11; 12 Ed. 4, c. 7). The rule of law in this country seems to be that, to justify an obstruction being placed in a navigable river, there must result therefrom a public convenience which overbalances the public inconvenience caused thereby; and the word "public" must naturally be applied to such persons as use the navigable river.

In the United States no less care has been observed in securing the navigable rivers as public high-

[ROLLS.]

ATTORNEY-GENERAL v. TERRY.

[ROLLS.]

THIS was an information filed by the Attorney-General at the relation of the Mayor and Corporation of Sandwich to restrain by injunction the defendant, who was the owner of a wharf abutting on the river Stour, from erecting or allowing to remain any piles or works in or above the river beyond the line of his wharf, and from otherwise obstructing the free navigation of the river.

The facts of the case are fully stated in the judgment.

Roxburgh, Q.C., and *Hanson* in support of the information cited:

Bickett v. Morris, L. Rep. 1 H. L. Sc. 47; 14 L. T. Rep. N. S. 835;

Attorney-General v. Earl of Londesborough L. Rep. 7 Eq. 377; 50 L. T. Rep. N. S. 64.

Fischer, Q.C. and *Beaumont* for the defendant contended upon the authority of *Rees v. Russell* (6 B. & C. 566) that the proposed erection would be beneficial to the public. They referred to *Hale's Treatise De Jure Maris*, para. II. cap. 5; *Hargreave's Law Tracts*, p. 85, where he says:—"An erection in a river is not to be deemed a nuisance simply because it infringes on the water highway."

They also cited:

Rees v. Ward, 4 Ad. & E. 384;

Attorney-General v. Sheffield Gas Consumers' Company, 3 D. M. & G. 304.

Sir G. Jessel.—The facts of this case, on which there is really no controversy whatever, or no substantial controversy, are as follows: The river Stour appears to be a small river. I am not personally acquainted with it, though I believe the court is supposed to know the topography of all England. It is a small navigable river, forming the port or harbour of Sandwich. That portion of the river is a public navigable river, that is, the tide flows and reflows there, and the defendant is accused of obstructing the harbour or haven of Sandwich. Now there is no dispute that this is a public navigable river, that the soil is in the Crown, that the defendant has a wharf there, and that he has erected the works which I will mention more particularly, and which are complained of by the information. The defendant, it appears, fifteen, or at all events less than sixteen, years ago, acquired the wharf in question, now called Terry's Wharf, and at that time he did what was certainly illegal and entirely indefensible; what

no doubt many wharf owners do if they have the opportunity—he took in a portion of the river. It is clearly proved in evidence that there was a small creek or portion of the river between an old boat-house and a former wharf he bought, that he filled in this, and extended his wharf, and literally took in a portion of the river. Nobody seems to have prevented him, and he remained, and has remained ever since, in quiet possession of the wharf as far as he has extended it. In addition to that, he put a campshore outside his newly formed wharf, which projected some two feet, as I understand it, beyond the wharf, and within a short distance of the campshore he put in some sloping piles, which in the evidence are called fender piles. This structure seems to have been as much unauthorised as the extension of the wharf.

Sandwich Harbour is, or ought to be, under the especial protection of the corporation, who have an Act of Parliament which was obtained in 1847, which, although not appointing them in form and in terms conservators of the river, really gave them much larger powers than ordinary conservators have of maintaining and improving the harbour. They do not seem to have been so much alive to the interests of the harbour fifteen or sixteen years ago as they are now. They allowed these encroachments to take place without objection or resistance, the natural result of which is that the defendant now thinks that it is a hardship when further encroachments are resisted, and I am not surprised at it. Recently, that is in the course of this year, the defendant thought he would improve his wharf, and I must say he seems to have acted *bona fide*, and in the belief that he had a right to do what he is doing. What he did was this, he took away the old campshore and piles, which having been there only fifteen years; it is not pretended that he had actually any right to—I do not mean to the piles themselves, or to the campshore—but to the maintenance of them in that particular place. The time required for prescription had not run, or anything like it, so that he had not acquired any right; but although he had not acquired any right, he seems to have considered that he had, and that if he did not by his new work do much more mischief to the navigation than the old work had done, he was entitled to erect the new work. Having taken away the old structures, he put in their place three very strong piles opposite his wharf, at a distance below of something under 3ft., but at the top they were 3ft. 3in., from the face of the wharf—that is, from the face of the wharf as he had formed it fifteen years ago. Upon this he was going to put some planking, or something of the kind, so as to make a platform. Upon this platform he intended to raise a structure of beams about 22ft. in height, and then he was going to put a sort of but at the top, or an erection of that shape and appearance, which would project 4ft. 8in. over the river, and would be connected with his warehouse behind, which was no doubt a very convenient arrangement for carrying on his business, and the landing and carrying away of his goods. That is what he proposed to do, and which he partly executed by putting in the piles. It seems he had gone through the formality of asking the consent of the Corporation as being the recognised guardians of the public interests at this part of the town, and that permission had been refused. Thereupon he

ways. By various Acts of Congress it is provided that all the navigable rivers within the United States territory shall be and remain public highways, and it must be remembered that there it is even more important than in this country, because the United States' rivers are navigable far away above the highest point to which the tide reaches, and form in many cases the principal means of communication from point to point. There, however, the question of the right to obstruct has usually arisen in cases where bridges have been erected across navigable rivers, and it has always been held that bridges if erected by and in accordance with State authority, so long as they were not a material obstruction to the navigation, might be erected. At the same time it is there universally held that obstructions to navigation whether by bridges or in any other manner, without direct authority from the legislature within whose jurisdiction the waters lie, are public nuisances: (see *State of Pennsylvania v. The Wheeling Bridge Company*, 13 How. (11 S. Rep. Cl.) 518; *Williams v. Beardsley*, 2 Carter (Ind.) 501; *Knox v. Chelmer*, 42 Maine, 150; *Hart v. The City of Albany*, 9 Wendell, 571; *Angell on Watercourses*, p. 743, et seq.) Before such an obstruction can become a public nuisance, the erection or works causing it must be productive of public benefit greater than the injury.—Ed.

[ROLLS.]

ATTORNEY-GENERAL v. TRENT.

[ROLLS.]

proceeded to do these works without permission, and the result was the filing of the present information.

Now, the information states the facts pretty well as I have stated them, but also refers to the towing path. I am not going to found my judgment on the towing path, and therefore I shall state nothing more about it. Then having stated the facts, it says that the defendant has commenced certain works and they are in progress, and that the width of the channel will be substantially diminished, and the navigation will be attended with difficulty; and, moreover, the yards and rigging of the vessels passing along the same will be in constant danger of coming in contact with, and getting entangled in, the defendant's platforms and other works, and the machinery and gear attached thereto, and under the circumstances aforesaid, the defendant's work will seriously interfere with and obstruct the public right to navigate the river, and will be to the damage and common nuisance of all Her Majesty's subjects using or exercising the same. And then the 9th paragraph says: "The works of the defendant are not yet completed, but he has made considerable progress therewith, and he persists in proceeding with the construction thereof in spite of the warnings of the corporation, and he will very shortly complete the same unless restrained by the injunction of this honourable court."

It appears to me the information is founded upon two complaints. The one complaint is that the obstruction caused by the erection of the structure of the defendant will be a nuisance in the common acceptance of the term—that is, will actually impede the navigation of the river; the other ground is this, that whether that be so or not, the defendant has no right to erect such structure, and he ought to be restrained by injunction, quite independently of the fact of there being an actual nuisance or not. I think the information is entitled to succeed on both grounds.

Now, as regards the law upon the subject it is necessary to say a word or two, because an argument was addressed to me yesterday to this effect: it was said on the first ground, admitting that it is some nuisance—that is, some interference in the navigation; a little nuisance—as the counsel for the defendant stated to me to-day, yet the rights of the public as to restraining a nuisance are confined within reasonable limits, and that there may be such a public benefit arising from the works in question as would entitle the person or body erecting these works to say that the public benefit far more than counterbalance the small impediment to navigation which the works occasion, and for that some authorities were cited which I think it is well to notice. It was said that that had been decided in the well-known case of *Rea v. Russell* (sup.).

Now I must say that *Rea v. Russell*, in my opinion, is not law, and it is right to say so in the clearest terms, because it is not well that cases should be continued to be cited which have been virtually overruled, although the judges have not said so in express terms. In that case there had been some staiths erected in the river Tyne, and a very eminent judge of those days, Mr. Justice Bayley, in charging the jury had told them this—he pointed out that the staiths were erected simply for the purpose of carrying on trade. He said that "the staiths were not merely

a private benefit, for that by means of them the coals were brought to market at a smaller expense, and in a better condition, in both which respects the public were benefited; and he then left to their decision the following questions:—'Were the staiths erected in a reasonable place? Was there a reasonable space left for the public navigation in the Tyne? Were the staiths a public benefit? Did the public benefit counterbalance the prejudices done to individuals?' The jury said that in consequence of this direction they found the defendants 'Not guilty.'" That was brought before the full court, consisting of the same judge, Mr. Justice Bayley, and two other very eminent judges, Mr. Justice Holroyd and Lord Tenterden. Mr. Justice Bayley adhered to his own opinion; Mr. Justice Holroyd did not in terms agree to that; he did come to the conclusion that the verdict should not be disturbed, but, having stated the facts, he did not lay down the law quite in the same terms as Mr. Justice Bayley, but put it in rather wider terms as regards the public benefit. As I understand it, he only put the law to this extent, that the public benefit might possibly counterbalance the public injury, for really they are both public, so that, taking it on the whole, the public was benefited. Lord Tenterden disagreed. The case came, I cannot say under review, because it was before the same court, but came under discussion in the case of *Rea v. Ward* (sup.). Sir William Follett argued that case, and it was his interest to support the case of *Rea v. Russell* (sup.) as far as he could. The way he speaks of it in argument is this, "The doctrine of *Rea v. Russell* need not come under discussion, nor is there any conflict of authorities. Erections may be made in a harbour, below high water mark, and in places where vessels might perhaps have sailed; and the question whether they are a nuisance or not will depend on this, whether upon the whole they produce public benefit, not giving to the terms 'public benefit' too extended a sense, but applying them to the public frequenting the port." Now I take it that the statement in argument of Sir W. Follett of the law was a correct statement: it must not be given too extended a sense, and must be applied to the public frequenting the port. Lord Denman, in giving the opinion of the full Court of Queen's Bench, says: "The greatest weight is due to the authority of Mr. Justice Bayley, who thus charged the jury, and afterwards upheld his opinion in this court, and no person can hesitate to ascribe every quality of an excellent judge in Mr. Justice Holroyd, who agreed with him in thinking that the rule for a new trial for misdirection ought to be discharged. But when we examine the grounds of this opinion as delivered by the latter they will not be found to support in any degree the proposition noticed in the summing up," (that is—the summing up of Mr. Justice Bayley) "on the contrary, he plainly considers the topic to have been introduced as an answer to some observations invidiously made to the defendant's prejudice by the counsel who conducted the prosecution, and thinks that it must be qualified throughout the summing up, and even to its close, by its connection with that argument. Mr. Justice Bayley himself, who delivered his judgment after Mr. Justice Holroyd, takes a much wider range, maintaining the right to estimate the balance of public benefit and public inconvenience, and to take into the account of the former the advantages that may

[Rolls.]

ATTORNEY-GENERAL v. TERRY.

[Rolls.]

be derived from the change by any part of the public. He takes for an example the purchasers of coal sent from an indicted staith to a distant market. Lord Tenterden thought it wrong to submit such extensive views to the jury, and that the question ought simply to have been whether the navigation and passage of vessels over this public navigable river was injured by those erections." Now that is the final judgment, but there had been a previous judgment, a short judgment of Lord Denman, as to the whole of the case that goes into detail, and what he said was this: "My understanding as the trial certainly was that the question was much the same as that in *Ree v. Russell*, a case the authority of which has been much doubted, and is perhaps likely to be more so as it is further examined." So that it must be taken to have been the opinion of the full Court of Queen's Bench in Lord Denman's time that the summing up of Mr. Justice Bayley in *Ree v. Russell* (*sup.*), could not be supported; he does not say so in distinct and clear terms: it being the judgment of the same Court of Queen's Bench, I suppose he did not like to do so, but the effect of the judgment of the full court was, that they agreed with Lord Tenterden, and disagreed with Mr. Justice Bayley.

What really were the points on which they disagreed? I think they were two, and I think on these two points the charge of Mr. Justice Bayley was erroneous. In the first place I think the benefit, whatever it is, must be a benefit, to the public who use the navigation, or, as was put by Sir William Follett, "the public frequenting the port;" he allowed the benefit to the public in London, or in distant parts far away from the Tyne to be taken into consideration, and as I said before I think he was wrong in that. In the next place I think there was another error in the charge, because I think the benefit to the public must be a direct benefit. Now the benefit which he was considering was an indirect, and as it appears to me, too remote a benefit. It was that coals came to the London market in rather a better condition, and were possibly sold at a lower price. That does not appear to me to be a public benefit within the sense of the term in which it ought to be used when considering the question of nuisance.

Then it may be asked what is a public benefit in my view? I say it is a benefit of a similar nature showing that on the balance of convenience and inconvenience the public at that place not only lose nothing, but gain something by the erection. There are two cases in the books which will illustrate my meaning, and I think fairly show what sort of public benefit it is. The first is this: In the case of a tidal harbour of irregular shape, it may be desirable to straighten the sides, the result of which would be, of course, in the parts where you take away the water way, to diminish the area usable for navigation, and in those parts where you add to the water-way you would increase the area. If in the course of this straightening the whole of the harbour is made larger and more commodious, then I think the public benefit gained overbalances the public injury at the particular point where the navigable water is narrower, and in that sense that improvement of the harbour would not be a nuisance, and that is what I understand Lord Hale intends to say in the passage which has been referred to: (*De Jure Maris*, Part II., cap. 7; Hargreave's

Vol. II., N.B.

Law Tracts, p. 85.) Another case is this, which also appears in reported cases: Suppose you have a navigable river, and it is necessary to cross it by a bridge, and the river is too wide to allow of a bridge of a single span, you must then put one or more piers into the middle of the river, and, of course, according to the extent you introduce bridge piers or bridge arches into a navigable river, you to some extent diminish the water way, and to some extent, perhaps to a more or less material extent, obstruct the navigation. But it is for the public benefit at that spot that a public road should be carried over the river by the bridge, and that benefit may so far exceed the trifling injury, if injury it be, to the navigation that on the whole a court of justice may fairly come to the conclusion that a public benefit of a much greater amount has been conferred on the public than the trifling injury occasioned by the insertion of the piers into the bed of the river. In that case also it would be a case of public benefit that would counterbalance the public injury. (a) I give those as illustrations, but I think it must be confined as put by Sir William Follett in his argument to cases of public benefit, and not used in too extended a sense.

In this case, really, I have no evidence whatever of benefit to the public. The defendant is doing this for the purposes of his own trade; it is too remote a benefit to the public to say that the encouragement of the trade of a single individual is therefore a benefit to the public. It seems to me to be an extravagant use of the doctrine even had it been sound law as laid down by Mr. Justice Bayley in the case of *Ree v. Russell* (*sup.*), and therefore I cannot for a moment listen to the argument of the defendant on those grounds.

Is there a nuisance? Counsel for the defendant admitted a little nuisance, but I take it a little nuisance will do. The doctrine of the court is no doubt *De minimis non curat lex*; but that is something of a very trifling character. The instance given by Lord Cranworth in a case to which I am about to refer was merely putting in a single stake in the stream, something too trifling to fear dissection; but where there is really an interference with the navigation, of course it is not within that doctrine.

Then is there an interference? Upon that when you come to look at the facts there really does not seem to be much room for argument. I cannot consider the comparison which has been so often suggested, both in the evidence and in the argument, of the illegal state of things produced by the defendant before he constructed these works, and the state of things produced by the new works. I must look upon it that the defendant has not acquired a right to keep his campshore or his sloping piles there, and has chosen to remove them; that the case must be treated in exactly the same way as if they had never existed, and therefore the question is, whether erecting these piles and putting up this platform in this narrow river can, to a person of ordinary common sense, on the facts which I am about to state, be considered as an interference with the navigation. [His Honour examined the evidence as to the width and depth of the river; finding as a fact, that defendant's works mate-

(a) See *Reg. v. Bell*, 16 Q. B. 1022; 4 Cox C. C. 211; and note, ante p. 174.—Ed.

[ROLLS.]

LATHAM v. THE CHARTERED BANK OF INDIA, AUSTRALIA, AND CHINA.

[V.C.B.]

rially lessened the width of the river at a point where vessels could only pass each other just about high water, and that there was therefore a material interference; that, although it was not shown that vessels had there come into collision, it was because they only passed each other at high tide, and continued:] I am of opinion that this is a material obstruction to the navigation, and would be indistinct at low as a nuisance.

If it was necessary to rest my decision on that I should have no difficulty in doing so, but I do not think it is necessary. But there is another ground also, and a ground of very great importance, upon which I say the informant is entitled to a decree, and that is this, that no man has a right to put an obstruction in the bed of a navigable river. As I understand the law it is not an answer to say that at the moment the obstruction is not a nuisance. It may become so, a change may take place either in the mode of navigating the river, that is as regards the vessels using the river, or a new mode of constructing vessels may be adopted, or a change may take place as regards the form of the harbour itself by removing an obstruction or otherwise, which might make that usable and navigable which was not before navigable, that is to say in a useful sense, and if you allow the obstruction to remain, you allow the person erecting the obstruction to obtain by law, by reason of the lapse of time, a right to keep the obstruction there, so that when the time arrives at which the obstruction really impedes the navigation, you will not be able to remove it. It is for that reason so important that a person complaining of the obstruction, though not able to maintain an indictment for nuisance, because the actual nuisance has not yet been committed, should be able to come to a court of equity and ask that court to restrain the continuance of the obstruction. This matter has been considered several times. I will refer to two cases on the point, though they do not actually relate to a public navigable river.

The first is the case of *Bickett v. Morris* (sup.) (14 L. T. Rep. N. S. 835.) That decided this, that in the case of a private river, where there were two riparian owners, each entitled to the soil *ad medium filum aquæ*, both entitled to the uninterrupted flow of water, that neither of these could erect on his own land any structure which might be eventually, though not then, an obstruction to navigation. Now, as Lord Westbury put it, this decision establishes the important principle that an encroachment on the *alluvium* of a running stream may be complained of, without the necessity of proving that damage had been sustained, or is likely to be sustained, the reason being that which I have given, that you cannot tell what may happen hereafter, and that the obstruction itself, being allowed to remain, will gain for the obstructor a prescriptive right. That was a Scotch case, but it was decided by English judges, and expressly on the ground that the Scotch and English law were the same. So it is an authority for English law. That is a case to a certain extent a *fortiori*, because there the man was erecting a structure on his own soil, the half bed of the river belonging to him. The point was considered as regards a navigable river in the case of the *Attorney-General v. Lord Londale* (sup.) Vice-Chancellor Malins distinctly held that the same principle extends to the case of a navigable river as regards interfering with navigation; and

that in a case where the rights of the Crown to the soil had passed by grant to the defendants, Lord Londale being the owner of the whole soil of the river, having obtained a grant from the Crown. There again it was a more favourable case for the defendant, because he was doing it on his own soil. Here in the present case the defendant has no right to put a stake in the soil of the Crown; he has no right whatever. It is a trespass to interfere with the soil; it is something like an ouster to put on a permanent erection as he has done. He is in a much more unfavourable position than the defendant was in either of the cases to which I have referred; but in those cases it was said, even without proof of damage either sustained or likely to be sustained, you have a right to prevent that which may hereafter, under altered circumstances, become a nuisance, without proving that it is likely to become so. Here, as I said before, we have an *a fortiori* case; here is a case in which the defendant has been putting these things (they are called piles, they are structures of very great solidity and strength, very substantial structures indeed, with a platform above them) into the soil of a navigable river, where the soil belongs to the Crown; and I am not prepared to say that even if the nuisance had not been proved, there is no apprehension of a nuisance, because as to all the points that have been raised as to the other wharves, and so on, now erected, the nuisance may be got rid of by the owners of the other wharves putting back their wharves, or the Corporation compelling them to remove all their illegal encroachments. How is it to be limited? If this defendant, the wharfinger, can take away 3ft. so can his neighbours; they may all take away 3ft. each, and the whole line of the river, according to his theory, may be diminished 3ft. 3in., and a week after that they may fill up their wharf to the frontage, and take 3ft. more, until finally they have appropriated all the river. If this sort of encroachment is not to be prevented I cannot see where it is to stop. It seems to me that the public body who have the guardianship of the river should apply to the Attorney-General to stop the encroachment at the beginning. It perhaps shows how very desirable it was to stop him at the very beginning, that this defendant thinks that now to be a hardship which he would not have considered a hardship if he had been stopped fifteen years ago when he first began these encroachments.

I have no hesitation in granting an injunction according to the prayer of this information in the terms of the first paragraph, and in ordering the defendant to pay the costs of the suit.

Solicitors: Prior, Digg, Church, and Adams; Lowless, Nelson, and Jones.

V. C. BACON'S COURT.

Reported by the Hon. ROBERT BUTLER and F. GOWLS,
Esq., Barristers-at-Law.

Wednesday, Jan. 14, 1874.

LATHAM v. THE CHARTERED BANK OF INDIA, AUSTRALIA AND CHINA.

Letter of hypothecation—Construction—Whether policy of insurance represents goods insured—Bill of exchange—Undertaking by holder not to present—Discharge of drawer.

V., a merchant in Bombay, consigned cotton to O. and Co., at Liverpool, per the *Aurora*, and

V.C.B.]

LATHAM v. THE CHARTERED BANK OF INDIA, AUSTRALIA, AND CHINA.

[V.C.B.]

drew a bill against it on C. and Co., which before acceptance, was sold to a bank. V. insured the cotton, and deposited the bills of lading and policy with the bank, with a letter of hypothecation, authorising the bank in case that bill or any other bills of his held by the bank should not be accepted or paid, to sell the cotton and recoup themselves. The letter of hypothecation made no mention of the policy.

V. shipped cotton on other vessels to W. and Co., and drew bills against it upon W. and Co., which were accepted by them and sold to the bank. The bank, at W. and Co.'s request (for value), deferred presenting their bills for payment at maturity. The ship *Aurora* with her cargo was burnt at sea, and the bank received from the insurance company the whole amount of the insurance money. C. and Co. failed before their acceptance matured.

V. and also W. and Co. failed, and the bills accepted by W. and Co. were not presented to them for payment.

Held, first, on the construction of the letter of hypothecation, that the bank had no claim on the policy moneys beyond the amount of C. and Co.'s acceptance, so as to apply the balance towards payment of the bills on W. and Co.

Secondly, that independently of that, they had, by agreeing not to present the bills accepted by W. and Co. for their payment at maturity released the estate of V., the drawer.

The plaintiffs carried on business at Bombay as general merchants, under the firm of Finlay, Scott, and Co., and the principal defendants were the Chartered Bank of India, Australia, and China. The bill prayed that the Bank might be declared to be trustees for the plaintiffs of the balance of certain policy money after the payment thereout to the Bank of the amount due on a bill of exchange then held by the Bank. The circumstances of the case were as follows:

In the month of April 1870, one Vullnhjee, a native trader in Bombay, shipped 100 bales of cotton by the ship *Aurora* from Bombay to Liverpool, the cotton being consigned to Messrs. Coupland Brothers there, for sale on account of the shipper. Vullnhjee drew a bill or bills of exchange against the cotton on Messrs. Coupland for 1200*l*. The cotton was insured by Vullnhjee in the sum of 1700*l*. in the British and Foreign Marine Insurance Co., and upon the shipment he sold the bill of exchange before acceptance to the Bank, depositing with them at the same time the bills of lading and the policy of insurance, and also a letter of hypothecation, which so far as material, was as follows:

To the Chartered Bank of India, Australia, and China.

Bombay, April 14, 1870.

Having this day sold to you three bills of exchange, drawn by me on Messrs. Coupland Brothers, of Liverpool, and at the same time handed to you as collateral securities for the due payment of the said bills, the bills of lading and shipping documents of the several goods. The agreement is understood to be as follows, . . .

I further authorise the Chartered Bank of India, Australia, and China, or any manager or agent thereof, on default being made in acceptance on presentment, or in payment at maturity of any of the above bills, or on the drawer's suspension of payment during the currency of the bills, to sell the said goods, or a competent part thereof, and to apply the net proceeds (after deducting usual commission and charges), in payment of such bills with re-exchange and charges, the balance, if any, to be placed against any other of my bills which may at the time be in the hands of the said bank, or any other liability of me to the said bank, and subject

thereto to be accounted for to the proper parties. In case the net proceeds of such goods shall be insufficient to pay the amount of any such bills with re-exchange and charges, I authorise the Chartered Bank of India, Australia, and China, or the holders thereof for the time being to draw on me for the deficiency, and I engage to honour such drafts on presentment, it being understood that the account current rendered by the said bank shall be acknowledged and allowed as sufficient proof of sale and loss.

Lastly, it is mutually agreed that the delivery of said collateral securities to your bank shall not prejudice your rights on said bills in case of dishonour, nor shall any recourse taken thereon affect the title of the bank to said securities, to the extent of my liability to your bank as above.

Your obedient servant,

JAYTHA VULLNHJEE.

The bill of exchange was dated 14th April 1870.

In the month of October 1870, before the bill of exchange arrived at maturity, the firm of Messrs. Coupland Brothers stopped payment.

In the month of May 1870 Vullnhjee shipped other cotton to Liverpool in the ships *Western Belle* and *Canute*, such shipments being consigned to Messrs. Haigh, Wilson, and Co. in England, against which Vullnhjee drew two bills of exchange for 3000*l* each, dated 6th May 1870. These bills also were sold to the bank, and the bills of lading thereof, together with letters of hypothecation similar to that of the 14th April, were deposited with the bank. Haigh, Wilson, and Co., failed to meet the acceptances, and the cotton on board the *Western Belle* and *Canute* was sold by the Bank, but the amount realised was not sufficient to cover the amount of the bills drawn against it.

The *Aurora*, with all her cargo, was burnt at sea, and the cotton on board her became a total loss.

Vullnhjee consigned various other parcels of cotton by the *Aurora* to various persons in London and Liverpool, and being largely in debt to the plaintiffs and pressed by them for payment, he on the 18th Jan. 1871 gave to the plaintiffs a letter of assignment, as follows:

Bombay 18th January 1871

Messrs. Finlay Scott and Co. Bombay

Dear Sirs—In consideration of your now advancing me the sum of rupees five thousand (Rs. 5000) and with reference to the various claims on me and on my agents . . . of yourselves . . . and for payment of all which claims you have . . . at my request agreed to forego immediate legal proceedings against me . . . and to compromise all those claims for the sum of Rs. 75,000 secured and to be secured as follows namely Messrs. Baring Brothers and Co. already hold policies of insurance for 4790*l* effected by me in the various offices noted in margin on 250 bales of cotton per the late ship *Aurora* burnt at sea the proceeds of which when received after satisfying the drafts against these consignments (which drafts are not affected by or included in this letter) and which proceeds after such satisfaction are for the purposes of this letter and subject as hereinafter is mentioned taken to amount to the sum of Rs. 25,000 will be applied in reduction of the said sum of Rs. 75,000 thereby reducing the same to the sum of Rs. 50,000 and as security for the same I hereby assign to you the various policies of insurance particularised at the foot of this letter effected by me on goods per the said late ship and all the proceeds of and moneys recoverable and to be recovered on the said policies (subject nevertheless to all now existing legal charges and incumbrances on such policies proceeds or moneys) And I hereby direct the various persons in whose hands the said policies proceeds or moneys now are or for the time being may be to account to you as the assignees thereof (subject as aforesaid) for the same respectively and I hereby authorise and empower you or Messrs. Baring Brothers and Co. or whomsoever else you may from time to time nominate for that purpose to collect and receive the same respectively in my name or in the name of my

V.C.B.]

LATHAM v. THE CHARTERED BANK OF INDIA, AUSTRALIA, AND CHINA.

[V.C.B.]

executors or administrators or legal representatives if thought desirable and I hereby agree to execute at your request a valid legal mortgage of the same policies proceeds and moneys with such covenant for payment and power of sale and other covenants and powers as you may desire and I declare that if the surplus proceeds of the said policies held by Messrs. Baring Brothers and Co. shall not amount to Rs. 25,000 (twenty-five thousand) then the balance shall be recoverable from any excess there may be in the proceeds of the policies particularised below over the sum of Rs. 50,000 and further that if these two sets of proceeds do not together realise to you Rs. 75,000 (seventy-five thousand) I am still liable for the balance of that sum—Yours truly
JAITHA VULLHJEE.

The list of policies accompanying the letter included the policy for 1700*l.* effected in the British and Foreign Marine Insurance Company.

The two bills of exchange drawn by Vullhjee on Messrs. Haigh, Wilson, and Co. were accepted by them, and matured on the 3rd Dec. 1870, but they, being unable to pay them at maturity, wrote to the bank the following letter:

Liverpool 3rd Dec 1870
To the Chartered Bank of India Australia and China,
London

Gentlemen—We have to request that you will defer presentment for payment of our acceptances maturing to-day as follows viz

(Here followed four acceptances, which are immaterial)

£3000 drawn by Jaitha Vullhjee against 250 B/C per Western Belle

£3000 drawn by Jaitha Vullhjee against 250 B/C per Conate

And in consideration of your so doing we hereby hold ourselves in every respect liable to you on account of the said acceptances as if the same had been regularly presented at due date as further security for all our obligation to your bank we now hand you £750 as additional margin. It is understood that the cotton represented by the above-named shipments is to be sold under the supervision and control of your agent in Liverpool Mr John Scott and to whom our broker will have to account for the net proceeds and that should all our acceptances not be fully paid before the re-drafts on the respective native drawers for deficiencies are sent out such re-drafts are to be placed in your hands for collection and the proceeds to be held by you against any balance that may be due to the bank by us

HAIGH WILSON AND CO

The letter further stated that as further security for all their obligations Messrs. Haigh, Wilson, and Co. assigned to the bank all their interest in certain contracts, which were not specified.

In compliance with this request the bank deferred presentment of the two bills, and at the time of the filing of the bill they had not been presented or paid, Messrs. Haigh, Wilson, and Co. having failed. Vullhjee subsequently became bankrupt.

The British and Foreign Marine Insurance Company paid to the bank the sum of 1700*l.*, being the whole amount of the policy effected on the cotton shipped to Messrs. Conpland Brothers, in the *Aurora*, out of which the bank paid themselves the amount due on Messrs. Conpland's acceptance, thus leaving in the hands of the bank a balance of about 470*l.* The bank now claimed, under the letter of hypothecation of the 14th April 1870 to hold this balance of 470*l.* towards the discharge of the two bills drawn by Vullhjee on Haigh, Wilson, and Co., for 3000*l.* each.

The plaintiffs thereupon filed their bill, stating that there was a large sum due to them from Vullhjee's estate under the assignment of the 18th January 1871, and contending that Vullhjee's estate was not liable to the bank on the two

acceptances of Messrs. Haigh, Wilson, and Co., and charging that, even if Vullhjee's estate had been liable thereon, it had been discharged by the agreement of the bank with Messrs. Haigh, Wilson and Co., the acceptors, to give them time for payment of the bills, such agreement being without Vullhjee's consent, and praying as above.

Kay, Q.C., and Ferrer, for the plaintiffs.—We are the second mortgagees of the policy under the letter of assignment of the 18th January 1871. The special power given by the letter of hypothecation of the 14th April 1870, in case of a sale of the cotton on board the *Aurora*, cannot be extended to a case where there was no sale at all, as was the case here, the cotton having been burnt. The letter of hypothecation refers only to proceeds of sale, which sale never took place. The letter of hypothecation does not even refer to the policy which was deposited only to meet the one bill of 1200*l.* drawn on Messrs. Conpland. The policy does not represent the goods insured: (*Berndtson v. Strang*, 3 Mar. Law Cas. O. S. 154; L. Rep. 3 Ch. 588; 19 L. T. Rep. N. S. 40). But even if the bank are right in their construction of the letter of hypothecation, yet by giving time for payment of the two bills for 3000*l.* to Haigh, Wilson, and Co., for valuable consideration without the consent of Vullhjee, the drawer, they have released him: (*Oriental Financial Corporation v. Overend, Gurney and Co.*, L. Rep. 7 Ch. 142; 25 L. T. Rep. N. S. 813.)

Eldis, Q.C. and Westlake for the bank.—We submit that the money received on the policy is liable under the letter of hypothecation as the proceeds of sale would have been if a sale had taken place. The letter of hypothecation charges the shipping documents. That term would include the policy which had been deposited. Wherever a right to sell the goods would arise, as it arose here by the bills not being paid at maturity, the policy money must be taken to represent the goods which are not forthcoming. As to the alleged discharge of Vullhjee's estate, a mere promise not to sue on a bill does not discharge anyone. Here the bank were merely to defer presenting the bills on a given day. No time was fixed. They might have been presented the next day. The bank, as holders, had a perfect right to delay presenting the bills without any contract for that purpose, and this would not have altered the position of the drawers. The effect of the undertaking of Haigh, Wilson, and Co. was that they would hold themselves liable just as if the bills had been presented, and they merely desired not to have the bills protested. In *Oriental Financial Corporation v. Overend, Gurney and Co.*, there had been a positive contract to give time. We are not seeking a remedy under the law merchant but upon the guarantee. They cited

Hitchcock v. Humphrey, 5 Man. & Gr. 509;
Walton v. Mascaill, 13 M. & W. 438;
Murray v. King, 5 B. & Ald. 165;
Pallopp v. Bryant, 4 Bing. 717;
Hall v. Cole, 4 Ad. & Ell. 577.

Kay, Q.C. in reply.—The policy is merely a contract of indemnity. The undertaking not to present a bill for an indefinite time is even more injurious to the drawer. There is no case showing that giving an indefinite time to the principal is not a discharge of the surety.

The VICE-CHANCELLOR.—It is a little surprising

V.C. B.]

LATHAM v. THE CHARTERED BANK OF INDIA, AUSTRALIA, AND CHINA.

[V.C. B.]

that, out of one of the most ordinary mercantile transactions that can be, such a question as this should arise, and that it should be discussed at such length. I have listened very willingly, because the thing is not without its interest. The transaction is simply this: A shipper in India draws a bill on his consignee in England; he sells it in the market in India, and accompanies it with the bill of lading, which is the only shipping document that I know of; but it is stated that at the same time he deposited with the person who bought the bill of exchange of him a policy of insurance against damage by fire to the cargo.

Now, what is the meaning of that transaction, without stopping for a moment to consider the terms in which it is expressed? It is this, and this only: "I have shipped to England goods that are worth at least 1200*l.*, for which I have drawn; I give you by means of the bill of lading the power to secure to yourself the payment of that 1200*l.*, if the parties liable upon the bill do not pay." Is there anything more in the contract between the parties? Is any other sum than 1200*l.* in the contemplation of either of them—the man who buys or the man who sells the bill? It is impossible to say that anything else entered into their contemplation. The only use of the policy of insurance is to guard against any accident that may happen by which the value of the goods shipped should be diminished, and to insure to the holder of the bill that he shall have at least the value of the 250 bales of cotton which are shipped on board the ship.

That is the plain transaction, that is so stated in the answer. I do not wish to attach more importance to the words of the answer than really belongs to them, or endeavour to strain them beyond what I take to have been the true intention of the parties, and the true nature of this most ordinary mercantile transaction. The statement in the answer is, that at the same time the shipper handed to the bank as security for the payment of the said draft the bill of lading of the cotton and the policy of insurance. That is the real transaction between the parties, and the benefit of that to the full the defendants, the bank, have had. The letter of hypothecation, as it is called—and rightly enough so called—does not extend that in the slightest degree. [His Honour then read from the letter of hypothecation, and continued.] It is confined in its terms as well as it is confined entirely in its nature to those bills amounting to 1200*l.* and to those 250 bales of cotton which are mentioned in the document to which I have been referring. Upon what ground can it be said that, if by any accident beyond the terms of this contract a sum of money came into the hands of the Chartered Bank of India, Australia, and China, they were therefore at liberty to apply that in satisfaction of any debt which the Indian merchant might owe to them? There is no ground whatever for any such pretence. The contract is clear, plain, usual, ordinary, and open to no doubt or question. Nobody has questioned the right of the bank to have the bills in this memorandum satisfied, and they have been satisfied, not exactly in the mode here contemplated, but by means of the delivery to them of the policy of insurance, which was so delivered to them only that they might have the bills paid when they arrived at maturity. It would be put-

ting a construction on these words wholly at variance, not only with the intention of the parties, but at variance with the very expressions themselves, if I were to hold that by means of this transaction—this letter of hypothecation and the policy of insurance against fire which accompanied it—they were entitled to any more than the very sum which was expressed in the bills of exchange.

The case might be decided upon that point, and upon that point alone. That would be enough to justify the plaintiffs in the demand which they now make. But another point has been suggested, and that is, the transaction with Haigh, Wilson, and Co. Messrs Haigh, Wilson and Co., having transactions with the bank, prevailed on the bank not to present for payment the particular bills. It is said that they desired to avoid the notoriety which might attend the protest. Why should the drawer of the bill be prejudiced by that? If that was convenient as between the bank and Haigh, Wilson, and Co., they might settle that for themselves, but that the memorandum, which is set out in the answer, is a plain agreement on the part of the bank to postpone for an indefinite time the payment of the money due on the acceptance, according to the tenor of it, no one who reads it can doubt. The agreement is this: [His Honour read the letter of the 3rd Dec. 1870.] Now, if it is said that no definite time is to be gathered from this document, although I admit that there is no particular day or month or year mentioned in it, it is quite clear that it is a contract that they will not enforce payment of the particular acceptances until the re-drafts have been made for the deficiency upon the native merchant, and the result of those drafts shall be ascertained, and in the meantime the drafts themselves are pledged to or placed in the hands of the bank for collection by them of the moneys for which they are drawn. Then it goes on, "As further security for all our obligations to the bank we assign to you all our interest" in certain contracts, which are not explained. That comes within the ordinary rule, a rule, as I understand it, without exception, that if the holder of a bill, having the right to present it, and the duty of presenting it as far as the drawer is concerned, when it arrives at maturity, neglects to do so, and gives time to the person, the acceptor, who ought to pay the bill, he thereby discharges the drawer. That is a rule most reasonable and just in itself, when you consider the consequences which it may have upon the drawer, and how his position may be grievously altered, not only by the neglect, but by the contract which the bank chose to enter into upon this occasion. I think upon that ground also the plaintiffs would be entitled to that which they ask by their bill.

Now, cases were referred to in answer to this part of the case, which I cannot help thinking have no real bearing upon it; cases, I mean, of collateral security. If a man has by an independent and separate contract agreed that, in a particular event, namely, in the event of the non-payment of a sum of money at a particular time, he will be answerable for that money, what has that to do with any formalities that may have been neglected or not properly enforced in the way of presenting the bills, if there were bills in the case, or giving time for the payment of the

[PRIV. CO.]

THE *RONA*—THE *AVA*.

[PRIV. CO.]

money if that had been done. It is a plain collateral security in every one of the cases which Mr. Eddis mentioned to me. The judgment of the court goes upon the terms, tenor, and effect of the collateral security, and excludes from the operation of that security all extraneous circumstances, and all that is not referable to the plain express contract between the parties. The policy of insurance I take to have been, not only from the words which are used, but in its very nature, simply a security that the bills [i. e., Comland's] should be paid when they became due. They have been paid after they became due. The whole demand of the bank in respect of those bills, all that was contemplated by the letter of hypothecation, has been accomplished. The bank have had all they contracted, and are entitled to have, and to say that the proceeds of the policy of insurance are to stand instead of the goods, is in contradiction of that principle of law which I gather from *Bernadon v. Strang* (ubi sup.), where the main purport of the decision is, to point out clearly that the goods themselves and the policy effected in respect of damage which might happen in respect of those goods, are in their nature distinct, and are not to be confounded, and that one is not to be taken for the other. The same thing is equally apparent here. There is no connection not only in the expressions in the documents referred to, but there is no connection in right, or reason, or in fair justice in an ordinary mercantile transaction, between the policy of insurance, which was only to effect the payment of the bills, or provide the means of paying the bills, and the surplus which, if the goods had arrived safely and had been sold, the Bank might have made some claim to.

In my opinion the plaintiffs succeed in their demand, and they are entitled to the £701, which is the balance of the policy of insurance, and for which alone this bill was filed.

Solicitors for the plaintiffs, *Markby, Tarry, and Stewart*.

Solicitors for the defendants, *Linklater and Co.*

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

ON APPEAL FROM THE VICE-ADMIRALTY COURT OF
HONG KONG.

Reported by JAMES F. ABERNETHY, Esq., Barrister-at-Law.

Dec. 5 and 6, 1873.

(Present: The Right Hon. Sir J. W. COLVILLE, Sir R. PHILLIMORE (Judge of the High Court of Admiralty), Sir BARNES PEACOCK, Sir MONTAGUE E. SMITH, and Sir R. P. COLLIER.)

THE *RONA*—THE *AVA*.

Collision—Speed—Lights obscured by steamer's smoke—Duty to stop and ascertain course.

It is negligence on the part of a steamer to go at full speed under steam and sail before the wind whilst her smoke is blown over her bows so as to obscure her lights and to prevent her from seeing and from being seen by other ships approaching from an opposite direction.

Where a steamship is approaching another, whose exact course cannot be at once ascertained by reason of her lights being obscured by her own smoke, it is the duty of the former to slacken speed and to wait till that course is ascertained before

taking any decided step to avoid the other vessel; if, before having ascertained the exact course of the other, she, without slackening speed, executes a manœuvre, which, although appearing to be right at the time, contributes to the collision, she will be to blame.

THESE were appeals from decrees of the Hon. Henry John Hall, the acting judge of the Vice-Admiralty Court of Hong Kong, in cross causes of damage lately pending in that court, brought by the appellants, the owners of a steamship called the *Rona*, against the steamship *Ava*, of which the respondents were owners, and by the respondents against the owners of the *Rona*, for the recovery of damages in respect of losses sustained by the respective parties by reason of a collision between the said two vessels.

The collision happened at about 7.40 p.m. on the 14th April 1872, about twenty miles S.S.W. of Turnabout Island, on the east coast of China.

The *Rona* was an iron paddle wheel steamer, of 784 tons register, and 150 horse power, and was proceeding from Shanghai to Swatow with cargo and passengers.

The *Ava* is an iron screw steamer of 1902 tons, French register (over 3000 tons English), and was one of the French mail packets, and was carrying the mails from Hong Kong to Shanghai.

There were no pleadings in the court below, but each party filed a preliminary act, setting out the facts as here given.

The facts of the case, as appearing by the evidence of the appellants, were, that the *Rona*, under steam and sail, was steering S.S.W. by compass (S.W. by S. $\frac{1}{2}$ S. true), and proceeding at the rate of about ten knots an hour, with a bright light exhibited at her mast head, and a green light on her starboard side, and a red light on her port side, all burning brightly—that the night was bright and clear—that the wind was blowing a gale from N.E. by E., carrying the smoke of the *Rona* over her starboard bow; the smoke was spread out over the water by catching the breeze—that a good look out was kept on board the *Rona*—that the three lights of the *Ava* were seen a little before the starboard beam of the *Rona*, distant about 300 or 400 yards (eighteen or twenty seconds before the collision)—that the helm of the *Rona* was immediately put hard a-starboard, but that the *Ava*, with her stern struck the *Rona* with great violence at her starboard forward gangway, and did her so much damage that she very soon afterwards foundered and was lost, with a number of those on board her. Those on board the *Rona* had been unable to see the *Ava* sooner owing to the smoke from the funnel of the *Rona* being carried by the wind over her starboard bow.

The case made by the respondents by their evidence was, that the *Ava* was steaming at the rate of from ten to eleven knots, steering N. 41 degrees E. by compass (N. 51° E. true), with her proper masthead and side lights up; that the officer in charge of her saw on the horizon and on the port bow of the *Ava* what resembled a shower of rain, and, shortly afterwards smelling smoke, supposed that the object which he saw was a steamer, and caused the helm of the *Ava* to be ported; the smoke then appeared to be from two to three miles away; that he afterwards saw the white light only of the *Rona*, distant about 700 or 800 metres (about a mile), and about three points on the *Ava*'s port bow; and then caused the helm of the *Ava* to

[PRIV. CO.]

THE *RONA*—THE *AVA*.

[PRIV. CO.]

he put hard aport. This brought the white light of the *Rona* $\frac{1}{2}$ points on his port bow, and in about a minute and a half he saw the green light of the *Rona* at a distance of about half a mile, and about $\frac{1}{2}$ points on his port bow; he at once ordered the engines of the *Ava*, which until then had been kept going ahead full speed, to be stopped and reversed, but that the collision ensued. At the time of the collision the head of the *Ava* was E. by N. by compass, (E. true). The smoke of the *Rona* prevented her lights being sooner seen from the *Ava*.

The learned acting judge of the court below (who was assisted by Capt. Hewlett, R.N., and Capt. J. B. Barnett, R.N. as assessors), pronounced the collision to have been wholly occasioned by the fault of the *Rona*, and decreed accordingly.

The reasons of the learned acting judge for the conclusion at which he arrived, as appearing in the judgment, were as follows:

First, that there was want of proper care and caution on the part of the *Rona* in carrying sail and maintaining such a high rate of speed when her lights and those of any vessel approaching from the opposite direction would obviously be obscured by her smoke.

Secondly, that there was neglect, in not porting the helm of the *Rona* at the instant of seeing the *Ava*'s lights. That the case was one of vessels meeting nearly end on, each having the other (according to calculation) not more than a point on the bow.

Thirdly, that was further neglect, on the part of the *Rona*, in not causing her engines to be stopped when danger was imminent.

Fourthly, that no blame attached to the *Ava*.

From these decrees the owners of the *Rona* appealed, for the following (amongst other) reasons:—

1. Because the learned acting judge of the court below erroneously held that the vessels were meeting nearly end on.

2. Because the evidence proved that the two vessels were brought into dangerous proximity by the porting of the helm of the *Ava*, and that there would not have been any collision if the helm of the *Ava* had not been ported.

3. Because the officer in charge of the *Ava* acted without due care and caution, in porting the helm of the *Ava*, before he had ascertained the course and position of the *Rona*, and when the *Ava* was in fact on the starboard side of the *Rona*.

4. Because there was negligence on the part of those in charge of the *Ava* in not causing the speed of the *Ava* when or soon after the smoke of the *Rona* was seen, and in not stopping and reversing the engines of the *Ava* in due time.

5. Because the sail and speed of the *Rona* did not cause or contribute to the collision.

6. Because the evidence proved that porting the helm of the *Rona*, when the *Ava*'s lights were first seen, would not have been proper, and would not have had the effect of avoiding the collision.

7. Because stopping the engines of the *Rona*, at the time indicated by the learned acting judge of the court below, would not have avoided the collision, and would not have been proper.

8. Because the evidence proved that the collision was not occasioned by any negligence on the part of those in charge of the *Rona*.

Milward, Q.C. and *Clarkson*, for the appellants.—These were not meeting ships within the mean-

ing of Rule 13 of the Regulations for preventing Collisions at Sea, as explained by Orders in Council of the 30th July 1865; there was more than a point and a half divergence between their respective courses. They were crossing vessels, and the *Rona* having the *Ava* on her own starboard hand, was bound to keep out of the way (Rule 14), and the *Ava* was bound to keep her course (Rule 18). This she neglected to do, and violated the rule by porting her helm. Moreover, she ported before she could have known in any way what was the course of the *Rona*; this was improper; she ought to have slackened speed and waited until she had ascertained the other's course before taking any decided step. Again, the *Ava* was wrong in continuing to port on seeing the white lights of the *Rona*; she ought to have continued her then course, and not to have gone round in a circle. If she had done so the *Rona* would have crossed her bows in safety.

The *Admiralty Advocate* (Dr. Deane, Q.C.) and *R. E. Webster*, for the respondents.—The *Rona* was to blame for coming down before the wind at such a speed, whilst her own and other vessel's lights were obscured by her smoke. The porting the helm of the *Ava* in the first instance was right, because it was the duty of the *Ava* to discover the course of the other ship, and the smoke being on her port bow, the port of her helm would carry her clear of it, and enable her to make out the other ship. Stopping or easing the engines would have involved the risk of bringing the other ship down upon the *Ava*, and starboarding the helm would, as the *Ava*'s watch supposed, have been crossing the *Rona*'s course. There was no duty cast upon the officers of the *Ava* after they had once taken the proper steps to avoid the collision; having ported they were not bound to stop and reverse.

The Earl of Elgin—*The Jezebel*, ante, vol. 1, p. 150; 25 L. T. Rep. N. S. 514; L. Rep. 4 P. C. 1.

Milward, Q.C. in reply.

Cur. adv. vult.

Dec. 6. — The judgment of the court was delivered by Sir BARNES PEACOCK:—These are appeals from two decrees of the learned judge of the Vice-Admiralty Court of Hong Kong, pronounced against the appellants, in two causes of damage promoted in that court, one by the present appellants, the owners of the steamship *Rona*, against the steamship *Ava*, the other by the present respondents, the owners of the steamship *Ava* against the present appellants, the owners of the *Rona*. The *Rona* was a paddlewheel steamer of 784 tons and 150 horse-power, belonging to the Union Steam Navigation Company of Shanghai, and was on a voyage from Shanghai to Swatow, with passengers and cargo. The *Ava* was one of the French mail packets, a screw steamer of upwards of 3000 tons (English), belonging to the Messageries Maritimes, and was carrying the mails from Hong Kong to Shanghai.

The suits arose out of a very lamentable accident, caused by a collision of the two vessels, which took place about 7.40 on the evening of the 14th April 1872, in the Formosa Channel, on the east coast of China, about 20 miles south-west of Turnabout Island, and 20 miles north-east of Oeksen. Each of the parties contended that the collision was caused solely by the fault of the other. There were no pleadings in the suits, but each party filed a preliminary act, which is set out at page 5 of the record. The two causes were

[PRIV. CO.]

THE *RONA*—THE *AVA*.

[PRIV. CO.]

heard together upon the same evidence, which was taken orally in open court. The learned judge was assisted by two nautical assessors, to whom, after hearing the evidence, he submitted two questions:—"1. Was there such negligence or want of ordinary care or caution on the part of the *Ava*, the *Rona*, or both, as, but for such negligence or want of care or caution, the collision would not have occurred? 2. Was the collision, in your judgment, occasioned by inevitable accident, understanding by the term inevitable accident whether the collision could not possibly have been prevented by proper care and seamanship, under the particular circumstances of the case?" and he further asked the nautical gentlemen, if they answered the first question affirmatively, to be pleased to state in what, in their opinion, such negligence or want of care or caution consisted.

It may be convenient to deal with the second question first, and to state that their Lordships concur entirely with the opinions of the learned judge and of the two assessors, that the collision was not the result of inevitable accident. They will now proceed to consider the first question—whether there was negligence on the part of the *Rona*, or of the *Ava*, or of both.

Their Lordships are of opinion that the *Rona* was to blame in maintaining such a high rate of speed when she was aware that her own lights and those of any approaching vessel would be, as they in fact were, obscured by the smoke from her own funnel. It was proved by Henry Archibald McInnes, her own master, that from 4 p.m. to the time of collision, they were going at from $9\frac{1}{2}$ to 10 knots an hour. He said, "We went very regularly, and kept up the same pace all through." The officer of the watch, the chief officer, the engineer on watch, the two look-out men, and all those who were on the deck of the *Rona* at the time when the *Ava* was sighted, were unfortunately lost when the *Rona* went down. There was, therefore, no one at the trial who could speak as to the nature of the look-out on board that vessel. It may fairly be assumed, as against the *Rona*, that a good look-out was kept, and that it was in consequence of the smoke which obscured her view that the *Ava* was not sighted until the time at which the signal whistle was sounded, about 18 or 20 seconds before the collision. If, however, the *Ava* might have been seen in time, if a good look-out had been kept on board the *Rona*, and was not seen, or, being seen, the *Rona* did nothing to avoid the collision, there was equally negligence on the part of those on board the *Rona*, and such negligence contributed to the accident. The learned judge held that the case was one of two vessels meeting "end on," each vessel having the other not more than a point on the bow; and that there was neglect on the part of the *Rona* in not porting her helm; from which their Lordships understood him to mean that the case was one falling within Article 13 of the Sailing Rules of the 9th Jan. 1863. By that article it is laid down:—"If two ships under steam are meeting end on or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other." The rule is explained by the Order of Her Majesty in Council of the 30th July 1868. It is there said: "The said two articles, numbers 11 and 13 respectively, only apply to cases where ships are meeting end on or nearly end on, in such a manner

as to involve risk of collision. They consequently do not apply to two ships which must, if both keep on their respective courses, pass clear of each other. The only cases in which the said two articles apply are when each of the two ships is end on or nearly end on to the other; in other words, to cases in which, by day, each ship sees the mast of the other in a line or nearly in a line with her own, and, by night, to cases in which each ship is in such a position as to see both the side lights of the other. The said two articles do not apply, by day, to cases in which a ship sees another ahead crossing her own course, or, by night, to cases where the red light of one ship is opposed to the red light of the other, or where the green light of one ship is opposed to the green light of the other, or where a red light without a green light, or a green light without a red light is seen ahead, or where both green and red lights are seen anywhere but ahead."

There can be no doubt, even if the additional rules had not been made, that Rule 13 would not properly apply to a case such as the present, for their Lordships are of opinion that it must be taken on the evidence that the *Rona*, when her smoke was first seen by the *Ava*, was steering S.S.W. by compass, and that the *Ava* was then steering N. 41° E. by compass, which may be taken as somewhere between N.E. and N.E. by N. It is clear that two vessels so steering could not be considered as vessels each having the other not more than a point on her bow, or as meeting end on within the meaning of the rule. But however this may be, it cannot be held that the vessels were within the 13th rule when neither of them could see the other, and when they were at such a distance from each other as by the evidence they are described to have been when the *Ava* first saw the smoke. The vessels were clearly not within the rule when the *Ava* first saw the white light, or when almost immediately afterwards she saw the green light of the *Rona* and when, as it is to be concluded from the evidence, the *Rona* could not see the *Ava*; nor were they within the rules when the *Rona* first sighted the *Ava*, about 18 or 20 seconds before the collision, and when, from the evidence, it appears that all the lights of the *Ava* were seen, and when she was about a point before the starboard beam of the *Rona*, and only 300 or 400 feet from her.

The fault on board the *Rona* was not in not porting her helm, in obedience to the 13th rule, before she saw the *Ava*, or when she saw the three lights of the *Ava* almost on her starboard beam. It is clear that at that time the vessels were not meeting end on or nearly end on. The fault of the *Rona* was in proceeding at the rate of $9\frac{1}{2}$ or 10 knots an hour when she could not from her own smoke see, and when she must have known that she could not be properly seen by other vessels.

The next question to be considered is, whether there was any fault or negligence on the part of the *Ava* which contributed to the accident. The learned judge, concurring in opinion with the two assessors by whom he was assisted, held that there was not. One of the assessors in his answer, says:—"Although the *Ava* appears to have acted right in porting her helm, the question naturally occurs—'should she have slackened her speed when the white light appeared, in accordance with section 16?' I am

PRIV. CO.]

MERCHANT SHIPPING COMPANY v. ARMITAGE.

[EX. CH.]

of opinion that this would not have been right under the circumstances, for her officer of watch having seen the smoke of the *Rona* for some time previous, would know, when he saw the mast-head light, that she was coming in his direction, and would assume that she, the *Rona*, would, on seeing his lights, port her helm, and that, therefore, if he slackened speed, he would be increasing the chance of collision."

Their Lordships cannot concur in the opinion of the learned judge that the *Ada* was free from all blame. The *Ada*, according to her own account, was going at, at least, $8\frac{1}{2}$ knots when she first saw the smoke of the *Rona*. The second captain in his evidence says,—at first it resembled a shower of rain 15 deg. or 20 deg. on his port bow. In about a minute or a minute and a half he smelt smoke, and, supposing it might be a steamer, he ported his helm a little; that his first impression was that it was $2\frac{1}{2}$ or 3 miles distance, but at that time he could only estimate it approximately. Afterwards, and when he had ported a little more, he saw a white light through his glass three points on the port bow, about a mile or 700 or 800 metres off. He then ordered his helm hard-a-port, considering that in doing so he was conforming to the regulations. It appears to their Lordships that in this construction of the regulation he was mistaken. The ships at that time were not, according to his own showing, end on, or nearly end on within the meaning of the rule. It appears to their Lordships that when he first saw the smoke and had reason to believe it was caused by a steamer, he ought to have slackened his speed, for he could not tell whether the steamers were end on or nearly end on, or whether they were passing or crossing, or at what rate of speed the *Rona* was going. It is clear from the position and bearing of the two vessels at the time of the collision, taking them according to the evidence of the *Ada*'s own witnesses, that the *Rona* must have crossed from port to starboard the line of the *Ada*'s course, that is to say, the course which the *Ada* was taking at the time when she first knew that the smoke was the smoke of a steamer on her port bow. At that time the *Ada*, as already pointed out, was steering N. 51 deg. E. true, or N. 41 deg. E. by compass, or between N. E. and N. E. by N., whereas at the time of the collision she was, according to the evidence of her own second captain, heading E. by N. by compass, or true course east. In this he was corroborated by the pilot on board the *Rona*. The second captain says, "At the time of the collision I did not see the compass, but I think I was three to four points to starboard of my course; that would be E. by N. by compass—true course E. The *Rona*'s head would be S. E. by E. Judging from the position of the *Rona*'s head, and her coming down channel, she must have been starboard sometime. To shift the *Ada*'s helm from hard-a-port to hard-a-starboard would take $1\frac{1}{2}$ to 2 minutes." See his evidence in answer to the Assessors' questions, page 28 of the Record, line 30. The pilot on board the *Rona* says, "The course of the *Ada* when I first saw her was E. southerly as far as I could judge." It is evident that if the *Ada* had kept her course and slackened her speed, instead of porting in the first instance and afterwards putting her helm hard-a-port when she saw the white light of the *Rona*, the collision would not have occurred as it did after the *Rona* had crossed the line of the *Ada*'s original course.

If the *Ada*, when she first saw the white light of the *Rona*, almost immediately before she saw the green light, had known what were the real position and bearing of that vessel, it would certainly have been a wrong manoeuvre to put her helm hard-a-port. If it be said on the part of the *Ada* that at that time the *Rona* was nearly enveloped in her own smoke, the answer is that if from the first the *Ada* had slackened her course until she knew what the real position of the *Rona* was, she need not have been in a position of having to make any manoeuvre in ignorance of the real state of things. The second captain of the *Ada* says, "I could not tell which way the steamer was going; it was impossible to form any opinion when I saw nothing but a cloud."

After considering the whole of the evidence attentively, their Lordships have arrived at the conclusion that the *Ada* was in fault in not slackening her speed, and waiting to ascertain, before she ported her helm, what was the real position of the *Rona*.

For the above reasons their Lordships are of opinion that each of the vessels was in fault, and that the fault of each contributed to the accident.

They will therefore humbly advise Her Majesty in Council, that the decree of the Vice Admiralty Court in each of the causes be reversed; that it be declared that both vessels were in fault, and that such fault contributed to the accident, and that a decree be made in each case accordingly.

Looking at all the circumstances of the case, and considering that each of the parties was to blame, their Lordships are of opinion that each ought to bear their own costs in the court below and of these appeals.

Their Lordships have only to add that the view which they have taken of this case is entirely in concurrence with the opinions of the nautical gentlemen by whom they have been assisted, and of whose great experience and practical knowledge in cases of this nature they have had the benefit.

Appeal allowed and decrees reversed.

Solicitor for the appellants, Thomas Cooper.
Solicitor for the respondents, W. J. Farnham.

EXCHEQUER CHAMBER.

Reported by JOHN SMOOT, Esq., Barrister-at-Law.

Friday, Nov. 28, 1873.

(Before Lord COLERIDGE, C.J., KEATING, GROVE, and DENMAN, JJ., CLEARY and POLLOCK, B.B.)
MERCHANT SHIPPING COMPANY v. ARMITAGE.

Ship and shipping—Charter-party—Lump freight—Loss of part of cargo by perils of the sea without the fault of shipowner—Right to recover full amount of lump freight.

A charter-party provided that the ship should load a full cargo at Colombo or Ceylon, and proceed to London and there discharge (fire, and all other dangers of the sea, rivers and navigation excepted); "a lump sum freight of 5000*l.* to be paid after entire discharge and right delivery of the cargo in cash two months after the date of the ship's report inwards at the Custom House."

The cargo having taken fire on the homeward journey, it was found necessary to scuttle the ship in Table Bay, and a large part of the cargo which had been injured by the fire and water was

there sold. The voyage was then resumed, and the remainder of the cargo was delivered in London. The charterers having refused to pay the whole of the lump sum of 5000*l.*,

Held (affirming the judgment of the Court of Queen's Bench), that the shipowners were entitled, notwithstanding the non-delivery of the entire cargo, to the payment of the lump sum of 5000*l.*, but (reversing the judgment of that court) that they were not entitled to interest.

Error from the Queen's Bench in an action brought for the recovery of 1152*l.* 18*s.* 1*d.*, and interest as hereinafter mentioned. By the consent of the parties, and by the order of Channell, B., dated the 2nd April 1873, according to the Common Law Procedure Act 1852, the following case was stated for the opinion of the court without any pleadings:

1. The plaintiffs are a company carrying on business as shipowners in the City of London, and were, and are, the owners of the ship *Clyde*, hereinafter mentioned, and the defendants are merchants, carrying on business at Colombo and London.

2. On the 25th Jan. 1872, the ship was lying in the harbour at Colombo, and upon that day the charter-party hereafter set out was made and entered into by Edward Shrewsbury, the master of the said ship, on behalf of the plaintiffs and the defendants. The charter-party was as follows:

Colombo, 25th Jan. 1872.

It is this day mutually agreed between Edward Shrewsbury, of the good ship or vessel called the *Clyde*, classed A1 in Lloyd's, of the register tonnage of 1151 tons, or thereabouts, now lying in this harbour of Colombo, whereof he is the master, on the one part, and Messrs. Armitage Brothers, of Colombo, merchants, on the other part. That the said ship being tight, staunch, and strong, and every way fitted for the voyage, shall with all convenient speed load here or sail and proceed to Cochin (orders to be given on or before the 25th inst.), and if ordered to Cochin, there load from the said charterers or their agents, completing at Colombo or Tuticorin, if so required by charterers, a full and complete lading of legal merchandise, which full and complete lading, the captain binds himself to receive on board and properly stow, but not exceeding what she can reasonably stow and carry, over and above her tackle, apparel, provisions, and furniture, and being so loaded, shall thereupon proceed to London, in the East or West India Docks, and discharge there as customary. The act of God, restraints of princes and rulers, the Queen's enemies, fire, and all and every other of the seas, rivers, and navigation, of whatever nature and kind soever, during the said voyage, always excepted. A lump sum freight of 5000*l.* to be paid after entire discharge and right delivery of the cargo in cash two months after the date of the ship's report inwards at the Custom House, or under discount at 5 per cent. per annum (or at the bank rate, if higher) at option of charterers' agents. Thirty-five working days are to be allowed the said charterers, if the vessel be not sooner despatched for loading, to commence and be continued from the time of the vessel having a clear hold and ready for that purpose, the master giving charterers or their agents written notice twenty-four hours in advance to that effect, and the charterers to have the option of keeping the vessel fifteen working days on demurrage, paying 20*l.* per day, to be paid to the master day by day. All goods to be brought to the vessel and taken from alongside at the risk and expense of the freighters; the master to sign bills of lading at any rate of freight required, without prejudice to this charter-party, but should the aggregate freight by bills of lading amount to less than the lump sum of 5000*l.* already stipulated for, the difference to be deducted from the amount to be drawn for disbursements, and the balance, if any, to be paid in cash at the rate of Exchange for eight bills existing at the time of the ship's

clearing in Colombo. The owners of the ship to have an absolute lien on the cargo for the amount of freight stipulated for, except as to the captain's draft for disbursements and commission as before mentioned in case of default. And it is hereby agreed that the charterers are to furnish cash for the disbursements of the ship at port of loading at current rate of exchange, not exceeding 750*l.*, free of interest, but subject to a commission of 2*l.* per cent. and cost of insurance, for the due appropriation of which the charterers are not to be held responsible, and for which and agency commission the master shall give his draft on the owners, payable in London at sixty days' sight, and in the event of the bill not being accepted or paid at maturity, the amount to be deducted from freight at settlement thereof, together with interest and cost of insurance. The ship to be consigned to owner's agents in London, and in case of the vessel having to put into the Mauritius, the vessel to be consigned to Messrs. Hylth, Brothers, and Co., there, or to Messrs. Thompson, Watson and Co., at the Cape of Good Hope. A survey certificate to be supplied by the captain (if required) to the effect that the vessel is in every way fitted to carry a dry and perishable cargo to any port in the world. The captain to carry cargo for charterers' benefit in any cabin, store room, or other place not absolutely required for use during the voyage. The charterers to have the option of appointing their own stevedores at the expense of the master, but at not exceeding current rates; but the captain is not thereby relieved of the responsibility regarding the proper stowage of his vessel. The captain and charterers to be at liberty to add any clause to this charter-party by mutual consent, without prejudice to this agreement. In default of performance of this agreement it is hereby mutually agreed that the amount of freight herein agreed for to be paid and taken as liquidated damages for such default.

(Witness) E. SHREWSBURY,
ARMITAGE BROTHERS.

3. In accordance with the orders of the defendants the said ship proceeded to the port of Cochin, and was there put up by the defendants as a general ship, and loaded with a full and complete cargo, the property of various merchants, which cargo was shipped under several bills of lading, signed by the captain upon the orders of the defendants. The total amount of the bill of lading freight was estimated by the charterers at 4995*l.* 10*s.* 6*d.*, and was payable in London on delivery of the goods there.

4. The said ship, with the said cargo on board, sailed from the said port of Cochin upon her voyage to London under the said charter-party, and on the 2nd May 1872 the said cargo was found to be on fire. The master of the said ship, after attempting ineffectually to extinguish the fire at sea, put into Table Bay, which was the nearest port of refuge, and, after a survey, it was found expedient, in order to extinguish the fire, to scuttle the said ship, as it was deemed that the said fire could not be otherwise extinguished. The said ship was scuttled in Table Bay, and the said fire was thereby extinguished.

5. After the said fire had been extinguished the water was pumped out, and the greater portion of the cargo was unladen, and as a large quantity thereof was greatly injured by fire and water, surveyors, as customary, were called, and the surveyors pronounced a great part of the said cargo unfit for reshipment, and it was, therefore, ordered to be sold, and it was sold accordingly and the proceeds thereof were paid into the hands of the plaintiffs, who have since accounted for the same to the owners of the goods sold.

6. The remainder of the said cargo was reladen on board the said ship, and on the 9th June 1872, the said ship having undergone some repairs, resumed her voyage to London with the remainder of the said cargo on board, and with no other

[Ex. Ch.]

MERCHANT SHIPPING COMPANY v. ARMITAGE.

[Ex. Ch.]

cargo, and arrived in port and proceeded to the West India Docks, and on the 12th Aug. 1872, was reported inwards at the Custom House.

7. The bill of lading freight upon the cargo which arrived in London have been received by the plaintiffs, and amount to the sum of 3482*l.* 7*s.* 10*d.*, and the defendants advanced to the master at Cochin the sum of 364*l.* 14*s.* 1*d.* for disbursements of the said ship, making together the sum of 3847*l.* 1*s.* 11*d.*, but the defendants have not paid the plaintiffs the sum of 1152*l.* 18*s.* 1*d.*, being the balance of the said lump freight of 5000*l.*, mentioned in the said charter-party, and refuse to pay the same to the plaintiffs.

The court may draw inference of fact.

The question for the opinion of the court is, whether the plaintiffs are entitled to payment by the defendants of the balance of the said sum of 5000*l.* under the said charter-party, after giving credit for the said aggregate sum of 3847*l.* 1*s.* 11*d.*, which has been received by them on account thereof? If the court shall be of opinion in the affirmative, the judgment shall be entered up for the plaintiffs for the balance of the lump freight of 5000*l.*, viz., 1152*l.* 18*s.* 1*d.*, with costs of suit. And if the court shall be further of opinion that the plaintiffs are entitled to interest, then for a further sum for interest to be calculated for such period at such rate and by such person as the court may direct. If the court shall be of opinion in the negative, then judgment with costs of defence shall be entered up for the defendants.

The Court of Queen's Bench were of opinion that the plaintiffs were entitled to payment by the defendants of the balance of the said sum of 5000*l.*, viz., 1152*l.* 18*s.* 1*d.*, and also to interest on the sum of 1152*l.* 18*s.* 1*d.* at the rate of 5 per cent. from the 12th Oct. 1872, and gave judgment accordingly. (See ante, p. 51.) On this judgment error was brought.

The plaintiffs' points for argument were: first, that by the terms of the charter-party the lump freight of 5000*l.* became payable without reference to the amount of the cargo delivered; second, that the ship having been chartered by the defendants for a lump sum for a certain voyage, and by them put up as a general ship, any amount of 5000*l.* which she had earned on the voyage would have belonged to the defendants, and as there has been a loss upon the voyage, it must fall upon them, and not upon the plaintiffs; thirdly, that the lump sum of 5000*l.* was by the terms of the charter-party payable for the use and hire of the ship.

The defendants' points were: first, that the sum of 5000*l.* was payable for the carriage and delivery of the cargo, and not merely for the performance of the voyage by the ship; secondly, that the said lump freight did not become due because there was not a delivery of the cargo; thirdly, that no action lies on the charter-party for the said lump freight, because it did not become due under the charter-party; fourthly, that the plaintiffs can recover only on an implied assumpsit for a *quantum meruit*; fifthly, that enough money has been paid to satisfy the claim of the plaintiffs.

Watkin Williams, Q.C. (with him M^r Leach), for the defendants, contended that the lump freight was not, under the terms of the charter-party, earned by the plaintiffs because there was not a delivery of the entire cargo, the words of the charter-party being "a lump sum freight of 5000*l.* to be paid after entire discharge and right

delivery of the cargo in cash two months after the date of the ship's report inwards, &c." Subsequent clauses of the charter-party show that the 5000*l.* was not to be paid by way of hire or rent of the ship for a given time, or for several services, but was a lump sum which the charterers agree shall be the minimum amount of the freight to be earned, thus: "the master to sign bills of lading at any rate of freight required without prejudice to this charter-party, but should the aggregate freight by bills of lading amount to less than the lump sum of 5000*l.*, already stipulated for, the difference to be deducted from the amount to be drawn for disbursements, and the balance, if any, to be paid in cash at the rate of exchange for sight bills existing at the time of the ship's clearing in Colombo." The "balance" referred to here means the difference between the bill of lading freight and the charter-party freight, minus the disbursements. The 5000*l.* was not agreed to be paid for the voyage; the charter-party was, in fact, one of a speculative character, the charterers being willing to run a certain risk. It is submitted that the 5000*l.* was freight in the strict sense of the term, and consequently was not earned as to the goods destroyed, and, therefore, not delivered.

Further, assuming that the defendants are not right in this contention, then, according to the plaintiffs, the 5000*l.* is one indivisible lump sum and cannot be apportioned. In *Bright v. Cooper* (Brownlow's Rep. 21), an action of covenant was brought upon a covenant made by a merchant with a master of a ship, that if he would bring his freight to such a port, then he would pay him such a sum; part of the goods having been taken away by pirates, and the residue brought to the place appointed, and there unloaded, the merchant would not pay, and the question was whether the merchants should pay the money agreed for since all the merchandise was not brought to the place appointed; and the court was of opinion that he ought not to pay the money, because the agreement was not by him performed. In *Abbott on Merchant Shipping*, p. 385, 11th edit., it is stated, "In the case of a general ship, or of a ship chartered for freight, to be paid according to the quantity of the goods, there can be no doubt that freight is due for so much as shall be delivered, the contract in these cases being distinct, or at least divisible in its own nature. But suppose a ship chartered as a specific sum for the voyage, without relation to the quantity of the goods (in which case the contract as observed by Lord Chancellor Hardwicke is more properly a contract for the use of the ship than for the conveyance of the merchandise) should lose part of her cargo by a peril of the sea, but convey the residue to a place of destination, in this case I do not find any authority for apportioning the freight. And it seems to have been the opinion of Malynes (p. 100) that nothing would be due; and the case of *Bright v. Cooper*, which will be mentioned hereafter, may be considered as an authority in support of that opinion." An authority to the same effect is 3 Kent's Com. 227, "In the case of a general ship, or one chartered for freight, to be paid according to the quantity of goods, freight is due for what the ship delivers. The contract, in such a case, is divisible in its own nature. But if the ship be chartered at a specific sum for the voyage, and she loses part of her

[EX. CH.]

MERCHANT SHIPPING COMPANY v. ARMITAGE.

[EX. CH.]

cargo by a peril of the sea, and conveys the residue, it has been a question whether the freight could be apportioned. The weight of authority in the English books is against the apportionment of freight in such a case, and the question has been repeatedly discussed and determined of late years. It has been held that the contract of affreightment was an entire contract, and unless fully performed by delivery of the whole cargo, no freight was due under the charter-party, in the case where the ship was chartered for a specific sum for the voyage. The delivery of the whole cargo is, in such a case, a condition precedent to the recovery of the freight. The stipulated voyage must be actually performed. A partial performance is not sufficient, nor can a partial payment be claimed, except in special cases." For this last proposition Keot refers to *Post v. Robertson* (1 Johnson's Rep. 24.) Parsons (in his Law of Shipping, vol. 1, p. 293, note 4) says: "We have seen that in the case of a general ship freight is sometimes due for the goods delivered; but, when a ship is chartered for a specific sum for the voyage, and only a part of the cargo is delivered, the rest being lost by a peril of the sea, it has been held, both in England and in this country, that in an action of covenant on the charter-party there can be no apportionment of freight. In *Post v. Robertson* (1 Johnson's Rep. 24) the question came before the Supreme Court of New York, and it was held that in an action of covenant freight could not be recovered unless all the goods had been delivered. A majority of the court were also of opinion that if a portion of the goods had been received an action of *assumpsit* would lie to recover freight *pro rata* on the implied promise. See also *Stiergis v. Gairdner* (2 Brevard's Rep. 233.) The question was raised and discussed in *Weston v. Minot* (3 Woodh. & Min. 436), but not decided. Woodbury, J. suggested that to avoid the difficulty, the proviso that freight should be paid *pro rata*, though a full cargo should not, by accident or other unblamable cause, be delivered, should be inserted in the contract of affreightment." [FOLLOCK, B.—In *Eitchie v. Atkinson* (10 East, 305), Lord Ellenborough says: "No doubt if the master do not bring home a full loading, the other shall recover; but the writer (Malynes) does not say that that is a condition precedent to the claim of freight in proportion to what is actually brought home. In all the cases of conditions precedent the thing to be done is some indivisible thing, but delivery of a cargo of goods is not one entire thing, but in its nature divisible." The Court of Queen's Bench decided the present case, on the authority of *Robinson v. Knight* (ante, p. 19; L. Rep. 8 C. P. 486) but the charter-party in that case was not of the speculative character which it is submitted the charter-party in the present case is; and the same remark applies to the case decided by the Privy Council of the *Norway* (2 Mar. Law Cas. O. S. 17, 168, 254; 3 Moore's P. C. N. S., 245.) [BRANWELL, B.—Are we not bound by the case decided by the Privy Council, unless it can be distinguished?] It has been decided that courts of common law are not bound by a decision of the Privy Council (a); and the case of the *Norway* is distinguishable. There the freighter, by the charter-party, agreed to pay a lump sum as freight "for the use and hire of the

vessel." That was not freight in the strict sense of the term, in which sense, it is submitted, it is used in the present case. Sir E. V. Williams said, in delivering judgment (2 Mar. Law Cas. O. S. 257): "although the lump sum is called freight in the charter-party and bills of lading, yet we think it is not properly so called, but that it is more properly a sum in the nature of a rent to be paid for the use and hire of the ship on the agreed voyages. The charter-party expresses that a sum of 11,250*l.* is to be paid a freight for the 'use and hire of the ship,' and this lump sum is to cover both the outward and homeward voyages, without any distinction as to how much of it is to be attributed to the outward and how much to the homeward voyage. If this be so, the shipper has had the full consideration for the money agreed to be paid. The ship took out the salt and received the rice on board, and performed her homeward voyage according to her engagement, and the event, that by the act of God it became impossible to carry to the port of destination the rice jettisoned and the rice sold, ought not to affect the shipowners' right to receive the full amount of the stipulated payment. It was objected on behalf of the respondent that by the charter-party the remainder of the lump sum is made payable only on 'a true and final delivery of the cargo at the said port of discharge.' But this does not necessarily mean that the whole cargo originally shipped must be delivered. It may well have been intended merely to fix the time for payment to be the time of the delivery of such cargo as the ship brings with her to the port of discharge." If the cargo taken home and delivered is accepted, the shipowner, though he cannot recover the whole of the lump sum, may recover a proportionate part of it, on a *quantum meruit*.

Manisty, Q.C. (with him Petheram), for the plaintiff, was not called upon.

LORD COLERIDGE, C.J.—I do not think that we need trouble you, Mr. Manisty. Error is brought on a judgment of the Court of Queen's Bench, which proceeded on the authority of the case of *Robinson v. Knight* (*ubi sup.*) decided by the Court of Common Pleas, and in accordance with the decision of the Privy Council in the case of *The Norway* (*ubi sup.*). I do not find from the short note of the present case given in the Law Reports (8 C. P. 489) that the members of the Court of Queen's Bench in following the decisions in these two cases intimated any doubt as to the correctness of the decisions or in any way dissented from them.

The present case seems to me to be in reality on all fours with those two cases. It is true that the words of the charter-party in the present case are not identical with those in either of the two cases referred to. In *Robinson v. Knight* the contract was that the ship should proceed to Riga, to load at Bolderan or Malgraben a full cargo of lathe wood, the ship to be provided with a deck load, not exceeding what she could reasonably stow, &c., and should then proceed to London and deliver the same on being paid freight as follows: a lump sum of 315*l.*; the freight to be paid in cash, half on arrival and the remainder on unloading and right delivery of the cargo, less four months' discount on half, at 5 per cent. per annum. Part of the cargo loaded in accordance with the charter-party having been lost by perils of the sea, without any default of the master or crew, it was held

(a) See *Smith v. Brown*, ante, p. 56.—ED.

[Ex. Ch.]

MERCHANT SHIPPING COMPACT V. ARMITAGE.

[Ex. Ch.]

that the shipowner was, on delivery of the remainder of the cargo, entitled to the full sum. In the case of the *Norway* the contract was a little different. The ship was to be made ready and load at Liverpool a cargo of salt, not exceeding 2200 tons, and therewith proceed to Calcutta, and after the discharge of the outward cargo, reload (or at freighter's option proceed to other towns) a complete cargo of lawful merchandise not exceeding what she could reasonably stow and carry, and being so loaded, should proceed therewith to Cowes, Queenstown, or Falmouth, at the master's option, &c. "In consideration whereof and everything before mentioned, the freighter hereby promises and agrees to load and receive, or cause to be laden and received, in the manner and within the time therein mentioned for these purposes, and pay or cause to be paid as freight for the use and hire of the vessel 11,250*l.* lump sum, if ordered to the United Kingdom, Havre, or Bordeaux; 11,250*l.* if ordered to Antwerp or Marseilles, the master guaranteeing to carry 3000 tons dead weight of cargo upon a draft of 26*ft.* of water, or to forfeit freight in proportion to deficiency," &c. It was found as a fact by Dr. Lushington in the court below that the jettison of a portion of the cargo and the sale of the damaged portion of it were the consequence of negligence or want of skill on the part of the pilot, for which the shipowner was responsible, but the Judicial Committee of the Privy Council found, as a conclusion of fact, that the jettison had not arisen from any negligence on the part of the pilot. There was, however, a non-delivery in point of fact of the entire cargo. Notwithstanding that it was held that the contract was satisfied, and that as to the portion of the cargo jettisoned and that damaged, as it was not shown to have arisen from the negligence of the pilot, or want of prudence on the part of the master, there ought to be no deduction from the lump freight on account of non-delivery. And Sir E. V. Williams, in his judgment, intimated an opinion that even if the jettison had been attributable to the negligence of the master, there ought not to be a deduction, saying that perhaps in such a case the proper remedy of the shipper would be by a cross action.

These two cases we are now in truth called on to review. *Robinson v. Knight* (*ubi sup.*) is not binding on us, neither is the decision of the Privy Council in the case of the *Norway*, unless we concur in it. The courts of Westminster Hall do not feel themselves bound by decisions of the Privy Council unless they agree with them. At the same time, I must say that the judgments of the Privy Council are entitled to the greatest possible weight, and, though not binding, are to be regarded with the greatest respect by any court in this country. The contract which we have to consider in the present case is one, as it seems to me, not substantially distinguishable from that in the two cases referred to.

In the present case the ship was to proceed to Cochin, there load from the charterers, completing at Colombo or Intiercin, if required by them, a full and complete cargo, and thence proceed to London in the East or West India Docks and discharge there as customary, the act of God, restraints of princes and rulers, the Queen's enemies, fire, and all and every other of the seas, rivers, and navigation of whatever kind soever

during the said voyage excepted. Then comes the stipulation, "A lump sum freight of 5000*l.* to be paid after entire discharge and right delivery of the cargo in cash two months after the date of the ship's report inwards at the Custom House or under discount at 5 per cent. per annum (or at the Bank rate, if higher) at option of charterers' agents." On her way home to London some part of the ship's cargo took fire, and the ship was taken to Table Bay, it was found necessary to scuttle her, and more of the cargo was thereby damaged, and had to be sold. The part remaining was duly delivered. Freight, then, in the more ordinary sense of the word, had not been earned as to that portion of the cargo which was not delivered; and we are asked to decide, on appeal, that the lump sum freight of 5000*l.* had not been earned under the contract. I must say for myself that, if this case stood alone, and the two cases referred to had not been already decided, the intention of the contract was to ascertain and fix the sum at which the freight to be earned by the ship on this voyage was to be taken, as between the parties to the charter-party, for the purposes of the contract. The charterer, being content to run a risk, hired the ship for this voyage for a sum of 5000*l.*, this sum being called freight, and substantially being freight, being paid for the use of the ship in carrying cargo from Cochin to London. A lump sum was fixed upon to prevent inconveniences to the parties.

This being the interpretation of the contract, the question arises whether the non-delivery of a certain portion of the cargo interferes with the contract—whether under the circumstances there has been, in the words of the contract, an "entire discharge and right delivery of the cargo." On this point we have heard a good deal of argument, and I do not say that something might not be urged in support of the defendant's contention, if the matter were entirely free from authority. It might be said that the words of the contract mean "after the entire discharge and right delivery of the cargo originally put on board." But, regard being had to the fact that a lump sum is agreed on, the fair construction of the contract seems to be that which the courts have already put on similar contracts; namely, that the cargo is entirely discharged and rightly delivered when the whole of it, not covered by any of the exceptions mentioned in the contract has been discharged and delivered. It appears to me that the contract has been complied with, that the lump sum has been earned, and that the part of it unpaid should be paid to the plaintiffs.

But an ingenious argument has been addressed to us, the effect of which is to introduce obscurity into a portion of the contract, based on a subsequent stipulation in the charter-party, by which it was agreed that the master should sign bills of lading "at any rate of freight required without prejudice to this charter-party, but should the aggregate freight of bills of lading amount to less than the lump sum of 5000*l.* already stipulated for, the difference to be deducted from the amount to be drawn for disbursements and the balance, if any, to be paid in cash at the rate of exchange for sight bills existing at the time of the ship's clearing in Colombo." Mr. Williams says that, according to the true interpretation of this, in the events which have happened,

[Ex. Ch.]

MERCHANT SHIPPING COMPANY v. ARMITAGE.

[Ex. Ch.]

the facts do not apply themselves to the words of this stipulation; but that a state of facts may be easily supposed which will test it. Mr. Williams says that the lump sum of 5000*l.* is the most which the charterers stipulate to secure; they engage that that much cargo shall be put on board, in respect of which freight may be earned. Suppose, then, the bills of lading amount only to 4000*l.*, that leaves the sum of 1000*l.* to be covered by the charterers according to the contract. That, Mr. Williams says, is to be paid in two ways, either in the way of disbursements, or by cash at the rate of exchange for sight bills existing at the time of the ship's clearing in Colombo. If the sum they give the captain for disbursements is not sufficient, the difference is to be paid in cash. Mr. Williams contends that this shows the real construction of the contract to be not that a lump sum of 5000*l.* was to be paid in substitution for freight, but that the charterers should guarantee that bills of lading amounting to 5000*l.* freight should be forthcoming, and that if the amount were not made up in that way, it should in another way, but that the freight should not be claimed unless it were earned. I am very far from saying that this interpretation of the contract is not the correct one; my own individual opinion is that it is correct. But it seems to me not to prevent the operation of the construction which I have already given to the former part of the contract. The stipulation relied on seems to me to be only a mode of securing the payment of the 5000*l.*, the character of which sum has already been impressed upon it by the former portion of the contract.

It appears to me, therefore, upon the true construction of the charter-party, and on the reason of the thing, as well as on the authority of the two cases cited, that the judgment of the court below was right, and ought to be affirmed.

BRAMWELL, B.—I am entirely of the same opinion. This case ought certainly to be a warning to one not to be too confident, for at one time I felt certain as to the construction of this clause in the charter-party, and I have now great misgivings as to whether I am right. I thought that "the balance, if any," was the balance to be got by deducting one sum from the other sum, and if it does mean anything different to that, then to my mind the parties have taken the most inconvenient means of expressing it. There is some difficulty in understanding it, if you look at it in that way—"the balance, if any, to be paid in cash at the rate of exchange for sight bills existing at the time of the ship's clearing in Colombo." That merely states at what rate you shall ascertain Colombo currency, and that the amount shall be paid in cash. I think, if that be so, it goes undoubtedly to show that it was a sum of money to be paid at Colombo, and it was to be paid to the master; and it furnishes an argument that it must be some other sum than the balance. The balance, I suppose, was arrived at by the deduction of that one sum from another which has been previously mentioned. If that is so, what it can mean is what Mr. Williams has said, not "and the balance," but "if the bill of lading freight shall be so much less than the charter-party freight, and the difference between the two shall be greater than the disbursements, then the difference between the disbursements and that difference shall be paid to the master." I must say that if that was the in-

tention of the parties, they have used words most inconvenient for the purpose of expressing it; but there is some ground for Mr. Williams's construction in the expression which afterwards occurs, that the disbursements are to be drawn for—which must mean disbursements less deductions, when there are any—by bills at sixty days' sight. There is great justification therefore for Mr. Williams's contention, for I think it would be almost impossible for any court of law to hold that the words "and the balance, if any, to be paid, &c., meant, not what the words express, but, "if when the bill of lading freight has been deducted from the charter-party freight, the sum which shall remain after such deduction shall exceed the amount of disbursements, then the balance shall be paid."

But I confess I cannot think that the solution of this puzzle is necessary to the decision of this case. Besides, even if Mr. Williams were right it would be but a step in furtherance of the argument which he has addressed to us. There may, indeed, be another reason for giving the construction contended for to the words. Mr. Williams argues that if the words are construed in that way, then the shipowner always has, in the amount of disbursements, and in the amount of cash paid, and in the amount of bill of lading freight, his full 5000*l.*; that is to say, if the disbursements are 500*l.*, and the bill of lading freight 4000*l.*, making in all 4500*l.*, he is to be paid 500*l.* in cash. That is the object, according to Mr. Williams, of inserting this clause; and he says that the shipowner, having thus got in disbursements, money, and lien his 5000*l.*, trusts to his lien, and not to the covenant in the charter-party. That, however, is an assumption. What is there to show, even supposing this construction of the clause in the charter-party to be the right one, that the shipowner has trusted to his lien? There is nothing, in my opinion, to show that he has done so. Cases might very well happen in which that lien would not be sufficient. Take, for example, the case of a consignee not taking to the goods and becoming insolvent. I think, therefore, that the second step in Mr. Williams's argument is an assumption for which no valid reason has been given. It is, no doubt, a customary thing for persons to let goods be taken on board their ships with a guarantee from the broker that the freight shall amount to a certain sum; and in such case, Mr. Williams urges, they must trust to the person guaranteeing, and not to the charter-party or the bill of lading. But is it likely that, if it was intended to limit in this way the liability, the parties would not have said so in their contract? They have not said it. The charter-party is an ordinary one, and were it not for the difficulties that have been raised as to the lump sum, it is one upon which the charterer would be clearly liable. It seems to me that Mr. Williams has not succeeded in establishing this second step in his argument, that the charterer's liability was to be limited to the amount of the difference between the bill of lading freight and the charter-party freight, minus the disbursements. No sufficient reason for this has been given, even assuming the construction contended for to be correct.

Mr. Williams next relies on another clause of the charter-party, which made it, he says, a condition precedent to the right to recover the 5000*l.* that the whole of the cargo should be delivered. I am not sure that I have correctly apprehended the con-

[Ex. Ch.]

MERCHANT SHIPPING COMPANY v. ARMITAGE.

[Ex. Ch.]

tention, whether it goes the length of saying that if the whole of the cargo is not delivered there is no right whatever to the lump sum, or any part of it, or whether it is meant that there is some contrivance by which a proportionate amount, which would be fair, could be ascertained and recovered. Supposing that a lump sum is agreed to be paid, and that the charterer is liable for it, subject only to the question whether it is a condition precedent that the entire cargo should be delivered, I cannot see, if this is really a condition precedent, how the charterer could be held liable to pay half the lump sum on half the cargo being delivered. The argument, it seems to me, must therefore go to this extent, that by reason of non-delivery of a single article of the cargo the whole amount of the lump sum would be lost.

In support of the contention that this is a condition precedent, Mr. Williams relies on the clause of the charter-party that the ship shall take on board a full and complete cargo, and shall proceed therewith to London and discharge it. That is the duty, but there is a qualification to that duty, "the act of God, restraints of princes and rulers, the Queen's enemies, fire," and so forth. It is said that this qualification only diminishes the liability, but afterwards comes this, "A lump sum freight of 5000*l.* to be paid after entire discharge and right delivery of the cargo, in cash, two months after the date of the ship's report inwards at the Custom House." Now, Mr. Williams says that until the ship is discharged, and there is a right delivery of the cargo, the lump sum is not due. It may possibly be that in this he is right, verbally right. If so, what is the meaning of "the cargo"? In my opinion it is the cargo which she has to deliver. It does not mean the cargo she has shipped, but which she is not bound to deliver, which the shipowner is excused from delivering. It means the right delivery of the cargo which is to be delivered, not the right delivery of the cargo which was originally shipped on board of the vessel. This seems to me a most cogent argument in favour of this construction. Suppose that 5*l.* worth of these goods had been stolen by the sailors, that would not be within the exceptions, could it possibly be said by reason of that that the whole lump sum was lost? Would not the common rule have applied that that did not go to the whole consideration. Supposing the defendant had said "I shall not pay you; you have not delivered the whole cargo." Could not an action be brought against him? Would not the common rule apply? If that is so, is not it very odd that the shipowner is worse off by reason of his not being subject to an action in this case than he would have been if he had been subject to an action? That is to say, he is worse off because fire has caused the loss than he would have been if the loss had been owing to a depredation. I venture to think some interpretation must be put upon the contract which precludes its being a condition precedent that the whole cargo should be delivered.

Then Mr. Williams asks what would happen if nothing were delivered? I say that in that case the day from which the time of payment was to be reckoned could never arrive, because the payment is to be a lump sum to be paid after, the entire discharge and right delivery of the cargo two months after the date of the ship's report inwards at the Custom House.

This supposes that there would be a right delivery of the cargo before the amount is payable, and if there was none of the cargo delivered, I suppose the event would never happen upon which the lump sum was to be paid. It may be said that it would be a very odd thing that if the ship brought home in safety one hundredth part of the cargo, the shipowner should be paid the entire 5000*l.*, whereas if that hundredth part was lost he would lose his 5000*l.* That is a difficulty, but not a technical difficulty.

I might further say that I think the case of the *Norway* (not *sup.*), as my Lord has said, is absolutely indistinguishable from this case. All the ingredients exist there that exist here. There is the same obligation to land a full and complete cargo, the same obligation to deliver, and the same statement that the sum to be paid is only payable on delivery of the remainder at the port of discharge. It is true that there the words used were that the sum payable was for the use and hire of the ship. Suppose those words had been left out, what difference would there have been between that case and this? No reliance is placed upon them in the judgment of the court, and I think when one comes to look at the legal principles involved the words cannot be of any consequence. The question is in substance is it a condition precedent to the right to recover the lump freight that there should be a delivery of the entire cargo? Besides the case of *The Norway* there is also the case in the Court of Common Pleas of *Robinson v. Knight*; and there is also the decision of the Court of Queen's Bench, in the present case, intimating their satisfaction at the former decisions. The judgment is shortly reported thus: "The judgment in *The Norway* had been followed by the Court of Common Pleas in *Robinson v. Knight*, and there, as here, the charter-party was for a single voyage only." I infer from that that they were rather content than otherwise with the decision in the former cases. Indeed, Mr. Williams does not say that the Court of Queen's Bench intimated any doubt as to the propriety of the former decisions. I think, on the authority of those cases, the plaintiffs are entitled to our judgment.

KEATING, J.—I am of the same opinion. I agree with the Lord Chief Justice that Mr. Williams's construction of this clause of the charter-party is the right construction; but, assuming it to be so, I cannot see how it meets the difficulty, because what he seeks to establish by means of this construction, is that the security of the freight was to be substituted, not to be a collateral security, but to be substituted for the security of the contract. I cannot at all agree in that. But looking at this charter-party without being perplexed as all by the ingenious suggestion of Mr. Williams, what does it amount to? It amounts to this: the charterer agrees to pay a lump sum for the use of the ship for this particular voyage, but the shipowner wishes to be secure, and inasmuch as he has a cargo of goods it is reasonable he should have the security of the goods, and therefore it is agreed that he shall have the security of the goods; and the various provisions that are made in this disputed clause are merely provisions to guard against any interference with the security which the shipowner is to have. Mr. Williams is driven by his argument reluctantly to contend that this is a condition precedent, and that the

[EX. CH.]

MERCHANT SHIPPING COMPANY v. ARMITAGE.

[EX. CH.]

shipowner, unless he brings every ounce of the cargo home, cannot be paid anything. He suggests a mode of meeting that difficulty thus: that although the shipowner could not recover anything upon the contract, yet if the consignees of the cargo accepted it, the shipowner possibly might recover from them upon a *quantum meruit* for services performed. I suppose the answer to that would be that a special contract is contained in the bills of lading. At all events, it would scarcely get rid of the difficulty which would arise—namely, that this contract is to be put an end to, and that the shipowner is to lose all security under this contract without any fault of his own being suggested. It seems to me that would be a most irrational construction to put upon a contract not very difficult to understand. I think, therefore, that the judgment of the court below ought to be affirmed. With reference to the authorities that have been cited, I quite agree with what my Lord Chief Justice and my Brother Bramwell said with reference to them. We are not bound by those authorities further than to regard them with the respect they deserve from what they contain. So far as I am concerned, I agree with what has been laid down in both those cases. The less I say about the last of them the better; but still I can say with reference to that that I have not seen the slightest reason to change the opinion which I there expressed.

CLEAVEY, B.—Undoubtedly, in this case the shipowner looks to be paid principally by means of his lien upon the cargo. I never heard it suggested that because he does rely mainly upon the security he has by means of the cargo that, therefore, there is no person liable to him. Now, in this case, in order to give him a full security for the 5000*l.* by means of the cargo, various provisions are introduced into the contract. There is to be an advance of 750*l.* and a bill is to be given in respect of it. If you suppose the bill to be actually given, and the bills of lading and freight only amounted to 4500*l.*, he would be in the position of giving, without any security, to the charterer 750*l.*, in order to guard against that which was originally introduced. First of all, we have this provision, that the bill which is to be drawn is not to be for the full amount of disbursements, unless the bill of lading freight amounts to 5000*l.* Supposing the bills of lading freight amounts to 4500*l.*, you deduct the 500*l.* from the 750*l.*, and the bill will only be for 250*l.* You provide for the balance in that way, but then the balance may be the other way, and I confess I do not feel the difficulty which my brother Bramwell does in applying these words, "and the balance, if any." That means the other balance, if any, because if the balance is that way, it has been already provided for by the bill to be drawn; and the meaning of "and the balance, if any, is to be paid in cash, is to me plain. There is the 5000*l.* provided for substantially by the security of the goods. With respect to the other point, there is a very pertinent question of my brother Brett in the judgment in the case in the Common Pleas, where he says that in the case of the *Norway* it was dependent upon the right delivery of the cargo. Then he asks "what is the cargo?" That is the question that my brother Bramwell has asked. The words of the charter-party are not upon the delivery of the entire cargo, although the word "entire" is made use of. It is the entire and complete delivery of the

cargo. I am satisfied with the reasons already given, and with the authorities that have been cited, and I think the judgment of the court below must be affirmed.

GROVE, J.—I am of the same opinion. I cannot see that Mr. Williams's argument stopped short of this, and indeed some of the cases support it, that in case the entire cargo as laden is not delivered this clause would so operate that nothing in fact would be earned. It is true that he says proceedings may be taken upon a *quantum meruit*, but I do not gather from the charter-party anything to satisfy me that you could recover consistently with the existence of this contract, upon a *quantum meruit*. Then the clause does not necessarily import the meaning put upon it by Mr. Williams. To do so, it must not only be altered to "after discharge and delivery of the entire cargo, but to the entire cargo as laden." Why should the court put a forced construction upon these words which do not necessarily import the delivery of the entire cargo, which it would not put in the case where the parties hired the ship for 5000*l.*? And why should the court put the person so bargaining in a worse position than he would be in under an ordinary contract? With regard to the other clauses, they have been commented on by the court, and I confess that I can find nothing in the words which without considerable addition, could support Mr. Williams's argument. This argument is certainly not founded on the clauses as they actually exist in this charter-party. I am of opinion, therefore, that the judgment of the court below should be affirmed.

DENMAN, J.—I am of the same opinion. I did for some time entertain a doubt as to the meaning of the words, "the cargo," in the charter-party, but I have come to the same conclusion as the rest of the court have arrived at, that "the cargo" means the cargo that arrives, notwithstanding that a considerable portion of the original cargo may not arrive.

POLLOCK, B.—I agree that the judgment of the Court of Queen's Bench should be affirmed. In substance I think that the decision in that court is in accordance with the two cases of the *Norway*, and *Robinson v. Knight*; but inasmuch as we are sitting as a court of error, neither of those cases is binding upon us. I listened with the greatest attention to the argument of Mr. Williams on the clause providing for payment, and I am far from saying that his argument would not have weight as to the construction to be put upon the words of the earlier clause, if the words of that earlier clause were doubtful and uncertain. But in instruments of this kind, where you have the well-known words adopted, it is extremely uncommon to allow any inference to be drawn as to what the parties intended with regard to any portion of the contract.

Manisty, Q.C., asked for interest.

BRAMWELL, B.—On what ground is it recoverable?

Manisty, Q.C.—Because it is a sum payable on a day certain.

Williams, Q.C. submitted that interest was not payable, there being no contract to pay interest.

Manisty, Q.C.—It is a sum of money to be paid at a day certain—two months after the arrival of the ship.

LORD COLERIDGE, C.J.—This matter was not

[ADM.]

THE CITY OF CAMBRIDGE.

[ADM.]

argued, but we will look into it and let you know about the interest to-morrow morning.

Nov. 29.—Lord COLERIDGE, C.J.—We have been considering the case, and we cannot see that the plaintiff is entitled to interest.

Manisty, Q.C.—Blackburn, J. thought we had been kept out of the money, and therefore we ought to have interest. There is no declaration, the case being stated without pleadings. We have a right to frame a declaration, and we could put in a special count for interest, they not having paid on the day they should.

BRAMWELL, B.—According to that, every case would carry interest.

Manisty, Q.C.—Wherever there is a day fixed.

Lord COLERIDGE, C.J.—But there is not a day. We cannot see that there is a day certain, and therefore we are of opinion that we cannot give judgment for interest. You have it for the principal.

Judgment affirmed as to the principal, but reversed as to the interest.

Attorney for plaintiffs, Szalows.

Attorneys for defendants, Thomas and Hollams.

COURT OF ADMIRALTY.

Reported by J. F. ASHBALL, Esq., Barrister-at-Law.

Nov. 19, 20, and 21, 1873.

THE CITY OF CAMBRIDGE.

Collision—Pilot's duties and responsibility—Ship at anchor—Look-out—Compulsory pilotage—River Mersey—Ship proceeding to sea—Mersey Dock Acts Consolidation Act (21 & 22 Vict. c. xcii.), ss. 138, 139.

Where a ship in charge of a licensed pilot is anchored within pilotage waters, the pilot determines and is responsible for the length of cable at which the ship rides, and it is the duty of the pilot, when the ship swings to the tide, to superintend that manœuvre and to regulate the helm, and it is negligence on his part to go below before the ship is fully swung, leaving the helm outsidships without orders as to its regulation; and if, through want of length of cable and of regulation of the helm, the ship sheers and so parts from her anchor in swinging during his absence, the pilot will be alone responsible, provided that the watch on deck take the right manœuvre to counteract the sheering.

Semble, that where the look-out has once reported to the pilot or officer of the watch a light on board another ship, and the report has been answered, there is no further duty on the look-out to report that light a second time on nearing the ship.

The Mersey Docks Acts Consolidation Act 1858 (21 & 22 Vict. c. xcii.)—providing for the pilotage of the river Mersey, and enacting (sect. 138), *inter alia*, that if the master of any vessel (with certain exceptions), being outward bound, "shall proceed to sea, and shall refuse to take on board or to employ a pilot, he shall pay to the pilot who shall first offer himself to pilot the same, the full pilotage rate," as if the pilot had piloted the ship; and, further, that (sect. 138) if a master requires the services of a pilot whilst his ship is lying at anchor in the Mersey, the pilot shall be paid for every day or portion of a day he shall attend, the sum of five shillings; "but no such charge shall be made for the day on which such vessel being outward bound, shall leave the river Mersey

to commence her voyage,"—compels a master so proceeding to sea to take a pilot.

Where a ship fully equipped and ready for sea leaves one of the Liverpool docks at night, with the intention of proceeding straight to sea, but her master, on getting into the river Mersey, determines, on account of the weather, to anchor for the night, he is proceeding to sea within the meaning of the Mersey Docks Acts Consolidation Act 1858 (21 & 22 Vict. c. xcii.), sect. 139, and is compelled by that section to take on board a licensed Liverpool pilot on leaving dock; and if the ship break from her anchor during the night, and a collision ensues through the sole negligence of the pilot, the owners are exempted from liability.

Semble, that in such circumstances the right of the pilot, under sect. 138, to an extra payment of five shillings a day whilst employed on the ship at the requirement of the master during the time she is anchored in the river, except on the day when the ship leaves the Mersey to commence her voyage, does not alter the character of the employment during that time, so as to make it a voluntary employment.

This was a cause of collision instituted on behalf of the owners of the ship *Birmah*, her cargo and freight, and on behalf of her master and crew, proceeding for their money, clothes, and private effects, against the screw steamer *City of Cambridge*, and her owners intervening.

The plaintiffs' petition alleged that the *Birmah* was an iron ship rigged vessel of 797 tons register; that on the evening of the 26th Feb. 1872, the *Birmah* being on a voyage from Illo Ilo to Liverpool, with a cargo of sugar and other produce, was towed into the river Mersey in charge of a licensed pilot, and was brought to anchor by her starboard anchor, at about 9.30 p.m., in about seven or eight fathoms of water, and to the N.E. of Egremont Ferry; that two regulation anchor lights were hoisted, one on the foremast, the other on the gaff end of the *Birmah*, and there continued to burn brightly until after the collision; that a good look-out was kept; that it was high water about 11.10 p.m., and about 11.30 p.m. the *Birmah* swung to the tide; that about 2.30 a.m. of the 27th Feb., those on board the *Birmah* perceived a screw steamer (which afterwards proved to be the *City of Cambridge*) about a quarter of a mile off, and a little on the port bow of the *Birmah*; and smoke was coming from the funnel of the steamer, but she appeared to be drifting rapidly with the ebb tide towards the *Birmah*; that the *City of Cambridge* continued to approach the *Birmah* until she struck her heavily with her starboard bow; the starboard anchor of the *City of Cambridge* was hanging just under the hawse pipe, and the force of the blow drove the anchor through the plates of the *Birmah* near her port fore-rigging, making a large hole below the water line; that the steamer struck the *Birmah* a second time abait the port main-rigging, carrying away a davit and a part of the bulwarks, and then went astern of her; a few minutes afterwards the *City of Cambridge* came up the river again under steam, passing between the *Birmah* and the Lancashire shore; that the *Birmah* began to fill rapidly through the hole in her port side; blue lights were thrown up, and a steam tug coming alongside, the crew escaped on board her leaving their effects behind; in less than half an hour from the time of the collision the *Birmah* sunk; that the collision was wholly caused by the

[ADM.]

THE CITY OF CAMBRIDGE.

[ADM.]

negligence and misconduct of those on board the *City of Cambridge*, who neglected to keep clear of the *Birmah*, and neglected to keep a proper look out.

The answer filed by the defendants was as follows:—

1. At about 11 p.m., on the 26th Feb. 1873, the screw steam ship *City of Cambridge*, of 1489 tons register, fitted with engines of 200 horse power nominal, and manned by a crew of forty-six hands, all told, left Morpeth Dock, in the port of Liverpool, on the way to sea, on a voyage to Calcutta, with a general cargo and passengers, in charge of a duly licensed Liverpool pilot.

2. At such time the *City of Cambridge* was properly furnished and equipped, and in all respects ready for sea. It was intended that she should, as a matter of precaution, come to anchor in the Mersey until daylight, and that she should then leave the river, but it was necessary for her to leave the Morpeth Dock at the aforesaid time, in order that she might so leave the Mersey at daylight.

3. The *City of Cambridge* was accordingly brought to anchor in the Mersey, by her said pilot, about abreast of the Woodside Landing stage, and a little on the Cheshire side of mid-river, by her port anchor and about sixty fathoms of chain.

4. About 12.15 a.m. on the following day, the wind was blowing fresh from the north-westward, with squalls and showers, and the night was dark and the tide was strong ebb, and the *City of Cambridge* was still at anchor in her said berth, with her proper riding lights duly exhibited and burning brightly, and with her fire banked and a proper watch being kept, when her said port cable parted, and she began to drift down the river athwart the tide.

5. By order of her said pilot steam was got on the *City of Cambridge*, and her helm was put a-starboard, and endeavours were made to put her head on to the tide, and shortly afterwards, by order of the said pilot, her engines were stopped, and her starboard anchor, which was in readiness, was let go. She was then over towards the Cheshire shore.

6. A large scope of chain was given to the starboard anchor, but it failed to bring the *City of Cambridge* up, and she continued to drift, and the pilot thinking that it might be foul, it was, by his order, hove up and sighted and found to be clear. The *City of Cambridge* continued to drop down the river, looking out for a berth in which to bring up, her engines and helm being used as directed by the pilot for the purpose of keeping her clear of the vessels at anchor.

7. When the *City of Cambridge* had got a little to the northward of Eggesmont Ferry, the *Birmah*, the lights of which had, with other riding lights, been previously seen, was noticed on the starboard quarter of the *City of Cambridge*, distant about two or three ships' lengths. At this time there were several other vessels at anchor near. By order of the pilot the engines of the *City of Cambridge* were set ahead, full speed, and her helm was put hard-a-starboard, but the tide taking the *City of Cambridge* so quickly towards the *Birmah*, that it appeared that these measures would not enable the *City of Cambridge* to clear the *Birmah*, the engines of the *City of Cambridge* were reversed full speed astern, but the *City of Cambridge*, with her starboard bow and anchor, came into collision with the port bow of the *Birmah*, and so much damage was thereby done to the *Birmah* that she subsequently sank.

8. Save as herein appears the defendants deny the truth of the several allegations contained in the petition filed in this case.

9. At the time of the said collision the *Birmah* was at anchor, improperly steered under a starboard helm, and with her yards hauled up on the port braces, and with her head angling to the Liverpool shore, and sheering about without anyone attending to her helm, and those on board her improperly neglected to port her helm before the said collision, and the said collision was occasioned or contributed to by the negligence of those on board or in charge of the *Birmah*.

10. The *City of Cambridge* parted from her said port anchor without any negligence on the part of the defendants or those on board of her, and owing to her great length, and the strength of the tide, and the state of the

weather, and of the number of vessels in the river, those on board her were unable to avoid the said collision, which was, so far as the *City of Cambridge* was concerned, the result of inevitable accident.

11. Before and at the time of the said collision, the *City of Cambridge* was in a district and under circumstances in which the employment of a qualified pilot was compulsory by law upon her and her masters and owners, and before and at the time of the said collision, the *City of Cambridge* was in charge of a duly licensed and qualified pilot, the employment of whom was compulsory by law, and all the orders of such pilot were duly obeyed by the master and crew of the *City of Cambridge*, and if the said collision was not occasioned by the negligence of those on board the *Birmah*, and was not the result of inevitable accident, so far as the *City of Cambridge* was concerned, it was occasioned by the fault or incapacity of the said pilot.

The pleadings were thereupon concluded.

Nor. 19 and 20.—The cause was heard before Sir R. Phillimore, assisted by Trinity Masters, and the plaintiffs' ship having been at anchor, the defendants were called upon to begin(a). The evidence called by the defendants proved substantially the allegations of fact made in paragraphs 1–7 of the answer: and it further appeared that the *City of Cambridge* was first anchored on a flood tide, which was then running about three knots. The ebb tide began to make shortly before midnight; it runs in the Mersey about six knots. The pilot was on deck at this time, and a proper anchor watch was set, a quartermaster being near the helm. When the *City of Cambridge* had swung three parts to the ebb, the helm was left amidships by the pilot's orders. The pilot thereupon went to lie down in the chart-room, or upon deck, giving orders to be called in the event of any emergency arising: the watch remained on deck. Soon after this, about 12.15, the *City of Cambridge* gave a sudden sheer, and the quartermaster immediately put her helm over, but before the helm had any effect on the ship the cable parted. The pilot was at once called, and came on deck almost immediately afterwards (the time elapsing between his being called and his coming on deck was found by the court to be very inconsiderable). When the pilot got on to the bridge, he gave directions for getting the ship's head to the tide, and she drifted stern foremost down the river. Her steam was up and ready for use. After she had so drifted for about twenty minutes, the pilot ordered her starboard anchor to be let go, and this was at once done. The ship, however, continued to drag till about twenty minutes before the collision, when the anchor was by the pilot's orders hove up and found to be clear, and not foul, as was supposed. It was not again let go before the collision. The *City of Cambridge* continued to drift, stern foremost, being manœuvred by the aid of steam and helm, so as to avoid the shipping through which she was running, and the amount of which was considerable. In trying to avoid another ship, the *City of Cambridge* ran into the *Birmah*. In the log of the *City of Cambridge*, it was stated that that vessel "took a sheer into the *Birmah*." Some few minutes before the collision the look-out had reported, and the pilot had answered the report, and had then seen

(a) No objection was taken by the defendants to beginning in this case, although it had been intimated in *The Abrahams* (ante, p. 24), that the rule in such cases always lay upon the plaintiff in the first instance. It has now, however, been formally decided, in a case named the *Otter*, which will be shortly reported, that in all damage cases the plaintiff must begin.—EN.

ADM.]

THE CITY OF CAMBRIDGE.

[ADM.]

the light of the *Birmah*, but the look-out did not again report that ship on nearing her. The distance from the place where the *City of Cambridge* was anchored to the place of collision was about a mile and a half. After the collision, the *City of Cambridge* steamed up the river, and anchored in the Sloyne. Evidence was given in support of the ninth paragraph of the answer.

On the part of the *Birmah*, it was proved that the allegations of fact contained in the petition were substantially true. It was further proved that before the *Birmah* swung to the tide her helm was fastened a starboard; her helm was worked by a screw, and when placed in one position, remained under ordinary circumstances; when the ship had swung to the tide, her helm was altered by putting it over two or three spokes to port, and there left; she was lying steady at the time of collision, and was not sheering about.

It was admitted that the anchors and chains on board the *City of Cambridge* were of a proper quality, and had been duly tested, and that the owners of that vessel were not to blame in that respect.

It was agreed that the question, whether the *City of Cambridge* had her pilot on board by compulsion of law, should be argued separately, in case the court should be of opinion that the collision was the fault of the pilot alone, as far as regarded that vessel.

Sir John Karlake, Q.C. (Milward, Q.C. and Clarkson with him), submitted for the defendants—First, that the cause of the collision was the breaking of the chain, and that was an inevitable accident; secondly, that even if this were not the cause of the collision, all subsequent acts were the acts of the pilot, and he alone was responsible; thirdly, that the officers and crew were guilty of no negligence; that the quartermaster had done what was best in putting over the helm, and had merely carried out the pilot's direction, who left him in charge, and that a proper look out had been kept.

Butt, Q.C. (Gully with him), for the defendants.—To establish a plea of compulsory pilotage the defendants must show that the collision was caused by the sole act of the pilot, and that no act of their master and crew contributed thereto; and of this they must give positive proof:

The Annapolis—*The Johanna Stoll*, 4 L. T. Rep. N.S. 421; Lush. 293; 1 Mar. Law Cas. O. S. 60;
The Iona, L. Rep. 1 P. C. 426.

Assuming it to be the duty of the pilot to bring the ship to anchor, and take charge of her whilst at anchor, it is the duty of the master and crew to carry out the pilot's orders, to see that the proper amount of chain is out, that the yards are properly trimmed, that she lies steady while the pilot is below, and they must prove that they did these things, and they have not so proved. They must show affirmatively that the sheering was the result of no negligence of theirs, and that they did all they could to prevent an accident at the critical period of the swinging of the ship. If a pilot is incapable, a master may supersede him; similarly, when a pilot is in bed, and an emergency rises, the officer in charge is bound to act independently, and the owners must be responsible for his acts or omissions. They must show that the quartermaster took the proper measures to counteract the sheer, and took them in

good time; if they do not show this, then the pilot cannot be said to be solely responsible:

The Mobile, Swab. 71, 128; 10 Moo. P. C. 471.

Before the pilot came on deck they could and ought to have let go the starboard anchor. The parting of the cable must be considered as the *causa causans* of the collision, and for this the crew are responsible; and if by this negligence the pilot was put in a difficulty and exercised a wrong judgment, he was not solely responsible, for it conducted to the collision: (*The Iona*, *sup.*) Under the circumstances, the look-out was insufficient just before the collision; it was not enough to call attention to the *Birmah's* lights in the first instance, as they approached her the pilot's attention ought again to have been directed to her:

Sir J. Karlake in reply.

Nov. 21.—Sir R. PHILLIMORE stated the facts as given above, and proceeded:—Upon these facts the first question arises, was the *City of Cambridge* to blame for the collision? and there are a variety of questions which I have had to put to the Elder Brethren of the Trinity House in order that I may be guided by their advice upon the principal nautical points which arise in this case. And, first, they are of opinion that she ought to have had more cable let out in the first instance; that sixty fathoms of cable was not sufficient; but that, at all events, when she swung to the ebb tide, expecting, as she must have done, a spring tide of six knots, then more cable should have been veered out. It is in evidence in the case that she had 150 fathoms of cable on such anchor, which was available for use.

The Elder Brethren think also that the pilot was to blame for leaving the deck when he did that he ought not to have gone away into the chart room when she was three quarters swung to the ebb tide; he ought to have waited till she was fully swung, and himself superintended that manœuvre, and seen that her helm was properly put. He left her helm amidships. No blame attaches to the *City of Cambridge* with respect to the men that were left on deck. There seem to have been sufficient men, and they were properly stationed. It is to be observed that when the vessel swung, the wind and tide were opposed, and no blame at all attaches, in the opinion of the Elder Brethren, with which I agree, to Boyle, the quartermaster, in the manœuvre which he effected. He executed the right manœuvre in countermacting the sheer the vessel had taken, and there was no delay in executing it, nor is there any reason to suppose that the pilot, if he had been on deck instead of in the chart room, would have directed anything to be done different from what was done in his absence.

The next observation which the Elder Brethren of the Trinity House make is this; that the starboard anchor ought to have been ready to have been dropped, or ought to have been dropped instantly, if it was intended to rely on it. But the real and principal master of blame in this case is as follows: The *City of Cambridge* ought never to have been allowed to go down the river stern foremost, as she was, into a crowd of shipping, scarcely avoiding one vessel before she was nearly into another; and in the opinion of the Elder Brethren, it is really a matter of great astonishment that she did not do more damage than she actually effected. She ought to have gone ahead, at all events, immediately after

ADM.]

THE CITY OF CAMBRIDGE.

[ADM.]

she sighted the starboard anchor, and found it clear, in the way I have described. The ship might have been under perfect command, and she ought to have been brought up in the Skye, and to have waited there till daylight. Upon that point the Elder Brethren of the Trinity House have no hesitation at all, nor have I any doubt that their judgment is perfectly correct.

With respect to the second point, I find upon the evidence that the pilot's orders were duly obeyed; and with respect to the third point, I have taken into my careful consideration the ingenious argument of Mr. Butt, but, nevertheless, I am of opinion, under the advice of the Elder Brethren of the Trinity House, that the crew on board the *City of Cambridge* cannot be said in any way to have contributed to the collision. There was no want of look out, and no want of due notice, on the part of those whose duty it was to keep a look out, to the pilot.

Lastly, I come to consider the question, which is forth in order, whether the *Birmah* contributed in any way to this collision. The *Birmah* was riding with her starboard anchor, quite steady, with seventy-five fathoms of chain; although in mere shoal water, with more chain than the *City of Cambridge*. She certainly did not sheer, in our opinion, into the *City of Cambridge*, but the truth is told in the log kept on board the *City of Cambridge* that that vessel sheered into her. She was lying quiet, and it matters not, in the opinion of the Elder Brethren, whether her helm was lashed to port or starboard; though I am bound to say that the evidence shows that she had her helm two or three spokes to port before the collision took place.

Upon these facts, I can, of course, come but to one conclusion, namely, that the *City of Cambridge* is solely to blame for this collision.

There remains another question to be discussed, namely, the question of law applicable to the pilot, as to which it is not necessary to detain the Elder Brethren.

The question of compulsory pilotage then came on for argument.

It had been proved by the Master of the *City of Cambridge* that when he left the dock on the night of the 26th Feb., he had intended to go straight to sea, but that on getting into the dock gates, and seeing the state of the weather outside, he, acting on the advice of the pilot, determined to anchor in the river and wait till daylight. The *City of Cambridge*, on leaving the dock, was fully equipped and ready for sea.

When a Liverpool pilot has completed his pilotage service, and is about to leave the ship, he presents to the master for signature a certificate on a printed form, setting out the nature and extent of his service. The rates which the pilot is entitled to charge are printed on the back of this certificate. The pilot either obtains the money from the master, or the pilotage authorities obtain it from the agents of the ship in Liverpool by means of the certificate. The certificate signed by the master of the *City of Cambridge* was as follows:—

LIVERPOOL COMPULSORY PILOTAGE CERTIFICATE.

No gratuity allowed.

Vessel's name—*ss. City of Cambridge*, of Glasgow, from Liverpool, bound to Calcutta.

Draught of water—21ft. 6in.; twenty-one feet nine inches.

Registered tonnage—1480.

I certify that Mr. Joseph Harrison, a licensed pilot of boat No. 4, has piloted the said vessel from Mersey Dock to N.W. light ship, and is entitled to pilotage according to Act of Parliament.

Towed from

To

Extra days 2.—W. H.

Witness my hand, the 28th day of February 1873.

JOHN SMITH, Master.

To Messrs. Allan, Brothers, owners or agents.

On the back of this pilotage certificate the rates charges, and receipt appeared as follows:—

LIVERPOOL COMPULSORY PILOTAGE RATES.

Inward.	
Foreign, Point Lynas to Liverpool	9s. per foot
" East of Ormeshead to "	8s. "
Coasting, half the above rates.	
Outward.	
Foreign, from dock or river to Bell Buscon, 4s.	"
Coasting " " "	2s. "

LIVERPOOL VOLUNTARY RIVER RATES.

Extra days in river, per day, 5s.

For docking and transporting from one dock to another, 11.

To and from Garston, 21.

Messrs. Allan and Co.,

Dr. to Joseph Harrison, pilot, No. 4 boat.

	s.	d.
For pilotage services rendered to the <i>City of Cambridge</i> , as per certificate on other side		
21ft. at 4s.	4	6
Two extra days at 5s.	0	10
	£4 16 0	

Settled, 6/3/73.

pro Jno. Leech.

J. H. LEECH.

The pilotage of the port of Liverpool is under the control of the Mersey Docks and Harbour Board, and is regulated by the Mersey Docks Consolidation Act 1858 (21 & 22 Vict. c. xcii.), sects. 118 to 164. The sections material to the present case are as follow:—

Sec. 123. If any person shall pilot any vessel into or out of the port of Liverpool, without having been first duly licensed by the board to act as a pilot, or after the expiration of his licence, and before the same shall have been renewed, he shall for every such offence be liable to a penalty not exceeding 20l.

Sec. 124. In case any pilot shall refuse to take charge of any inward bound vessel, upon a proper signal being made for a pilot, or of any outward bound vessel, upon the request of the master thereof . . . the board may recall the licence granted to such pilot, and declare the same to be void, or may suspend the same for such time as they shall think proper, &c.

Sec. 127. Every pilot taking upon himself the charge of any vessel shall, if so required by the master thereof, pilot such vessel, if sailing out of the port of Liverpool, through the Queen's Channel, so far to the westward as the buoy, commonly known by the name of the *Farmly North-west Buoy*, or Fairway buoy of the Queen's Channel; and if sailing through the Rock Channel, pilot the same so far to the westward as the North-west buoy of *Boyle*; and any pilot who shall in any such case refuse to pilot such vessel to such distance as aforesaid, shall forfeit his right to receive any sum of money for piloting such vessel, and may also, at the discretion of the board, be deprived of his licence.

Sec. 128. The pilot in charge of any inward bound vessel shall cause the same (if need be) to be properly moored at anchor in the river Mersey, and shall pilot the vessel into some one of the wet docks within the port of Liverpool, whether belonging to the board or not, without making any additional charge for so doing, unless his attendance shall be required on board such vessel while at anchor in the river Mersey, and before going into dock, in which case he shall be entitled to receive 5s. per day for such attendance.

ADM.]

THE CITY OF CAMBRIDGE.

[ADM.]

SECT. 129. The master of every inward bound vessel liable to pay pilotage rates shall, on coming within the pilot stations, as fixed by the bye laws made under the authority of this Act, display and keep flying the usual signal for a pilot to come on board; and if any such master shall omit so to do, he shall be liable to a penalty on every such omission of not exceeding £1. and if any pilot shall come within any reasonable distance of any such vessel, the master thereof shall render all necessary assistance (so far as may be consistent with the safety of such vessel) to enable such pilot to come on board.

SECT. 130. In case the master of any inward bound vessel, other than a coasting vessel in ballast or under the burden of 100 tons, shall refuse to take on board or employ a pilot, such pilot having offered his services for that purpose, such master shall pay to such pilot, or if more than one, then to the first of such pilots who shall have offered his services, the full pilotage rates which would have been payable to him if he had actually piloted such vessel in the port of Liverpool.

SECT. 130. And, whereas outward bound vessels are sometimes forced back, by storm or otherwise, before the pilots have left such vessels, or before such pilots have conducted such vessels as far as is required by this Act, and it is expedient that such pilots should have reasonable compensation made to them in addition to the usual rates of pilotage: be it enacted, that in every such case the board may determine the amount of such compensation, so that such compensation shall not in any case exceed a moiety of the rates which such outward bound vessels would have been liable to pay in case such vessels had not been forced back as aforesaid.

SECT. 131. If the master of any vessel shall require the attendance of a pilot on board any vessel during her riding at anchor, or being at Hoylake, or in the river Mersey, the pilot so employed shall be paid for every day or portion of a day he shall so attend the sum of 5s. and no more; provided that the pilot who shall have the charge of any vessel shall be paid for every day of his attendance whilst in the river; but no such charge shall be made for the day on which such vessel, being outward bound, shall leave the river Mersey to commence her voyage, or, being inward bound, shall enter the river Mersey.

SECT. 132. In case the master of any vessel, being outward bound, and not being a coasting vessel in ballast, or under the burden of 100 tons, for which provision is otherwise made, shall proceed to sea, and shall refuse to take on board or employ a pilot, he should pay to the pilot who shall first offer himself to pilot the same, the full pilotage rate that would have been payable for such vessel if such pilot had actually piloted the same into or out, as the case may be, of the said port of Liverpool, together with all the expenses incurred in recovering the same.

Sir J. Karlake, Q.C. and Milward, Q.C. (Clarkson with them), for the defendants.—The main question is, whether the *City of Cambridge* was "proceeding to sea;" if so, then she was within the provisions of sect. 139, which makes pilotage compulsory in such a case. It is admitted that the vessel was ready for sea; and the going into the Mersey must be considered as a mere step in that direction. In *Rodriguez v. Melnikish* (24 L. J. 26, Ex.), which was a case decided under the similar section of a former Act (5 Geo. 4, c. 133, s. 35), Pollock, C.B. said: "Here the owners were bound to show that the vessel was compelled to have a pilot on board at the time of the accident. . . . The question is, whether this vessel was proceeding to sea. Now, if she had her cargo on board, if her master had been ready and everything prepared for starting, there would be good ground for saying that she was proceeding to sea, within the meaning of the section. But her rigging was not complete, and, being a vessel carrying the mail, she was not to sail until the following day. I think, therefore, that she was not proceeding to sea, and might lawfully refuse to take a pilot on board whilst thus in the river. The owners, therefore, are not exonerated, and

this rule must be discharged." Under the corresponding sections relating to inward bound ships, it has been held that ships coming into the river with a pilot are bound to employ that pilot or another to take them into dock.

The Annapolis—*The Johanna Stett*, 4 L. T. Rep. N. S. 417; Lush. 295; 1 Mar. Law Cas. O. S. 60.

In that case it was said by Dr. Lushington, "The original employment of the pilot to take the ship into the port of Liverpool being compulsory, the next question is, whether the compulsion prevailed at the time when the ship was proceeding from the river into dock and the collision occurred. The ship had been anchored for some days previously in the river. The 128th section of the local Act is as follows:—(For this section see *sup.*) This section prescribes the duty of a pilot piloting a vessel inward bound. It appears to me to provide for all probable contingencies. First, the pilot is to moor the vessel in the river, if need be, that is, if she cannot go at once into dock; secondly, he must pilot her into dock without making any additional charge; thirdly, he is entitled to 5s. a day, if his attendance is required on board the vessel whilst at anchor, and before going into dock. It appears to me that this section contemplates considerable delay between mooring the ship and taking her into dock, and it provides for the consequences of that delay in two ways; for the master, that he shall not pay more for complete pilotage, that is, the bringing into dock; for the pilot, that if detained on board the ship, he shall be paid for such additional service. I put a very different construction on the proviso beginning, 'unless his attendance shall be required, &c.' than that contended for by the plaintiffs. The words, in my judgment, do not diminish or control the duty of the pilot, but under circumstances increase the pay." Similarly, under sects. 131 and 132, the pilot is bound to pilot an outward bound vessel from dock, and if there is any delay he becomes entitled to more pay, but is not relieved from any duty. The obligation is imposed upon the pilot by sect. 124, which imposes upon him a penalty if he refuses to take charge of an outward bound vessel, "upon the request of the master thereof." This vessel was outward bound, and the pilot went on board, at the request of the master, in dock, and was bound so to do. The vessel left the dock on her way to sea, and only paused in the Mersey for a favourable opportunity to cross the bar at the mouth of the river. Hence, on leaving the dock, she was "proceeding to sea," within the meaning of sect. 132, and was bound to take a pilot. The test to be applied is that, being quite ready for sea, she broke ground for that purpose, and hence is within the dicta of Pollock, C.B. in *Rodriguez v. Melnikish* (*ubi sup.*). Moreover, to give exemption it is not necessary that pilotage should be compulsory at the time the collision happens; it is enough that the pilot be employed within a district within which pilotage is compulsory by law:

The Merchant Shipping Act 1854 (17 & 18 Vict. c. 104) s. 388.

The General Steam Navigation Company v. The British and Colonial Steam Navigation Company (Limited), L. Rep. 3 Ex. 230; L. Rep. 4 Ex. 238; 19 L. T. Rep. N. S. 337; 20 L. T. Rep. N. S. 581; 3 Mar. Law Cas. O. S. 168, 237.

A liberal construction should be put upon the statute, and the pilot having been employed for the purpose of taking the ship to sea, such employ-

[ADM.]

THE ENTRACHT.

[ADM.]

ment being compulsory, it should be considered that he was on board by compulsion of law whilst the ship, although delaying her final departure, did so only on her way to sea, and whilst waiting for daylight. The pilotage certificate itself represents the compulsory pilotage rate onwards to be paid for pilotage from dock to the Bell Beacon.

Butt, Q.C. and W. O. Gully, for the plaintiffs.—The master was not bound to take a pilot until he actually proceeded to sea. On his being advised by the pilot not to go until the next morning, he could have declined his services until that time, and would have incurred no penalty for so doing; he might have anchored his own ship in the river. The keeping the pilot on board on leaving dock was a purely voluntary act, and the pilot must be considered as the servant of the owners until the ship weighed anchor to go out of the river. No pilotage became due until that time, and no penalty for refusing pilotage could till then be incurred. The mere refusal to have a pilot on board before proceeding to sea constitutes no offence. Under the 13th section there must be an actual proceeding to sea, and a refusal to take on board or employ a pilot for that purpose, before the master became liable to pay the penalty; this differs from the inward bound section (section 130) in so far as the latter inflicts the penalty on a mere refusal. On leaving the dock the master was not proceeding to sea, but to an anchorage in the river. Proceeding by any number of steps from one part of the port to another is not proceeding to sea; the proceeding to sea within the meaning of this section takes place when the master weighs anchor for the last time and goes out of the river. No rate for pilotage proper would become payable until the ship actually began to leave the river, and the pilot in this case had at the time of the collision earned, not a compulsory rate, but a rate which is expressly called in the certificate "voluntary;" that is to say, a rate extra and beyond that which the shipowner is compelled to pay. The payment of this rate the master might have avoided, if he had declined a pilot before the time he actually sailed. Suppose the ship had been sunk in consequence of the collision, or had been so damaged that she had to wait some weeks for repairs, the pilot would have had no claim for the compulsory rate, and the master would have had the right to dismiss him on his services being no longer required, with the payment of the voluntary rate for as many days as he had served. *Rodriguez v. Melhuish (ubi sup.)* does not really affect this contention, as all that is there decided is that pilotage is compulsory only whilst a ship is actually proceeding to sea. *The Annapolis—The Johanna Stoll (ubi sup.)*, is clearly distinguishable, because in that case there was a special clause, compelling pilots to take ships from anchorage to dock, and it was whilst performing this operation the collision occurred, and not whilst the ship was, or ought to have been, at anchor; here, on the other hand the master was not bound to take a pilot to pilot his ship out of dock and to anchor her in the river, nor was the pilot bound to go on board for that purpose; and, moreover, the collision took place whilst the ship should have been at anchor in the river, and whilst she was neither going from dock nor proceeding to sea.

Mitford, Q.C. in reply, was stopped by the court.

Sir R. Phillimore.—As my own private judg-

ment is strongly adverse to the immunity of a wrongdoer on the ground of compulsory pilotage, I should be not at all sorry if I could come to the conclusion which has been pressed upon me by the argument for the plaintiffs; but I cannot do so.

It seems to me that the 13th section must be construed, as far as one can apply it to this Act of Parliament, according to the light of common sense.

Now what is the section: "In case the master of any vessel being outward bound," then there are certain exceptions which do not apply to this case—"shall proceed to sea, and shall refuse to take on board or employ a pilot, he shall pay to the pilot who shall first offer himself to pilot the same, the full pilotage rate that would have been payable for such vessel if the pilot had actually piloted the same into or out, as the case may be, of the said port of Liverpool, together with all expenses incurred in recovering the same."

Now it appears to me that the real point to which the court's mind must be directed is, what did the Legislature mean by the word "shall proceed to sea?" It could not be intended that the offence of refusing to take on board a pilot should not be completed until the vessel was actually at sea, because the section provides that he must take the pilot, the first who shall offer himself for the purpose of taking her to sea.

Now in this case what was the state of the vessel? The state of the vessel was this: she was in every way equipped for her long voyage to Calcutta. There is no doubt upon the point. What are the facts? That she intended to go to sea, but that after a conference between the captain and the pilot, who had been taken on board for the purpose of going to sea (a conference which had been brought about by the circumstances of the night, and other reasons), as to whether it was expedient she should go to sea that night or wait till morning to cross the bar, it was determined to lie in the Mersey that night, and cross the bar in the morning.

Shortly after she had begun to lie in the Mersey the collision happened, and in these circumstances can I really come to the conclusion that the vessel was not proceeding to sea, because an accidental circumstance prevented her from going to sea that very night? It was, as I think, fairly enough put by Sir John Karslake in this case, that her staying outside the dock that night was a step in her progress of procedure to sea. I really must think that common sense compels me to put that construction on the statute, and having a strong opinion upon it I do not see why I should delay expressing it to-night; although, if there is any desire of the parties that I should delay it, and give a more elaborate judgment, I would do so, but I see no reason myself why I should delay expressing my opinion that this was a compulsory pilotage under the statute.

Solicitors for the plaintiffs, *Simpson and North.*

Solicitors for the defendants, *Duncan, Hill, and Dickinson.*

Thursday, Jan. 27, 1874.

THE ENTRACHT.

Salvage—Derelict—Abandonment by first salvors—Right to reward—Pleading—Admissions—Practice—Evidence.
Where in a salvage cause the plaintiffs' petition

ADM.]

THE EINTRACHT.

[ADM.]

states expenses to have been incurred in rendering the services without stating their amount and the defendant's answer admits all the allegations of the petition, the High Court of Admiralty will not allow evidence to be called by the plaintiff to show the amount of the expenses. If specific amounts are claimed they must be pleaded so as to give the defendant the opportunity of admitting or denying them.

Semble, that the court will, if necessary, amend the pleadings, allowing the plaintiffs to set forth the amounts, but giving the defendant time to admit or deny such amounts.

Where, in a salvage suit the defendants admit all the allegations of fact in the plaintiffs' petition, but deny the inferences of fact made therefrom in the petition, the plaintiffs may call evidence to establish those inferences.

Where a steamship having taken in tow a vessel in distress, and having towed her for some hours in the track of vessels, on the weather getting worse and the lives of her crew becoming endangered, takes the crew out of her and finally abandons her in a place where she is afterwards picked up by another vessel and taken into port, the owners, master, and crew of the steamship are entitled to salvage reward in respect of the lives so saved, but not in respect of ship and cargo.

THESE were two causes (Nos. 6645 and 6665) of salvage instituted against the barque *Eintracht* and her cargo, the one on behalf of the owners master and crew of the steamship *Countess of Dublin*, the other on behalf of the owners master and crew of the steamship *Houpoee*. A separate petition was filed on behalf of each steamer, but the causes were then by order of the court consolidated, leave being given for each set of plaintiffs to appear separately by counsel at the hearing. The plaintiffs' petitions setting out the facts were as follows:

No. 6645.

1. The *Countess of Dublin* is a steamship of 474 tons register, and of the value of 25,000*l.* or thereabouts. At the time of the occurrences hereinafter mentioned, she was manned by a crew of twenty-four hands all told, and was in the prosecution of a voyage from Dublin to Palnmouth with a general cargo of the value of 4460*l.* or thereabouts, and thirty passengers, including some emigrants.

2. The *Eintracht* is a barque of 355 tons register, and was loaded at the time of the occurrence hereinafter mentioned with a cargo of deals and firewood; the value of the said barque and her cargo is agreed between the parties hereto at 3000*l.*

3. Between 9 and 10 a.m. on the morning of the 16th Nov. 1873, the said *Countess of Dublin* fell in with the said barque about seventy miles from the Longships, in the Irish Channel. The barque was derelict and water-logged, her bowsprit and gear gone, her fore-topmast and fore mastedhead carried away, and her port bow stove in. It was then blowing a whole sail breeze, from E. to E.S.E., with a rolling sea.

4. The captain of the *Countess of Dublin* thereupon sent the mate and carpenter and three hands on board the barque in a boat, and the mate having examined the condition of the said barque and reported to the captain thereon, sent the steamer's boat with three hands back with a line, to get a tow-rope on board. The said line was then made fast to a tow-rope on board the

steamer, and the boat and the three hands returned to the barque; but the said line parted in hauling the tow-rope on board the barque. The tow-rope was then hauled back on board the steamer, and ultimately the steamer steamed round the barque, and one of the steamer's lines was thrown on board, by which the tow-rope was at last got on board the barque and made fast, and the steamer took the barque in tow at 12.30 p.m.

5. The steamer continued to tow the barque until 12.30 a.m. of the 17th, the sea had by that time become very rough, and the wind was blowing a fresh gale. The barque was full of water, the waves washing clean over her, and the men on board being in constant and imminent danger of being washed overboard. At this time the steamer's wheel-ropes parted, and she was for a considerable time unable to continue towing, and had to ship fresh steering gear, which caused great danger to both vessels.

6. The steamship continued to tow the barque, stopping once when in shelter under the lee of the Longships to freshen the nip of the tow-rope, until about 12.30 a.m. of the 18th, when the tow-rope, which was a sound ten-inch rope, parted. At this time the wind was blowing a fresh gale from east by south to east south east, and there was a very heavy short broken sea on. The steamer's boat, which had been towing behind the barque, sank, and it became necessary to cut her adrift in order to prevent her fouling and damaging the barque's rudder. The vessels were at that time in the race of the *Lizard*, the *Lizard*'s light bearing about north-west by west. There was no other serviceable boat on board the barque.

7. The steamer stood by the barque till morning in considerable danger, and the mate endeavoured to rig up some side lights for the barque with candles, but they were constantly washed out and quite useless, and it was necessary to prepare torches, to light in case of danger of collision with any other vessel arising.

8. The wind and sea continued very heavy, and the barque was drifting on to the Stag rocks, with her head on shore, when at about 3 a.m. the men on board the barque got the helm a-starboard and hauled the afteryards round, and got the ship's head to wind. They then pulled the main-stay sail up, with the sheet to windward, till the ship's head paid off. They then set the main trysail, hauled the main staysail sheet aft on the starboard side and lashed the helm a little to port, it being impossible for any person to remain at the helm, on account of the waves washing over, and the men being obliged to stop in the rigging. By these acts, which were accomplished with great difficulty and danger, they succeeded in getting the barque to drift clear of the Stag rock by about fifty yards.

9. Between three and four in the morning, when daylight broke, the weather moderating slightly, the steamship again succeeded in getting the barque in tow with two hawsers, a ten-inch and a new six-inch hawser, but it not being possible, on account of the wind and sea, to get round the *Lizard*, the steamship, with the barque in tow, bore up for Mallon, under the lee of the *Lizard*, and anchored there at 11 a.m. of the 18th until 8 a.m. of the 19th.

10. On the evening of the 18th, two small tugs came to the steamer, having been sent by the steamer's agents to assist her if necessary, but

[ADM.]

THE EINTRACHT.

[ADM.]

the steamer began to tow the barque to Falmouth at 8 a.m. of the 19th without their assistance. After two and a half hours towing by the steamer alone, the two tugs assisted to tow, and the barque was finally brought into Falmouth Harbour at 2.30 p.m. of the 19th.

11. Had it not been for the services aforesaid, the steamship would have arrived at Falmouth on the night of Sunday the 16th, when she was due, and in consequence she consumed forty tons extra coals and a large extra quantity of provisions were consumed by the passengers, and many of the passengers had to be forwarded to their destinations by train, and their fare had to be paid. Some of the emigrants missed their ship from Plymouth to New South Wales, and had to be compensated and kept by the owners of the steamship for a considerable time. And the tugs have to be paid 30*l.* at least between them. The barque was finally made fast at Falmouth with an eight-inch hawser belonging to the steamship, which was left in her, and was of the value of 10*l.*

12. During the whole of the time aforesaid the captain and crew of the steamship, and the mate and men on board the barque, were in constant exertion, and the captain never had his clothes off, and never left the deck except for two hours. The mate and men on board the barque were constantly wet, and in risk of their lives.

No. 6665.

1. The *Hoopoe* is a screw steamer of 1004 tons register, and 120-400 horse-power, and is of the value of 18,500*l.* or thereabouts. At the time of the events hereinafter stated, she was manned by a crew of twenty-four hands, and was bound on a voyage from Antwerp to Liverpool, with a general cargo. The value of the said cargo was 13,387*l.* or thereabouts.

2. About noon on the 15th Nov. 1873, the *Hoopoe* was about fifty miles from the Longships light, and steering a course for the Smalls. The wind was about S.E., very light. At this time those on board the *Hoopoe* observed a barque on the starboard bow, flying a signal of distress.

3. The *Hoopoe* bore down upon the barque, which was the *Eintracht*, of Griefswalde, of 355 tons register, laden with a cargo of timber. She had come into collision with a vessel in the Bristol Channel some days before, and had been seriously damaged, and had become waterlogged, and was being driven by the wind out into the Atlantic Ocean, without power to help herself.

4. The master of the *Eintracht* hailed the *Hoopoe* to take his vessel in tow; he at the same time stated that he had nothing for the crew to eat but a barrel of biscuits and some salt provisions.

5. The mate of the *Hoopoe* was accordingly sent with four men in a boat to get a line from the *Eintracht*, but in consequence of the condition of the *Eintracht* her crew could not get out either line or hawser, and the master of the *Eintracht* asked the master of the *Hoopoe* to send his own line and hawser. This was done, the hawser sent being a nine-inch one, and the boat on board the *Hoopoe*. It was made fast to the chain of the *Eintracht*, and thirty fathoms were paid out.

6. The *Hoopoe* then began to tow the *Eintracht* towards Milford Haven, and continued towing till about 4 p.m. It was then getting dark; the wind, still from the eastward, was increasing in force; the sea had risen, and beat heavily against the bows of the *Eintracht*, causing so great a strain

on the tow-rope that it appeared likely to part. And the weather looked even more threatening.

7. In these circumstances, the master of the *Hoopoe* advised those on board the *Eintracht* for their own safety to come on board the *Hoopoe*. It was then discovered that the boats of the *Eintracht* were disabled, and her master and crew (twelve in all) were therefore taken off in two trips by the boats of the *Hoopoe*.

8. The *Hoopoe* continued to tow the *Eintracht*, though the wind and sea continued to increase, till 8 p.m. At this time she had brought the *Eintracht* about twelve miles on her road to and within forty miles of Milford Haven. The after iron bits of the deck of the *Hoopoe* then gave way, and then first one and then another of the strands of the hawser gave way, and the whole parted and was lost. The night was very dark, the weather kept getting worse, and the *Hoopoe* had not a large supply of coal on board. Her master was therefore obliged to continue his voyage to Liverpool.

9. The *Eintracht* was on the following morning found by the steamship *Countess of Dublin*, then on a voyage from Dublin to Falmouth, and ultimately towed into the Port of Falmouth and saved.

10. If the *Eintracht* had not been met with and towed by the *Hoopoe* as aforesaid, she would have drifted further into the Atlantic Ocean and out of the track of vessels. The *Hoopoe*, by towing her as aforesaid, brought her nearer to the coast and more within the track of vessels, and in particular into the course of the *Countess of Dublin*, which otherwise would never have met her.

11. The aforesaid services of the *Hoopoe* largely contributed to the saving of the *Eintracht*, her cargo and freight, from total loss.

12. By the aforesaid services of the *Hoopoe*, the lives of the master and crew of the *Eintracht* were saved.

13. In rendering the aforesaid services, the *Hoopoe*, lost her hawser, worth 40*l.*

14. The value of the *Eintracht*, her cargo, and freight, is 3000*l.*

The answer filed by the defendants to both petitions was as follows:

Thomas Cooper, solicitor for the owners of the barque or vessel *Eintracht*, and of the cargo now or lately laden therein, says as follows:

1. He submits to the judgment of this honorable court upon the statements of fact contained in the petition filed in cause No. 6645, which statements he admits to be true in substance.

2. He admits the truth of the statements contained in the first nine articles of the petition filed in cause No. 6665, but he denies the truth of the deduction sought to be drawn therefrom in Articles 10 and 11 of the said petition, and submits to the judgment of this honorable court as to whether such deductions ought or not to be drawn from the facts stated.

3. He further says that the *Hoopoe* finally and altogether abandoned her attempted service of saving the *Eintracht* and her cargo, and left her a derelict, and without any other assistance near her, and he submits that the owners, master, and crew of the *Hoopoe* are not entitled to any remuneration for their towage of the *Eintracht*.

4. He denies the truth of the allegation contained in Article 12 of the said petition in cause No. 6665, and says that the master and crew of the *Eintracht* would in fact have been saved by the *Countess of Dublin*, or by some other vessel.

[ADM.]

THE EINTRACHT.

[ADM.]

The pleadings were thereupon concluded, the value of the *Eintracht* and her cargo being agreed at 3000*l*.

Jan. 27, 1874.—The cause came on for hearing before the learned judge, assisted by Trinity Masters.

Bayford and Davidson appeared for the *Countess of Dublin*.

Phillimore for the *Hoopoe*.

Clarkson and Lamb for the defendants.

Bayford proposed to call evidence for the purpose of showing what was the amount of the expenses alleged in par. 11 of his petition (No. 6645), to have been incurred.

Clarkson objected on the ground that, the answer (par. 1) having absolutely admitted the statements in the petition, it was against the practice of the court to allow evidence to be called in support of any allegations made. If the plaintiffs had wished to charge the defendants with specific amounts they were bound to have set those amounts out in *extenso* in their petition, and so given the defendants an opportunity of considering whether they would admit them or deny them. Moreover the court never allows these amounts in *solido*; it roughly estimates the expenses to which the salvors have been put, and includes these in its general award; it will not ordinarily allow specific evidence to be given of the loss. The court is quite capable of judging these amounts without figures being laid before it.

Bayford in reply.—If I am not allowed to produce evidence in the pleadings as they now stand, I must ask for leave to amend.

Sir R. PHILLIMORE.—There can be no doubt that if the plaintiffs wished to give in evidence these amounts, they ought to have been pleaded, and I cannot in the present state of the pleadings allow evidence to be called to show what they were. These amounts are always taken roughly in salvage causes, and I have never allowed any evidence to be given where the defendants have admitted the whole petition. To do so would admit all kinds of side issues, and increase the expense of these suits enormously, and so defeat the very object of the admission. I must, however, accede to Mr. Bayford's application for an amendment if he presses it, provided the defendants have the opportunity of considering whether they admit or deny the petition as amended, but I think that the defendants have enough in the pleadings already for practical purposes.

Clarkson objected to evidence being called, but was willing to accept the statement of the plaintiffs' counsel of the amount of the expenses, and this was agreed to.

Phillimore then tendered evidence in support of the allegations in paragraphs 10, 11, and 12 of the petition (No. 6645), which were denied by the answer; this evidence was objected to by the defendants on the ground that the answer did not deny any facts, but only the deductions from facts already admitted; evidence however was admitted by the court on the ground that the position of the *Hoopoe*, and the degree of peril to which her crew was exposed, were facts which were denied by the answer, and which consequently must be proved.

Evidence was then called to show that the *Eintracht*, when found by the *Hoopoe*, was about in the track of vessels, but the wind having freshened from the E. S. E., she would have

drifted (the winding continuing the same) out into the Atlantic out of the track of vessels if the *Hoopoe* had not towed her as she did; the *Eintracht* had actually drifted from the time she had been in collision some forty or fifty miles; at the time the crew were taken off she was dragging under water.

Bayford for the *Countess of Dublin*, submitted that the service was meritorious and deserving of considerable reward.

Phillimore for the *Hoopoe* contended that his clients were entitled to reward for salvage of both life and property; for the former by reason of rescuing the crew, for the latter by reason of having brought the ship into a place where she was more certain of being saved. It is not because salvors abandon after making meritorious efforts to save and bringing to a place where there is a greater chance of her being saved that they lose their reward.

The E. U., 1 Spink's Ec. and Adm. 63.

Clarkson for the defendants.—We admit that the *Hoopoe* has rendered life salvage, but deny any service to ship and cargo by that vessel. To constitute salvage service there must be a leaving of the property in safety; here the ship was left as a derelict at sea. It is true that first salvors may recover although the salvage is completed by others, but there must be no actual abandonment by the first salvors, and they must have contributed to the result.

The Gunga Bastiam, 5 C. Rob. 322.

The Atlas, Lush. 518; 5 L. T. Rep. N. S. 434; 1 Mar. Law Cas. O. S. 168, 235.

The real question is whether there has been an entire service rendered by both sets of salvors resulting in the entire safety of the ship. The first salvors did not contribute in any way to the service.

Phillimore in reply.

Sir R. PHILLIMORE.—This is undoubtedly a case in which a very meritorious service has been rendered to both life and derelict property. After consultation with the elder brethren of the Trinity House, as to the effect of the towage performed by the *Hoopoe*, I am clearly of opinion that that vessel is not entitled to reward in respect of services rendered to ship and cargo, but that she is unquestionably entitled in respect of the lives which she saved. The other service rendered by the *Countess of Dublin* was to ship and cargo alone. The service was well rendered, there being great probability that the vessel might have been lost, or, what never must be forgotten in these cases, that she might have been a source of danger to other vessels whilst floating about in the ocean. Unfortunately the sum with which I have to deal is very small, and I am sorry to say that the reward cannot be very large. I shall award 200*l*. to the *Hoopoe*, and 800*l*. to the *Countess of Dublin*, with costs. These sums will cover all expenses and damage sustained by the salvors. I will certify for costs in the case of the *Hoopoe*.

Proctor for the *Countess of Dublin*, W. G. Jennings.

Proctors for the *Hoopoe*, Toller and Sons.

Solicitor for the defendants, Thomas Cooper.

[ADM.]

THE LANCASHIRE.

[ADM.]

Jan. 21 and 22, 1874.

THE LANCASHIRE.

Collision—Fog—Ferry boat—Right to run—Liability—Depositions before Receiver of wreck.

A steam ferry boat continuing to cross and recross the river Mersey during a dense fog takes upon herself the responsibility incident to such a course, and is not entitled to set up public convenience against the probability of loss of life and property; but she will be liable for any damage done to other vessels with which she may come into collision, provided those vessels take the precautions required by law to warn her of their position. (a)

A receiver of wreck in taking depositions under the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104) sect. 448, should put down the facts deposed to as given by the deponent, and should not correct any statement made by the deponent which within the personal knowledge of the receiver is erroneous. (b)

(a) This same principle is affirmed with regard to vessels crossing a good anchorage ground at sea in *The Otter*, post p. 208—Ed.

(b) Depositions taken before receivers of wreck are now commonly used in the High Court of Admiralty for the purposes of cross-examination, and sometimes even for contradicting witnesses who have made different statements at different times. On the purposes of cross-examination there is no doubt these depositions may lawfully be used just as much as any other statement in writing signed by a witness. But to contradict a witness they are not admissible, although so used in the Admiralty Court (see *Northard v. Pepper*, 2 Mar. Law Cas. O.S. 58); and it should not be forgotten that they have been used for that purpose in that court rather by consent than in consequence of any decision. If they were admissible for such a purpose, no doubt it would be very important that the receiver should take down only what the deponents say, and should not themselves offer any suggestions. When, however, the object of the enactment is considered, it will be seen that it is obviously the receiver's duty to extract from a deponent the best and most accurate information that it is possible to procure on the subject of the loss inquired into, and that the Act never contemplated these depositions being used to contradict witnesses as to the mode in which the loss occurred; if they could be used to contradict at all it would only be in cases the witness denied that injury or loss of any kind had taken place after having sworn so in the deposition. The object of the enactment (Merchant Shipping Act 1854, sect. 448) is to enable the receiver on ascertaining that a vessel has been lost or damaged, to obtain accurate information respecting her name and character and her cargo, the cause of her loss or injury, whether salvage service was rendered to her, and such other things as the receiver may think useful to the Board of Trade and to *Lloyd's*, to each of whom he is bound to send a copy of the deposition. The provision has two objects: First, to let the Board of Trade, upon inquiry as to the causes of the loss and injury, and as to the necessary steps to be taken in that particular case, and to prevent the recurrence of similar catastrophes; secondly, to inform the persons most interested, whether owners or underwriters, by publication in a place where such losses are usually announced. The exact act of negligence which occasioned the loss it is no part of the receiver's duty to inquire into; he has to do only with the broad fact of the loss. If this be the case, it is his business to make the deposition accurate, if within his power. He would not be justified in allowing a man to depose by mistake, or even wilfully, that a collision had occurred off the North Coast of Ireland if it had to the receiver's knowledge occurred off the coast of Cornwall. The deponent might so depose to state of things which would have the effect of setting up a policy of insurance which would otherwise be vitiated by deviation. With the greatest respect to the learned judge, whatever value a receiver may take from a deposition by correcting a palpable error in it, he thereby only

THIS was a case of collision instituted on behalf of the owners of the screw steamship *Levant* against the steam ferry boat *Lancashire* and against the Birkenhead Improvement Commissioners, her owners intervening.

The case on behalf of the plaintiffs, as appearing from their petition and evidence was that the *Levant* was a screw steamship of 472 tons register, and at the time of the collision was bound from Liverpool to Constantinople. She left the Queen's Basin in the river Mersey, on Oct. 26th, 1873, about one a.m., in charge of a licensed pilot, and came to an anchor in the river opposite the Albert Dock warehouses, according to the evidence of her pilot and crew (the exact place in which she was being a matter in dispute), she rode to sixty fathoms of chain in a clear berth, and, as alleged by the plaintiffs, in a safe and proper anchorage. At the time the *Levant* came to an anchor it was a fine clear night and lights were plainly visible, and the *Levant* hoisted her regulation riding lights. It was alleged by the plaintiffs that the crew of the *Levant* kept an anchor watch and a good look-out. About 6.30 a.m. on the morning of Oct. 26th a dense fog set in, and as alleged by the plaintiffs the fog bell on board the *Levant* was rung loudly at intervals of less than half a minute. The *Levant* had come to anchor on the flood tide, but when the fog came on the tide had turned and she was riding on the ebb, with her head to the southward. At about 7.30 on the same morning the *Lancashire* approached the *Levant* in the fog, and in spite of hailing from the *Levant* struck that ship's stem with her own port sponson. The petition of the plaintiffs after setting out the above facts charged the *Lancashire* with negligence as follows:

7. Those on board the *Lancashire* were navigating her at an improper rate of speed before the said collision.

8. A proper and sufficient look-out was not kept on board the *Lancashire* before the said collision.

9. Those on board the *Lancashire* improperly neglected to keep clear of the *Levant*.

10. Having regard to the state of the weather, it was an improper proceeding on the part of those on board the *Lancashire* to cross the river Mersey.

11. Those on board the *Lancashire* improperly neglected to blow her whistle as frequently as is required by law.

12. The said collision was occasioned solely by the negligence or carelessness of those in charge of the *Lancashire*, and was not occasioned by any negligence or carelessness on the part of those in charge of the *Levant*.

The defendant's answer was as follows:—

1. The *Lancashire* is a large double-ended paddle-wheel steam ferry boat, and is moored from a platform placed in the middle of the vessel upon the saloon deck, which is above the passengers' deck cabin.

2. On the morning of the 26th Oct. last, at or about a quarter past seven o'clock, the *Lancashire* left the Woodside landing stage for the George's landing stage on the Liverpool side of the river Mersey. The tide being ebb, and it being the practice of the ferry boats to leave and approach the stages head to tide, the *Lancashire* left the stage with her head to the south, came round under a starboard helm, and proceeded in a north-easterly direction towards the George's landing stage. A good look-out was kept. The master was at the engine telegraph, one man was forward on the saloon deck on the look-out, two men were at the wheel, and one man was at the steam whistle. The *Lancashire* proceeded at a slow speed, about three knots an hour.

3. At the time the *Lancashire* left the Woodside performs his duty, and this he is bound to do quite irrespective of any future consideration as to the cross-examination of witnesses in the Admiralty Court.—Ed.

[ADM.]

THE LANCASHIRE.

[ADM.]

landing stage there was a dense fog, the wind calm. From the time of leaving the stage the whistle was continuously sounded.

4. A few minutes after leaving the Woodside landing stage, and in about mid-river, abreast of the George's landing stage, the look-out man forward called out "Vessel right ahead." The engines were immediately reversed full speed. The *Levant* was seen about half a boat's length ahead, no lights visible on her, and no bell ringing, as required by law. The port bow of the *Lancashire* struck the starboard side of the stem of the *Levant*, causing damage above the water line only.

5. The *Levant* was anchored in the regular track of the Woodside ferry boats, had no bell ringing as required by law, and no proper look-out.

6. Except so far as they are herein admitted, the defendants deny the truth of the allegations contained in the plaintiffs' petition.

7. The said collision was caused wholly by the negligent and improper conduct of those on board the *Levant*. They anchored their vessel in an improper and unsafe berth, in the known track of the ferry steamers. They had not a proper look-out, nor a bell ringing as required by law.

8. The said collision was not caused by any negligence on the part of those on board the *Lancashire*, and was, so far as they were concerned, an inevitable accident under the circumstances.

The pleadings were therefore concluded.

Evidence was called by plaintiffs to support the allegations in their petition that they duly sounded their bell during the fog, &c. It appeared in the course of the cross-examination of the mate of the *Levant* that when making his deposition before the receiver of wreck as to the injury to that vessel, he had stated in the first instance that the vessel was lying at the time of collision on the flood tide with her head to the northward; this statement the receiver, from his own knowledge of the circumstances perceiving to be incorrect, altered by inserting the actual fact, viz., that the *Levant* was lying at anchor on an ebb tide, with her head to the southward. The plaintiffs' evidence is sufficiently set out in the judgment.

The evidence called by the defendants showed that the *Lancashire* is one of three large ferry boats running between Liverpool and Woodside in the river Mersey; they carry both goods and passengers, and, during the night and also during foggy weather, form the only means of communication between the Lancashire and Cheshire shores in that part of the Mersey; they always run during foggy weather in order to keep open the communication. These boats cross the Mersey within a certain space commonly known as the "Ferry Track," which is within a line drawn from the north pierhead of the Manchester Dock entrance on the Liverpool side to the south end of the Woodside landing stage, and another line drawn from the north pierhead of the Morpeth Dock entrance on the Cheshire side to the south end of the Prince's landing stage. When running in a fog only two boats are worked, and the running is so arranged that only one is making the transit at the same time. Attempts had been made by the Birkenhead Commissioners to induce the Mersey Docks and Harbour Board to make a by-law prohibiting vessels from anchoring in the ferry track, but the board had declined to do so on the ground that they did not consider that they had the power under their Acts; it appeared, however, that the superintendent of pilots had given informal directions to pilots ordering them to keep vessels under their charge clear of the ferry track whilst at anchor. Masters of the ferry boats had instructions from the Birkenhead commis-

sioners to endeavour during foggy weather to induce all vessels lying in their course to keep their bells going constantly, so as to give them due warning of their position. During foggy weather a bell is rung on the George Landing Stage, and another on the Woodside Landing Stage; when a ferry boat is about to leave either stage, her steam whistle is sounded, and is replied to by the bell on the other stage, so that the steamer may know the right direction to steer. This is repeated at short intervals during the passage. The defendants' witnesses alleged that the *Levant* was so anchored that on the flood tide she swung opposite the north end of the George's Landing Stage, and that she was consequently right in the track of the ferry boats. There were two other steamships lying at anchor within or close to the outside lines of the ferry track, the one to the north, the other to the south of the *Levant*; that to the southward of the *Levant* was the *Anna*. At 5.30 a.m. on the 26th Oct. 1873, the *Lancashire*, going from Liverpool to Woodside, passed under the *Levant*'s stern, and the *Levant*'s riding lights were then out; the master of the *Lancashire* hailed the *Levant*, but got no reply. On the return from Woodside at 6 a.m. her lights were still out and the fog was just then coming on. At 6.30 a.m. the *Lancashire* left the George's Stage whistling to warn ships; there were no other ships moving about, but those at anchor began ringing their bells as the fog had then come on. Passing to the southward of the *Levant*, the master of the *Lancashire* could only see her masts; not her hull. There was no bell ringing on board of her, according to the defendant's evidence. The *Lancashire* stopped, her whistle was blown, and her crew hailed the *Levant*, but got no answer. The *Lancashire* then continued her passage, and on arrival at Woodside, the master who had been in charge during the night left, and was succeeded by another man. The former master warned his successor of the position of the *Levant* and the other vessels. The collision occurred on the next trip from Woodside to Liverpool. The crew of the *Levant* and a number of passengers were called to prove that no bell was heard from the *Levant* before the collision, although they heard bells from the other vessels.

The Admiralty Advocate (Dr. Deane, Q.C., *Myburgh* with him) for the plaintiffs, contended, first, that it was a negligent act on the part of the defendants to cross the river in such a dense fog, and that no public convenience could justify the risk of loss to life and property run by such a course; the danger was shown by the defendants seeking to have the ferry track kept clear; secondly, supposing the *Levant*'s bell was not rung the defendants had sufficient knowledge of the position to have enabled them to keep out of her way, and they were bound to do so; thirdly, the *Levant* was not in the ferry track, and even if she was she had a right to be there, no by-law to the contrary existing; fourthly, the *Levant*'s bell was continually rung. The requirement of the law is every five minutes (Regulations for preventing Collisions, Art. 10), and this having been fulfilled the speed of the defendant's boat would account for the not hearing it after leaving the stage.

Milward, Q.C. (*Tidswell* with him) for the defendants.—The substantial question is whether the *Levant*'s bell was rung or not. Their duty was clearly to ring it oftener than five minutes under

[ADM.]

THE LANCAHIRE.

[ADM.]

the special circumstances of the case (Art. 19). As long as the *Lancashire* went at a proper speed she was entitled to go, and ought not to be held liable. When such precautions are taken it cannot be said that the public are to be put to the inconvenience of having the ferry stopped. The ferry track ought to be kept open, and this is acknowledged by the pilots being ordered by their superintendent to keep it open. It may not be illegal to anchor in the ferry track, but it is clear that by the custom of the river it is not usual, and hence is improper. The speed of the *Lancashire* was very slow, as evidenced by the small amount of damage done.

The *Admiralty Advocate* in reply.—Even if it was improper to anchor there, which I contest, the defendant had no excuse for running into the *Levant*, knowing where she lay.

Sir R. J. PHILLIMORE.—In this case the *Levant* a screw steamship of 472 tone register, and the *Lancashire*, a large paddle-wheel steam ferry boat, came into collision on the 26th Oct. last either at thirty minutes past seven in the morning, or at a very approximate time to that, in the river Mersey. The exact place is a matter of controversy, but it is sufficient to state at present that it was between the Woodside landing stage and the George's landing stage, and one-third from the Liverpool side. It appears from the evidence that this *Levant* had been brought by the pilot at about forty-five minutes past one in the morning out of the Queen's Basin, and he says that he anchored her abreast of the Albert Warehouse, and he brought her up by her starboard anchor with sixty fathoms of chain. A great deal of the discussion which has taken place before me has turned on the particular position in which this vessel, the *Levant*, was placed by the pilot. There is in this, as I regret to say, in other parts of the case, a very great conflict of testimony. It is not to be laid out of consideration that she was brought up on the flood tide, and the ebb tide, of course, would make a considerable difference in her position. That she was at the time of the collision lying north and south, with her head to the south, there is no doubt at all. The probability appears to the court to be, after a consideration of the evidence, that she was not exactly in the place that is described either by the witnesses produced on behalf of the *Levant* or by those produced on the part of the *Lancashire*. She was probably nearer to the outside line, the southern line of the track in which this ferry-boat was in the habit of going; even if she was not actually within the two lines she was probably nearer than she represented herself to have been towards the southern line. However, she certainly was not in a place where it was unlawful for her to be, nor can I say, upon the evidence before me, that she was in a place in which it was improper for her to be.

The weather was perfectly calm, it was an ebb tide, it was a Sunday morning, and there appears to have prevailed, speaking generally from the evidence, great tranquillity at the time. I should observe, too, before I go into the other parts of the case, that the damage was slight, and I think that fact has been fairly used by the counsel for the *Lancashire* in aid of establishing the position that the ferry boat, the *Lancashire*, was not going at a great speed at the time when the collision happened. I think I may as well say at once, to get rid of this part of the case, that the result of the evidence appears to be that she was going at the

rate of about three knots an hour at the time the collision happened.

The *Lancashire* crosses, as I understand, about every ten minutes till eight o'clock in the evening, and after that once every hour during the night. On her last expedition she set out from the Woodside Ferry somewhere about a time variously stated from a quarter to twenty minutes past seven o'clock in the morning. Before she started there had come on a very dense fog. There is no dispute whatever as to this fact. It was a very dense fog, and the captain who had come over from the Liverpool side on the last trip warned the other captain to whom he gave up his charge, and who was to go back with her to the Liverpool side, that he had passed three vessels which were lying—to use his own expression—badly in her track.

Now a very great deal of dispute also has arisen as to the position of these two other vessels, one to the south and one to the north. With regard to the southernmost vessel we have the evidence of the pilot, who placed her in her position, with regard to the northernmost we have no evidence at all, because the ship had gone before the fog finally lifted; at all events no witnesses have been produced from on board of her. It was stated by several of the witnesses produced on behalf of the *Lancashire* that these other vessels, the north and south vessels, were also within the two lines which have been so much referred to—that is, in other words, within the usual track of the ferry-boat steamer. But it was fairly admitted by the manager, Mr. Penny, who was the last witness examined, and by other witnesses that those two vessels to the north and south were out of the track of the steamer, and that is to be borne in mind. But Captain White who came over in command of her on her last expedition from the Liverpool shore, before the collision, tells us he passed round the *Levant* at twenty minutes past six, that he hailed her, sounded his whistle, that he could get no answer, and he came away; and certainly, as the fog was just beginning to show itself at that time, it seems a very strange thing that, if he thought the *Levant* was in a dangerous position for the steamer which was about to return, he should have contented himself only with hailing and whistling, and come away without having drawn the attention of those on board to the situation in which she was. However, such appears to have been the case, and, as I have already said, he thought it his duty to warn the captain who succeeded him, Captain Howard, that there were three vessels badly in his way, or, as Captain Howard says, "He told me there were three steamers lying right in the track, two ringing their bell, and the centre one he could not get an answer from, but she was called the *Levant*."

The first question that arises in this case is, whether it was proper and right in this ferry-boat to go deliberately across the river in a fog of such a dense nature as here described, and with the knowledge of these vessels lying in her track, or one of them in her track, and the others nearly so, and also with the knowledge, as she contends, that one of them was insufficiently watched? It has been urged very strongly on the court that if this were not to be so, if the ferry-boat vessel was to be delayed on account of the fog the greatest possible inconvenience would ensue to the public;

ADM.]

THE LANCASHIRE.

[ADM.]

and the enormous number of ten millions and a quarter passengers per annum has been cited to me as a proof of this assertion. I have no doubt that it is very much for the convenience of the public that the ferry-boat should go in all weathers, and at all times; but at the same time I cannot myself think it right to set the possibility, or rather the probability, of danger to human life, to say nothing of damage to property—I mean, to set the great convenience of the public in competition with the probability of injuring human life, and greatly damaging property. At the same time, the custom appears to have been for this vessel to have gone in a fog always, and regulations appear to have been made with a view to preventing accidents, surrounding her with every precaution that was possible. That such precautions are not always available is perfectly clear, not only from what has happened in this case, but from the evidence of White himself, the captain, who says he has met occasionally with disasters in fog time, and from the knowledge which unfortunately the court has acquired while sitting in this judgment seat that such disasters have occurred notwithstanding the precautions such as the blowing of whistles, and the ringing of bells which the Legislature has provided. But one thing appears to me quite clear that if this ferry-boat vessel thinks herself justified in going across the river in such a dense fog as this she takes upon herself all the responsibility incident to such a course. She has the advantage if she goes over safely, and she must have the disadvantage if she injures life or property in the course of the passage.

One of the questions which I thought it my duty to put to the Elder Brethren was, assuming that there was no bell rung on board the *Levant*, and taking into consideration the assistance which the *Lancashire* derived in her navigation from the ringing of the bell on the George's landing stage, and from the knowledge of where these three vessels were on this occasion, whether ordinary skill would still have avoided the collision? The Elder Brethren are of opinion, and I entirely agree with them, that this would be the case, and that assuming that she had a right to cross the river in such a fog, and assuming that there was no bell rung on board the *Levant*, she could not be found to be to blame for this collision.

Upon this follows the next question, which is really and in fact the important question in this case, namely, the question whether the *Levant* did comply with the requisition of the law in ringing a proper bell, at proper times during the prevalence of this fog, and whether she did thereby convey to the *Lancashire* that knowledge which the Legislature thinks it right that all vessels should have in fogs? On that question the great controversy in the case has arisen, and there is unfortunately in this case, as often happens in this court, the greatest possible conflict of evidence upon the point. I must endeavour, and I have been assisted in this matter—although it properly devolves on the court alone, being a question of credibility of the witnesses—by many observations made to me by the Elder Brethren of the Trinity House. In the first place I must remark that there is no doubt there was a bell on board this ship, and a proper bell; and there is no doubt at all, considering the time, namely, that it was half-past seven or

later, in the morning, that there is every probability that the bell would be rung during this fog, because the men, although there were only a few of them on board besides the two officers, would be at their work at that time in the morning, and there is every *a priori* probability of their taking the very natural and easy precaution of ringing the bell which, as I have already said, it is proved that they had on their deck. The positive evidence is very strong and very uniform. The witnesses are produced who rang the bell. The amount of time which was occupied by it is proved, although some little difference has been pointed out, as to the interval which elapsed in the ringing of the bell; but on examining that part of the case, I find very little difficulty in dealing with it. The first mate says, "I rang the bell every half minute for two minutes, and then I stopped half a minute." That is said to be in a direct contrast with the evidence of Davis, the Liverpool pilot of the *Anna*, whose evidence is extremely valuable in the opinion of the court, because it can be looked upon as perfectly disinterested. He says he brought the *Anna* to anchor in the river at the south end of the Albert Dock Warehouses; then he marked on the chart where she was; then he says he saw the *Levant* on his starboard quarter, a cable's length off. He went to sea at ten; at seven there was a dense fog, and he kept his bell going; then he says he heard the *Levant's* bell every half minute, and he heard the bell going at the time when he also heard the paddles of the approaching ferry boat. I do not think myself that this discrepancy between his hearing this bell every half minute, and the other man who said that he rang it for two minutes and then stopped, is a serious discrepancy at all. The great question is the fact, was there any bell rung or not? and it might very well be that this pilot of the *Anna* may be mistaken as to the pause that there was. Whether he heard it every half minute or not, he could not be mistaken very well, considering his position, as to whether the bell was rung or not, and it is very strong evidence as it seems to me in favour of the statement of the *Levant*, that the bell was rung during this period. But if I turn to the evidence on the other side, I must say, though it is at variance, and in conflict with that to which I have referred, that a close examination of it will very much diminish its efficacy. In the first place the variety of statement is very remarkable in this case. The witnesses who naturally would hear exactly the same sound from the same bell are very far from having done so. To take an instance which I have under my hand at this moment, Spargold, who was on board the *Lancashire* on the occasion, as a passenger, and who was standing on the port bow, he says, "There were several bells ringing, and I should not like to say how many bells there were," and again he says, "There were more bells than one to the southward." A previous witness, Young, who was the helmsman on board the *Lancashire*, said he heard two bells, one to the south and one to the north, and he heard the hailing to those on board the *Levant*, "Why don't you keep that bell going." The witness Kearing says, "I heard no bell at all before the collision,"—"up to the time of sighting the vessel," he said, which afterward he explained to be; the same as the collision. He heard no bell, at all.

ADM.]

THE OWEN WALLIS.

[ADM.]

After he heard one from the steamer to the north, and no other, except, he said, from the small tugs that were not in our track. And I think to the same effect was the evidence of the witness Gibbons, who was engineer of another steamer which had no connection with this case. He was a passenger, and was standing on the port side of *Lancashire*. He said he heard one bell to the north of the *Levant*, he heard none to the south. He says the *Levant's* bell had a very good clear sound, and was a very good bell. Another witness of the name of Seed, who was master of a steaming, and who also happened to be a passenger, says he heard one bell a good bit off to the south. It is part of the case of the *Lancashire* that the two vessels between which the *Levant* was placed did ring their bells, and yet from what I have read it appears that some heard the bell from the northern, some heard that from the southern vessel, some heard both, and some heard none. And this satisfies me of the extreme difficulty with regard to these acoustics at sea of knowing with any very great accuracy, in such circumstances as these, the exact quarter from which the sound of a bell may come. And the Elder Brethren tell me, and I am very glad to have their opinion upon this point, that they very much doubt whether in this case it was possible to tell whether the sound came from the northern vessel or the southern vessel.

Therefore, the case resolves itself into this, that there is affirmative, positive evidence on one side, supported by the independent testimony of the pilot of the *Anna*, that their bell was, as in all natural probability it would be, rung properly from the beginning of the coming on of the fog, and on the other side there are those statements which I have already pointed out, which are really at variance with themselves, as showing the great varieties of ways in which the sense of hearing seems to have been affected by those who were on board the *Lancashire* on that night. It is very far from the wish of the court to charge the witnesses produced on behalf of the *Lancashire* with wilful perjury. I can see that they may very fairly have been mistaken as to the quarter from which they heard the bell, whereas it would be quite impossible with respect to the witnesses who give their affirmative evidence, from the *Levant* that her bell was ringing, to come to any other conclusion, if that were not so, but that they were guilty of deliberate perjury.

Looking to the circumstances of the case, and without going further into the evidence, although other discrepancies might be pointed out, I am of opinion that the *Levant* has established the fact that her bell was rung at this time. It follows as a consequence, as it was admitted throughout, that if the court is of opinion that the bell was rung by the *Levant*, that she has done all her duty. Hence I must hold that the *Lancashire* is alone to blame for this collision.

Before I leave this case I wish to make an observation in consequence of what was said by the counsel, with respect to an error which I think the receiver of wreck has fallen into. He seems to have thought it his duty when he took the statement of one of the witnesses in this case, not simply to take down the witness's evidence as he gave it, but to import his own evidence into it. That is a very great error on his part, and I trust will not be repeated by any receiver of wreck in

the future. It will tend to make the depositions of witnesses of no value at all in this court.

Solicitors for the plaintiff, *Duncan Hill*, and *Dickinson*.

Solicitor for the defendants, *Ambrose Wain*.

Friday, Jan. 23, 1874.

THE OWEN WALLIS.

Collision — Steamship — Dumb barge — Lights — Course on river Thames — Duty to keep out of the way.

Dumb barges in motion driving with the tide up or down the river Thames at night are not bound to carry lights.

A dumb barge coming up the river Thames in a flood tide may keep on either side of the river, and there is no obligation on her by custom or otherwise to keep in mid-channel.

There is no duty on a dumb barge driving with the tide in the Thames to keep out of the way of a steamship; but it is the duty of the steamship to keep out of the way of the barge.

THIS was a case of collision instituted on behalf of the owners of the dumb barge *Lord Clarendon* and of her cargo against the *Owen Wallis* and her owners intervening.

The plaintiffs' petition was as follows:

1. At the time hereinafter stated the plaintiffs were possessed of a dumb barge called the *Lord Clarendon* and of certain cargo laden on board of her.

2. At about 2 a.m. on the 29th Dec. 1871, the said barge *Lord Clarendon*, of 60 tons burden, laden with cargo, was proceeding up the river Thames in charge of a licensed waterman and an apprentice, and was off the entrance to the Regent's Canal.

3. The wind at such time was about from south-east to east-south-east, the morning was fine and moonlight, and the tide was about half flood, and of the force of about four knots per hour, and the *Lord Clarendon* was driving up the river with one oar out to keep her with her head up the river, and was over towards the south side of the river.

4. At such time the above-named steam vessel, *Owen Wallis*, which was under steam, came out of the entrance to the Regent's Canal, and instead of keeping clear of the *Lord Clarendon*, as she ought to have done, ran against, and with her stem struck the *Lord Clarendon* on her starboard side, and did her so much damage that those on board had to take the assistance of a steam tug, which towed her into shallow water, where she grounded, and some of her cargo was lost and the rest greatly injured.

5. The *Owen Wallis* went away without rendering or offering to render any assistance to the *Lord Clarendon*.

6. The *Owen Wallis* improperly neglected to take proper measures for keeping clear of the *Lord Clarendon*.

7. The *Owen Wallis* improperly neglected to comply with the provisions of Article G of the 26th of the By-laws for the Regulation of the Navigation of the River Thames, (a)

8. The said collision was occasioned by the negligence of those on board the *Owen Wallis*.

9. The said collision was not in any way occasioned by any negligence on the part of the plaintiffs or of those on board the *Lord Clarendon*.

The defendants' answer was as follows:

1. At about 2 a.m. of the 29th Dec. 1871, the screw steamship *Owen Wallis*, of 350 tons register or thereabouts, propelled by engines of 95 horse power and manned by a crew of twenty hands, left the Regent's Canal Dock in the port of London in charge of Henry George Row, a licensed waterman, in water ballast, bound on a voyage to Newcastle-on-Tyne.

2. Shortly before 2.15 a.m. of the said morning the

(a) This bye-law corresponds with Art. 19 of the Regulations for Preventing Collisions at Sea.—En.

[ADM.]

THE OWEN WALLIS.

[ADM.]

wind was about west-south-west, a light breeze, the weather was fine and clear, the tide was flood, and of the force of between three and four knots an hour, and the *Owen Wallis* was on the north side of the river Thames opposite the entrance of the said Regent's Canal Dock, and had her head down the river, her engines just beginning to work slowly ahead, and the Admiralty regulation lamps, to wit, a bright white lamp at her foremast head, a green lamp on her starboard side, and a red lamp on her port side, duly exhibited and burning well and brightly, and a good look-out being kept on board her.

3. In this state of circumstances, and when the *Owen Wallis* had only been moved a few feet on her course down the river, a barge, which afterwards proved to be the *Lord Clarendon*, the owners of which are the plaintiffs now proceeding in this case, was made out ahead of the *Owen Wallis*, at the distance of about two hundred feet, driving up against the tide and inside of the canal buoy, and thereupon the engines of the *Owen Wallis* were stopped and reversed full speed, but the starboard side of the barge came in contact with the stem of the *Owen Wallis*.

4. The barge had no light exhibited, and made no signal to warn vessels of her approach, and was not being navigated in a careful and proper manner, or in a proper part of the Channel, and those on board her neglected to use proper means to prevent her drifting against the *Owen Wallis*.

5. Those on board the *Owen Wallis* spoke to the men in charge of the barge after the collision, but the men in charge of the barge refused to receive advice or assistance from the *Owen Wallis*. The barge was picked up by a small steam tug and towed into the new ship entrance alongside the west pier at the Regent's Canal Dock.

6. The said collision and the damages and losses consequent thereon are attributable to the negligence and improper conduct of those on board the *Lord Clarendon*.

7. No blame is attributable to the *Owen Wallis*, or to any one on board of her.

8. The defendants deny the several allegations in the petition save such as are admitted by this answer.

The pleadings were thereupon concluded.

Jan. 23.—Evidence was called by plaintiffs and defendants in support of the allegations in the petition and answer respectively, the effect of which is sufficiently stated in the judgment. Evidence was also called by the defendants to show that it was the custom of dumb barges going up the river or a flood tide to keep in mid-channel so as to keep out of the way of vessels coming out of dock.

Butt, Q.C. (Clarkson with him) for the plaintiffs, contended that it was the duty of the defendants to keep out of the way of the barge, and that they might have done so if they had kept a good look out.

Gainsford Bruce (Herschell, Q.C., with him) for the defendants.—It is a question of importance whether barges ought to come up the side of the river on a flood tide when they know that vessels are coming out of dock; it is plainly the custom to go up mid-channel. A ship coming out of dock would not expect a barge to be coming up the side of the river, and hence the want of look out such as would discover a barge, a small object on the river, without a light, is not such an act of negligence as would render the ship to blame. [Sir R. Phillimore.—Your witnesses said that if they had seen the barge 200 yards off they could have avoided the collision, and that a barge could have been seen at that distance.] If the look out did not see the barge as soon as he might have done, he was no doubt to blame. But is not the barge also to blame? She ought to have been in mid-channel, and to have kept out of the way. The rule as to keeping out of the way does not apply to a steamer in the case of a barge, and, more-

over, there are exceptional circumstances here which require the barge to keep out of the way. The barge ought to have exhibited a light to warn the steamer of her position.

Butt, Q.C. in reply.—There is nothing in the Sailing Rules or the Thames Conservancy By-laws requiring barges in motion to carry lights, and if they did so it would be most misleading.

Sir R. Phillimore.—This is a case of collision which took place between a dumb barge and a steamer of 559 tons on Dec. 29, 1871. There is in these cases extreme difficulty in ascertaining facts when a suit is heard and decided in *recentissimo* fact, but the difficulty is greatly increased when such a length of time has elapsed between the collision and the hearing. The excuse for the delay given is that the parties were trying to come to some arrangement. On Dec. 29, 1871, in the early morning the barge was going up the Thames in charge of a licensed waterman on the flood tide. Unfortunately the waterman who had charge of the barge is since dead. When the barge got near the entrance of the Regent's Canal, about 2 a.m., the *Owen Wallis*, a steamer, which was in charge of a licensed waterman, was coming stern foremost out of the dock entrance. The barge was sweeping up in the flood tide, broadside on with two oars out. One man rowing with his face to her stern, the other with his face to her stern. One of the men discarded the *Owen Wallis* about 30 or 40 yards off. The steamer, according to her own statement, sighted the barge about 200 feet away and ahead.

Two questions have been raised; first, whether the barge was to blame, assuming she was not in mid-channel but to the north of it, for not keeping further out into the river, and so out of the way of the steamer; secondly, whether the barge was to blame for not carrying a light.

Now, I cannot hold that the barge was out of her right in coming up the river on either side as far as the law is concerned. It has been laid down in recent decisions, that vessels may navigate on either side of the river. It may be desirable that some uniform practice should be established; but I am by no means sure that it has been shown in this case that the barge was not in mid-channel.

It is further said that she carried no light. Now, not only is there no law requiring dumb barges to carry lights, but even if it were suggested that common prudence required it in such a place, there would be great difficulty as to what light a dumb barge ought to carry. The ordinary lights would on a barge be most misleading, and there is no provision for any other.

Then, what could the barge have done to get out of the steamer's way? Even if this were possible, there is no duty imposed by statute upon a barge to get out of the way of a steamer; nor do I consider that there was any duty under the special circumstances of the case. On the contrary, it was the duty of the steamer to get out of the way of the barge.

Now, the result of the evidence given on the part of the steamer is that, it being a morning when vessels could be seen at a fair distance, they ought to have made out the barge at a distance of 200 yards, whereas in fact no report was made at all of the barge by the look-out, and the pilot on going on to the bridge saw the barge at a distance of 30 or 40 yards only. The pilot had been aft whilst the ship was coming out of

ADM.]

THE OTTER.

[ADM.]

dock, and came on to the bridge only just before the collision. I must, therefore hold that the evidence establishes that if there had been a good look-out and the barge had been reported in sufficient time, the steamer might have gone astern, and so have avoided collision.

I think it right to say that the Elder Brethren have suggested difficulties as to this being done by the steamer; but, as these difficulties were not proved, I must decide that the steamer is alone to blame, and this I do on my own responsibility.

Solicitors for the plaintiffs, *Plews and Irvine*.
Solicitors for the defendants, *Thomas Cooper*.

Wednesday, Jan. 28, 1874.

THE OTTER.

Collision—Practice—Duty to begin—Fog over anchorage ground—Duty to anchor.

In all cases of damage, the onus being upon the plaintiff to establish negligence against the defendant, the plaintiff must begin; and this rule applies to cases where the only defence is inevitable accident and the plaintiff's vessel is at anchor, contrary to the former practice of the High Court of Admiralty.

Where a steamship, whilst in a good and well-known anchorage ground, enters a dense fog, it is her duty to anchor at once; and if she neglects to do so, and continues her course, she will be to blame for a collision ensuing, provided that the other vessel has done all that the law requires. (a)

This was a case of collision, instituted on behalf of the owners of the steamship *J. H. Lorentsen*, against the Tyne Steam Shipping Company (Limited), the owners of the late steamship *Otter*.

The plaintiffs' petition was as follows:—

1. The steamship *J. H. Lorentsen*, of 567 tons register, with a crew of seventeen hands, left Sunderland on the 19th Feb. 1873, with a cargo of coals, bound for Portsmouth. In the course of her voyage she encountered thick and foggy weather, and in consequence thereof was brought up to anchor between Mandesley and Hasborough, on the coast of Norfolk.

2. Between 7 and 7.30 a.m., on the 20th Feb. aforesaid, the *J. H. Lorentsen* was riding at anchor as aforesaid, in a good and proper berth, Hasborough Light Vessel bearing about north-east by north; Hasborough Church about south-west by south, and distant about five miles; Bacton bearing about south-west by west half-west, and Cromer Light about north-west by west. The wind was very light from the west, and it was very foggy. The tide was in the last quarter ebb, and of the force of nearly two knots an hour. The *J. H. Lorentsen* was riding with her head about south south-east; a good look out was being kept on board her, and her bell was being frequently sounded, as required by law.

3. In these circumstances those on board the *J. H. Lorentsen* heard a whistle sounding several times on their port bow. Their bell was kept going. After a little time those on board the *J. H. Lorentsen* observed a steamship, which was the *Otter* (whose owners are proceeded against herein), about half a ship's length off,

(a) This decision carries out to a legitimate conclusion the arguments to be derived from former decisions as to the precautions to be taken by vessels in a fog. In many instances it would be impossible for a ship to anchor whilst on its voyage on a fog overtaking it, and then she must go ahead to avoid drifting and loss of reckoning. Where, however, there is an opportunity of anchoring, common sense teaches that it is the right course to adopt. This principle has already been carried out in *The Lancashire*, ante p. 205, where a ferry boat was held liable for damage done in crossing the Mersey in a fog.—Ed.

and crossing their bows from port to starboard; those on board the *J. H. Lorentsen* hailed the *Otter* to port her helm; but instead of this being done, the helm of the *Otter* was put a-starboard, and the *Otter* almost immediately came into collision with the *J. H. Lorentsen*, striking her on her stem, with the starboard quarter very violently, and doing her considerable damage.

4. Shortly after the collision the *Otter* herself sank, from the damage which she received. Her master, crew, and passengers were received on board the *J. H. Lorentsen*.

5. The collision aforesaid, and the damage consequent thereon, were caused by, and are wholly attributable to the neglect, default, or mismanagement of the *Otter*, or those on board her.

6. No blame in respect of the said collision or damage is attributable to the *J. H. Lorentsen*, or to any of those on board her.

The defendants' answer was as follows:—

1. Between 7.30 a.m. and 8 a.m. on the 20th Feb. 1873, the screw steamer *Otter*, of 422-300 tons register, and 86-horse power, whilst on a voyage from Newcastle to Antwerp, with a general cargo and four passengers, was in the wold off Hasborough.

2. The wind at such time was about north, a light breeze, the tide was ebb and of the force of about three knots per hour, and there was a thick fog. The *Otter* was under steam, proceeding dead slow, feeling her way with the lead with a view to finding a safe and proper anchorage, and to coming to anchor on account of the fog. She was heading about south-west, and a good look out was being kept, and her steam whistle was being duly sounded at short intervals.

3. At such time the bell of the *J. H. Lorentsen* was heard, and immediately afterwards the *J. H. Lorentsen* was made out through the fog at a very short distance from the *Otter*, and bearing about a point on the starboard bow. The engines of the *Otter* were stopped and her helm was put hard a-starboard, but she, with her starboard quarter, came into collision with the stem of the *J. H. Lorentsen*, and the *Otter* received so much damage that she shortly afterwards foundered.

4. Save as herein appears the defendants deny the truth of the several statements and allegations contained in the first five articles of the petition filed in this case, and say that the collision was, so far as the *Otter* was concerned, the result of inevitable accident.

The pleadings were thereupon concluded.

The case came on for hearing.

The Admiralty Advocate (Dr. Deane, Q.C.) (*W. G. F. Phillimore* with him), for the plaintiffs, claimed the right to begin; contending that in all cases of damage the plaintiffs having to prove negligence ought to have the right of reply, which they lost if the defendants begin.

Clarkson (*Webster* with him) submitted that the defendants ought to begin, the plaintiffs' ship being at anchor.

Sir R. Phillimore.—The practice of the court has of late got out of gear as to the right to begin in cases of damage where the defendants rely on a defence of inevitable accident. Up to the time of the decision of the Privy Council in *The Marpesia* (26 L. T. Rep. N. S. 833; L. Rep. 4 C. P. 212; 1 Asp. Mar. Law Cas. 261), following the practice of my predecessor on the point, I was accustomed to hold that the party pleading inevitable accident was bound to begin; but after that case I thought it my duty, rightly or wrongly, to hold that the party complaining must begin, notwithstanding that the pleadings set up the defence of inevitable accident alone. I wish the matter to be finally settled to-day. In the case of *The Denmore* (L. Rep. 4, Adm. & Ecc. 132), where no charge of negligence was made against the plaintiff, and the only defence raised in the pleadings was inevitable accident, I said that after the recent case of *The Marpesia* (*ubi sup.*),

ADM.]

THE OTTER.

[ADM.]

I could no longer allow the former practice to prevail, and I ruled that the plaintiffs must begin. Again, in the case of *The Abraham* (23 L. T. Rep. N. S. 773; 2 Asp. Mar. Law Cas. 34), I was persuaded by Mr. Clarkson that the effects of the ruling in the *Marpesia* was to oblige me to call upon the plaintiff to begin; and I said that I thought his view was correct, and that the *Marpesia* rightly expressed what ought to be the practice of the court. I therefore think it better to say that until the Judicial Committee of the Privy Council take a different view of this matter, I shall rule that the plaintiffs must begin in all cases of damage, whatever are the circumstances. I do not think that the rule I now lay down will make much, if any, difference in most cases which come before me, but at all events it is right that there should be a definite practice on the point.

Evidence was then called by the plaintiff and defendants in support of the allegations in the petition and answer respectively, which is sufficiently noticed in the judgment.

The *Admiralty Advocate*, for the plaintiffs, contended that the *Otter* ought to have anchored at once on the fog coming on, she being then in a good anchorage ground; that the plaintiff's crew had in every respect performed their duty in ringing their bell, and were guilty of no negligence.

Clarkson for the defendant, contended that the plaintiffs did not ring their bell, and that the defendant's ship was entitled to choose her own anchorage ground, having regard to safety.

Sir ROBERT PHILLIMORE.—This is a case of collision between the *J. H. Lorentzen*, a steamship of 567 tons register, and the *Otter*, a screw steamer of about 472 tons register. The collision took place on the coast of Norfolk, with "Hasborough Light vessel bearing about N.E. by N., Hasborough Church bearing about S.W. by S. distant five miles, Bacton about S.W. by S. $\frac{1}{2}$ W. and Cromer Light about N.W. by N.," according to the statement in the plaintiff's preliminary act and pleadings; according to the statement by the defendant's preliminary act, "in the Wold off Hasborough." The spot where the collision happened is, however, admitted, so there is no controversy between the parties on that point. The direction of the wind at the time is stated by the plaintiff to have been about W., and by the defendant as about N., but as it is admitted by both sides that the wind was very slight, this contradiction is not of any consequence, and can make no difference as to how the case is to be decided. Now, the *J. H. Lorentzen* appears to have been bound from Sunderland with a cargo of coals to Portsmouth; and in the course of her voyage she found herself in a dense fog, and in consequence anchored in about thirteen fathoms in the spot where the collision afterwards occurred, about a quarter to one in the morning of the 29th Feb. last. In the position which she had so taken up the *J. H. Lorentzen* lay in safety till about 7.30 a.m., when the *Otter* ran into her, her stem being struck by the starboard quarter of the *Otter*, and so much damage being done to the latter that she sunk shortly after the collision. Now the first question which arises in the case is this: If, in fact, the *J. H. Lorentzen* in anchoring where she did came to an anchor in a proper place—and that she did anchor in a proper place is the opinion of the Elder Brethren of the Trinity House, agreeing with my opinion

formed during the argument upon perhaps less scientific consideration—were the precautions required by law to be taken by a vessel anchored under such circumstances, namely, by ringing her bell as often as the law required, observed by her? We think these precautions were observed. From these facts this proposition arises: that if the *J. H. Lorentzen* was anchored in a proper place, and made use of the signal, of which she was under an obligation to make use, she was in law entitled to have lain at her anchorage unmolested by any other vessel. I do not agree with the contention which has been made, that the approaching vessel, the *Otter*, by the sound of her steam whistle (which is stated to have been almost continuously blown) must have drowned the sound of the bell of the *J. H. Lorentzen*, and this prevented those on board the *Otter* from hearing it ringing. I must assume as to this that the Legislature in enacting as it has done, that during fog steamships shall sound a steam whistle at least every five minutes did not lay down the rule without consideration of all the consequences which might flow from its observance. I must also assume that the bell on board the *J. H. Lorentzen* was sounded according to law. This is in evidence. There is evidence, indeed that her bell was rung much oftener and more frequently than was required by the law. Then if the case is—as I must hold—that the *J. H. Lorentzen* is in nowise to be blamed for the collision, the further question arises, Was the collision occasioned by inevitable accident so far as the *Otter* was concerned? This involves two questions, and here I must refer to the statement of the case set up by the *Otter*. Now the *Otter* says in her statement that she was on a voyage from Newcastle to Antwerp with a general cargo and passengers, and was in the Wold of Hasborough. The tide was ebb, and of the force of about three knots per hour, and there was a dense fog—as dense a fog, the evidence proves, as could be described. "The *Otter*" (the statement goes on to say) "was under steam, proceeding dead slow, feeling her way with the lead with a view to finding a safe and proper anchorage, and to coming to anchor on account of the fog." Now what was the duty of the *Otter* in such a dense fog? I am of opinion she was, from after the time she passed the Hasborough Light vessel up to the time of collision, in a fair and proper anchorage ground. I am of opinion, and with this opinion the Elder Brethren agree, she ought to have come to an anchor before the collision. She knew her whereabouts. She was near Cromer Light and had just passed the Hasborough Light. These circumstances, in my opinion, which is borne out by that of the Elder Brethren, ought to have guided the master of the *Otter* as to the advisability of anchoring at once and not proceeding further through the fog. The *Otter* ought to have stayed where she was until the tide turned. It was merely an act of common prudence that she should have dropped her anchor in the position she found herself long before the collision occurred. I am of this opinion, and so the Elder Brethren of the Trinity House assure me. This, however, is not all; for the Elder Brethren also assure me that she ought not to have run on trying to find ten fathoms to anchor in, but ought to have anchored in water which she found as shallow as thirteen fathoms. It has been said that the rule laid down in Art. 16 of the Regulations for Preventing Collisions

ADM.]

THE RAITHWAITHE HALL.

[ADM.]

at Sea, does not contemplate that steam vessels in a fog must stop, but directs that "every steamship shall when in a fog go at a moderate speed." I am of opinion that the Legislature could not, by passing the rule, have intended to hold that such an extraordinary proposition was true as this, namely, that in whatever position a vessel might be in a fog it would be contrary to her duty, or that there would be no obligation on her, to stop. With regard to the speed at which the *Otter* was going, I think, as Mr. Clarkson rightly said, she was proceeding with all due care. I do not found my judgment on the question whether the manoeuvre the *Otter* adopted, but unsuccessfully, to avoid the *J. H. Lorentzen* by starboarding her helm was the right manoeuvre for her to take; but I think, for the reasons I have stated, that the *Otter* has not made out the plea of inevitable accident raised by her, nor shown that she was not by any negligence on her part liable for the collision. I find the *Otter* entirely to blame for the collision.

Proctor for the plaintiff, *Cyrus Waddilove*.
Solicitors for the defendants, *Gellatly, Son, and Martin*.

Jan. 20 and Feb. 12, 1874.

THE RAITHWAITHE HALL.

Collision—County Court appeal—*Shorthand writers' notes*—Corrections by County Court Judge—*Bicer navigation*—Effect of river byelaws—Duty in fog.

In an appeal to the High Court of Admiralty from a County Court where there is a conflict between the transcript of the notes of evidence and judgment taken by a shorthand writer in the County Court under the County Court Rules No. 32, and the County Court Judge's own notes, the version given by the County Court Judge must be accepted as binding, and if the County Court Judge alters the shorthand writer's notes so as to correspond with his own version, the Court of Admiralty will order the alterations so made to be carried into effect in the printed copies of the appendix.

Byelaws made by a local authority governing the navigation of a river are to be taken as evidence of what it is the duty of vessels to do in the circumstances named therein, and although the mere breach of one or any of them will not be sufficient reason for holding a ship to blame for a collision, yet, if that breach occasions or contributes to the collision, the evidence of the byelaw will afford the best reason for holding the ship violating the byelaw to be guilty of a breach of duty, and consequently to blame for the collision.

Where a byelaw regulating the navigation of a river prescribes the side of the river upon which a ship is to navigate going up or down the river, the observance of this byelaw is doubly necessary during a fog when vessels can only be made out at short distances; and the breach of the byelaw cannot be excused by the plea that it was usual during foggy weather to navigate on the wrong side of the river in order to insure greater safety for the vessel so doing.

THIS was an appeal from decrees of the Judge of the County Court of Northumberland, holden at Newcastle-upon-Tyne, in cross causes of damages instituted in personam, the one by the owners of the screw steamship *Holmside*, against the owners

of the screw steamship *Raithwaithe Hall*, the other by the owners of the *Raithwaithe Hall* against the owners of the *Holmside*. The appellants in both causes were the owners of the *Holmside*.

The story told by the appellants was as follows: The *Holmside* was a screw steamship of 593 register tons, and 98 horse power, and on the 2nd April 1873 she left the Tyne Dock, on the river Tyne, at about 6.30 a.m., with a cargo of coals bound for London. During the previous night a very dense fog had prevailed, and at the time of the *Holmside* leaving dock still continued, but was beginning to lift. The *Holmside* was in charge of a licensed pilot, and went down the river dead slow, keeping on the south side of the river about 30 feet from the tiers of ships on that side. At that time those on board of her could see for a distance of about 700 feet. The *Holmside* went dead slow till she got into the Narrows opposite a shipbuilding yard known as Wallace's Yard; there she stopped her engines to wait for the pilot's cable. She had way on her, however, and continued down the river till she came to another yard known as Saffley's Yard. Then a steamer was reported right ahead. The *Holmside* was at this time nearly stopped; her engines were immediately put full speed astern, and her helm put hard a port. The other steamer, which was the *Raithwaithe Hall*, came on and struck the *Holmside* port bow to port bow. The allegations of negligence against the *Raithwaithe Hall* were that she had not a proper look-out, that she neglected to port her helm, and that she was coming up the river on the wrong side, contrary to the provisions of the Tyne Byelaws which will be found set out in the judgment of the court.

The evidence on behalf of the respondents was as follows: The *Raithwaithe Hall* was a screw steamer trading from and to the port of Newcastle-upon-Tyne. At about noon on the 1st April 1873 she arrived off the Tyne. The weather was very thick, and her master, not being able to make out the river, cast anchor. On the following morning, about 5.30 a.m. the fog was beginning to lift, and the *Raithwaithe Hall* got under weigh and entered the river. When she started, the Souter Horn bore about W.S.W.; she made the Bell Buoy at the end of the South Pier, and then the Herd Sand Buoy, and kept up the south side of the river till she came to the Fish Pier. Her head was then put slightly over towards the northward; her speed was slackened, and she whistled for her pilot. Immediately afterwards the *Holmside* was reported ahead; the *Raithwaithe Hall's* helm was put hard a port and her engines reversed. The collision then occurred. At the time of the collision the *Raithwaithe Hall* was stopped, if she had not stern way on. The place of the collision was, according to some of the respondents' witnesses, in midchannel; according to others to the south of midchannel. In entering the river the master of the *Raithwaithe Hall* had declined to take a pilot, because he could not get his usual pilot, and after entering the river did not use his lead to ascertain his position in the river. The respondents charged the *Holmside* with proceeding at an improper pace in such a fog, and with being unable in consequence of that pace to stop in sufficient time to avoid a collision.

The learned County Court Judge (Thomas Bradshaw, Esq.) gave judgment in favour of the respondents, as soon as the case was concluded,

[ADM.]

THE RAITHWAITHE HALL.

[ADM.]

holding that the *Holmside* was alone to blame, on the ground that she was going at an improper pace. Afterwards, when an appeal was asserted, he gave his reasons in writing; he then found as a fact, that the collision took place south of mid-channel, abreast of Solly's Yard, at a distance of about 200 feet from the south shore line, and somewhere about eighty or ninety feet from the Fish jetty end, and about the same distance west of the jetty, and then said:—"Upon the state of things thus shown, the plaintiffs' counsel contended that, as the *Raithwaithe Hall* was not in her proper winter, under the seventeenth rule of the By-laws for the Navigation of the Tyne, the plaintiffs were entitled to my judgment in their favour, on the ground of the infraction of this rule by the defendants' vessel. I have before had occasion to say that I cannot accede to this view. These byelaws were authorised to be made for the orderly navigation of the river in ordinary circumstances, and for the infraction of any of them they prescribe their own penalties. But the principle upon which regulations of this nature are to be construed and obeyed is well understood. Due regard is to be had to the dangers of navigation, and also to any special circumstances that may arise in any particular case rendering a departure from them excusable or even necessary. But I do not rest my opinion in this matter on principle alone. I have authority with me also. In giving judgment in the Court of Exchequer, in *Smith v. Fox* (26 L. J. 253, Ex.; 2 H. & N. 97), Bramwell, B. uses some words which are in point. He says: 'Disobedience of the rule of the road is some evidence against the vessel or vehicle; obedience is some evidence in its favour; but it still leaves the question open, whether the one or the other caused the collision.' I quote these words as showing that such an infraction of a byelaw would not, even under ordinary circumstances, be regarded as conclusive of the question. But the circumstances here are not ordinary ones. It is in evidence that the fog was drifting to the northward. I have already stated, and it is in evidence, that the *Raithwaithe Hall* had been grappling up the river on the south side in the dense fog. Now this is precisely, as it seems to me, one of those special cases in which a departure from the byelaw might become necessary in order to avoid danger. Moreover, the evidence shows that there are differences of opinion among the pilots as to what is the best and safest course to take in entering and proceeding up the river Tyne in densely foggy weather. It is sufficient to refer to James Young's evidence. He said, in reply to the assessors, 'that in foggy weather he should have taken the course taken by the *Raithwaithe Hall* that morning, grappling up the south side, till he got abreast the jetty, and then angling over to the northward.' He said, also, in re-examination to Mr. Blackwell: 'In foggy weather we must do so.' Young probably speaks with as much authority as anyone on a matter like this. He is a man of the greatest experience—a pilot of thirty-six years' standing—the plaintiffs' witness, and pilot of the plaintiffs' vessel at the time. If any other evidence were needed, it may be found in the fact that the two experienced men who sat with me as assessors were divided in opinion about it, and I was thereby deprived of the benefit of their united counsel and assistance, and forced to give my judgment without their sanction. I cannot, therefore, and I do

not find that the *Raithwaithe Hall* was a wrongdoer in thus infringing the 17th byelaw, or that she was guilty of contributory negligence in taking the course she did under the circumstances. The cause of the collision must be sought for elsewhere." He then found that the *Raithwaithe Hall* was almost stationary at the time of the collision, and that the *Holmside*—whatever her pace, which he did not exactly fix—was going too fast, considering the circumstances and state of the weather on the morning in question; that she was not sufficiently in hand, and, consequently, could not bring herself up in time to avoid a collision within the distance that her look-out could see vessels on that morning; and that the *Holmside* was on that account alone to blame.

From these decrees the owners of the *Holmside* appealed. The evidence had been taken below by a shorthand writer, and his notes were printed and filed for use on the appeal. The printed transcript of the notes of the evidence and notes having been submitted to the County Court judge, he corrected the evidence in respect of certain questions which he himself had asked, and also corrected his judgment where he alleged it to have been incorrectly reported. These corrections were made by indorsements in the margin of one of the printed appendices.

Jan. 20.—*Webster*, for the respondents, now moved that the shorthand writer's notes and the printed copies thereof should be altered, in accordance with the County Court judge's corrections. The shorthand writer's notes are admitted to prove the evidence of the witnesses, under rule 32 of the General Orders Regulating the Practice of the County Courts of Admiralty Jurisdiction, but they cannot be taken as against the judge's notes; in common law cases the judge's notes are always held binding.

E. C. Clarkson, for the respondents, contended that the shorthand writer's notes were binding, and could not be altered. The shorthand writer is sworn to take the evidence and judgment correctly, and the 32nd rule clearly shows that his notes are intended to be binding. Unless it is positively shown that the notes are erroneous, they should not be altered, and this has not been done. The judge ought not to be allowed to correct the notes with a view of making his judgment appear correct.

Webster, in reply.

Sir R. PHILLIMORE.—There is no dispute in this case as to the decree; no dispute as to the judgment; no conflict of evidence as to what the judgment was in its result; and the only question which the court has before it is, whether the court shall accept as accurate the shorthand writer's notes or the version of the evidence and reasons for the judgment, as corrected and stated by the judge himself. I am of opinion that it is my duty to accept the latter. I am clear that the judge has a perfect right to place before the Court of Appeal the actual reasons for his judgment, and that where there is a conflict between the judge and the shorthand writer as to questions and answers put and received, the judge's version must be accepted, more especially where those questions were put by the judge himself. I will only repeat, what I have so often said, that the practice of the County Court judges giving reasons for their judgments in cases coming up on appeal, ought always to be followed, and is,

[ADM.]

THE RAIHWAITHE HALL.

[ADM.]

indeed, of great assistance to the court. There is no difficulty in the present case. The course I shall pursue in the matter is this: I shall direct the registrar to see that the amendments made by the learned judge are inserted in the margin of the printed appendix in red ink, so that the alterations may be opposite to the parts which are, in the learned County Court judge's opinion, inaccurate. I shall therefore grant the prayer of the motion. The costs will be costs in the cause.

Feb. 12.—The appeal now came on for hearing.

Milward, Q.C. and Clarkson, for the appellants.

Webster and Davidson, for the respondents.

The arguments sufficiently appear in the judgment.

Sir R. PHILLIMORE.—This is an appeal from a decree of the judge of the County Court of Northumberland, holden at Newcastle-on-Tyne, in cross causes of collision, brought by the owners of the screw steamer *Holmside* against the owners of the screw steamer *Raihwaithe Hall*, and by the latter against the former respectively. The collision took place about seven o'clock in the morning of the 2nd April 1873, on the south side of the river Tyne, off a yard known as Softley's Yard. The learned judge of the court below found that the *Holmside*, which was coming down the river, was alone to blame, and his decision was founded upon the pace at which she was going in a fog—founded solely on her speed.

The learned judge has taken great pains to render his judgment perspicuous by most carefully stating his reasons—a circumstance which, of itself, would make the court most reluctant to reverse the decision of the tribunal, which has had the great advantage of having the witnesses examined before it. The judgment, however, rests almost entirely upon the learned judge, for the nautical assessors appear to have differed among themselves and from the court; and this is a circumstance deserving of notice. Hence the decision was rightly given upon the responsibility of the judge alone, and rests, as I have already pointed out, upon the fact of there being a very thick fog, and the pace of the *Holmside* during that fog.

It appears that the *Raihwaithe Hall* had arrived off the Tyne the night before the collision, and had there anchored, thinking it not safe to proceed on account of the fog. The next morning, however, her master deemed it right to attempt to enter the river.

Now certain bye-laws have been admitted and put in as hiding upon vessels navigating the river Tyne, and they purport to be made by the Tyne Improvement Commissioners under various Acts of Parliament. There should, however, be no misunderstanding as to the effect of these and similar bye-laws governing the navigation of a river. It cannot be held that, because they or any of them are disobeyed, the vessel disobeying them must therefore be held to blame. They are only evidence of what it is the duty of a vessel to do under the circumstances named in the particular bye-law. As such evidence, however, they are an important element in every case that comes within their provisions, and if it should appear that by the breach of one of them a ship has occasioned or contributed to a collision, the existence of such a bye-law would afford the very

strongest reason for holding that that ship had been guilty of a breach of duty, and was to blame for the collision.

Now, by clause 17 of these bye-laws, it is provided that "All vessels navigating the river, when proceeding towards sea, shall keep from south of mid-channel; and when coming to the seaward, shall keep to the north of mid-channel, so that the port helm may be always applied to clear vessels proceeding in the opposite direction." By clause 18, "All steam vessels, and vessels towed by steam vessels, must so approach the river from sea as to enter on that side of the channel reserved for their navigation." By clause 19, "All vessels when under weigh, requiring to pass over a part of the channel which is not within that half reserved for their navigation, for the purpose of proceeding to or from landing moorings or other places, must take upon themselves the responsibility of doing so in safety, with reference to the passing traffic, &c." The 22nd clause is, "When steam vessels, proceeding in opposite directions, approach each other, they shall, at a proper distance, put their helms to port, and when within thirty yards shall ease their engines sufficiently, and keep as near as possible to the right or starboard side of the river, so as to afford all possible facility for passing each other."

The fact is admitted, and upon this point there is no controversy, that this collision took place south of mid-channel, or in what may be called the waters of the *Holmside*. This fact is most material in the consideration of this case. There is no question either as to the state of the weather. There was a very thick fog, lifting occasionally, but, as one witness says, "no one could judge accurately as to what course to take." Other witnesses used various words to express its density, but they all agreed that it was sufficiently dense to prevent vessels being seen at a greater distance than 700 or 800 feet.

The observation which the court naturally makes on this part of the case is, that, if vessels choose to navigate in such a fog as this seems to have been, they do it at their own peril, and it is incumbent on them to navigate with every precaution and act of prudence possible; and if in course of navigation has been laid down by competent authorities and well-known rules, surely it is not less, but rather more, incumbent upon vessels to keep that course and to observe those rules, and if they neglect to do so they must answer for the consequences of that neglect. I am at a loss to understand the argument, that because there was a dense fog, the rules might therefore be departed from. I myself should have arrived at the conclusion that the existence of the fog was the most conclusive reason for obeying the rules, and that each vessel would on that very account have good reason to think that the other was obeying the law. That a vessel should navigate in a river at all during such a fog is a dangerous and reprehensible thing, and it is probable that the *Holmside* would not have started if the fog had not begun to lift shortly before she left dock. This, however, was not alleged against the *Holmside* in the court below as an act of negligence, probably because the river regulations do not prohibit navigation in a fog, for they provide (clause 38), that "during fogs the speed of steam vessels navigating the port shall not exceed half speed;" but, nevertheless, the existence of a fog renders it the more incumbent

ADM.]

THE KJØBENHAVN.

[PRIV. CO.]

upon vessels so navigating to observe the regulations.

Now, not only did the *Raithwaite Hall* disobey the rules to the side of the river on which she was to navigate, but she did not even take the ordinary precaution of employing a pilot. Her captain took upon himself the responsibility of taking his ship into port in that fog. He entered the river on the south side, and intended to cross from the Fish Pier to the northward, and his defence for his disobedience to the rules is, that there is a custom that overrides the law. Some of the pilots who were called for the *Raithwaite Hall*, say that there may be such a regulation, but that when a ship is entering the river in a fog, it is the custom to come in on the south side until she sights the Fish Pier, and then make over to the northward.

In the first place it would be extremely difficult for any court to support the proposition that it is competent for any person to set aside an established regulation, which is binding in law, for their own convenience. It is incumbent upon the court to uphold the law.

But I am by no means satisfied that any such general custom has been proved, nor that there was any such safety for vessels taking that course in a fog as would form good ground for establishing such a custom. One of the nautical assessors was evidently struck by this, for he asked the master of the *Raithwaite Hall*: "Q. If you had come up on the north after you saw the Herd Buoy, and had gone and found the Beacon on the Middens, would there have been a collision? A. You see, the danger is putting your ship aground.—Q. I am not asking you about that; I have my opinion of that, and I was the one who had the Beacon put there? A. There is just as likely to be a collision as there was, because the ships were not in sight.—Q. You would not have been able to grapple your way up there? A. Not so well as on the south side.—Q. Because you never put your lead overboard? A. I told you the truth; I never used the lead in the harbour, in the river." There can be no doubt that the Middens is a dangerous place, but the course indicated by the nautical assessor might have been pursued in the opinion of the Elder Brethren, provided the master had taken careful soundings.

This shows that the collision might have been avoided, despite the weather, if the *Raithwaite Hall* had taken ordinary precautions, and had obeyed the regulations. But here is a vessel going up the Tyne in a thick fog, on her wrong side, without employing a pilot or using her lead, and the court is asked to find another, which is navigated with both care and skill, alone to blame for an ensuing collision. The learned judge found the *Holmside* to blame, on the ground of her speed alone; but he admitted that he could not fix that speed accurately. No doubt the result of the evidence is to leave her speed uncertain, but it is clear that she was not going more than four knots. According to her master she was going dead slow, and just before the collision was nearly stopped. The *Raithwaite Hall* was then reported right ahead, and was at the distance of about 700 feet; she came straight on and struck the *Holmside's* port bow with her own port bow.

The Elder Brethren are quite agreed upon the nautical points in this case, and also agree with me as to the effect of the evidence. I

am unable to make out from that evidence how the judgment below can be maintained on the basis on which the learned judge has placed it, namely, that the *Holmside* was going at an undue pace. It never seems to have occurred to the learned judge that the *Raithwaite Hall* was to blame for her infraction of the law, and he condemns the *Holmside* alone. The evidence leads me to the exactly opposite conclusion, and, however much I regret it, I must reverse the judgment below, and find the *Raithwaite Hall* alone to blame. I shall allow the costs of this appeal, and those in the court below.

Solicitors for the appellants, *Ingledeu, Ince, and Greening*, for *Ingledeu and Daggett*, Newcastle-on-Tyne.

Solicitor for the respondent, *H. C. Coots*.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY OF ENGLAND.

Reported by J. F. ASHFALL, Esq., Barrister-at-Law.

Feb. 13, 14, and 17, 1874.

(Present the Right Hons. Sir J. W. COLVILLE, Sir BARNES FRASER, Sir MONTAGUE E. SMITH, Sir R. P. COLLIER.)

THE KJØBENHAVN.

Collision—Defence—Inability to comply with regulations—Disabled ship—Prior collision—Responsibility for.

Where a ship seeks to excuse her failure to comply with the sailing regulations and with a reasonable precaution, by showing that such a failure was in consequence of her being disabled in a prior collision, it is material to inquire whether the prior collision was due to her default, or was the result of inevitable accident.

Seem, if the prior collision be due to the default of the ship so seeking excuse, and if her subsequent failure to comply as aforesaid contributes to the collision proceeded for, she will be to blame therefore.

This was an appeal from a decree of the learned Judge of the High Court of Admiralty of England (Sir R. Phillimore) in a case of damage lately pending in that court, promoted and brought by the appellants, the General Steam Navigation Company, as owners of the late steamship *Mermaid* against the *Kjøbenhavn* and her owners, the respondents intervening, to recover damages for the total loss of the *Mermaid* in a collision between the two ships. The collision occurred in the river Thames, about half-a-mile above the Orens Buoy, off Coal House Point, on the north side of the river.

The *Mermaid* was a screw steamship of 377 tons register, and 90 horse power, and was bound from Shields to London with a cargo of coals. The *Kjøbenhavn* was a screw steamer of 700 tons register and 100 horse power.

The case, on behalf of the *Mermaid*, was that she was proceeding up the river at full speed on the north shore, rounding Coal House Point, when the masthead light of a steam vessel, which proved to be the *Kjøbenhavn*, was seen a little on the starboard bow of the *Mermaid*, distant about half a mile; that the engines of the *Mermaid* were eased, and her helm ported, in the expectation that the *Kjøbenhavn*, which was supposed to be under

way coming down, would also port her helm, so that the two vessels might pass port side to port side, but that the *Kjoberharn* proved to be at anchor, and although the engines of the *Mermaid* were stopped and reversed, the *Mermaid* with her port side came into collision with the stem of the *Kjoberharn*, and suffered a great deal of damage. That the *Mermaid* was run ashore, but slid off again into deep water, and became a total wreck.

The appellants attributed blame to the *Kjoberharn* for having been improperly lying at anchor in an unusual and improper place, for having improperly had her masthead light up and burning, and for not having had a riding light up. They called the harbour master of Gravesend, to show that the place where the *Kjoberharn* was anchored was improper, and that he should have removed her if he had seen her.

The respondents in their answer alleged—

2. That the *Kjoberharn* was lying at anchor near the Essex shore, just above Coal House Point. That the wind was about E.N.E. very light. That the tide was about half flood, and of the force of about three and a half knots an hour; that the weather was fine with a slight haze on the water; that there were occasional clouds of smoke issuing from some cement factories a little lower down, and borne across the river; that the *Kjoberharn* was riding with twenty-five fathoms of chain, heading steadily to the tide, and shored out from shore under a port helm.

3. That the *Kjoberharn* had not been long at anchor; that the bright white or masthead light was, when she came to anchor, carried on the outer jib stay, about thirty-six feet above the hull, and remained there till the collision; that it exhibited a clear light to all vessels coming up the river; that just before the *Kjoberharn* had come to anchor, as aforesaid, she had been in collision without any fault on her own part with a brig riding at anchor. That in this collision her riding light had been destroyed; that at the time she came to anchor, as aforesaid, and up to the time of the collision, she had not any proper riding light, and could not exhibit one.

4. In these circumstances those on board the *Kjoberharn* observed the white and red lights of a steam ship from one to two ship's lengths off and nearly ahead. They were unable to do anything to avoid the steamship carrying these lights, which was the *Mermaid*, whose owners are proceeding herein, and she almost immediately came in collision with the *Kjoberharn*, her port side striking the stem of the *Kjoberharn* with considerable violence. The *Mermaid* then passed, and no damage was done to the *Kjoberharn*.

5. Save as hereinbefore in Art. 3 has been stated, the *Kjoberharn* had not improperly her masthead light up and burning, and was not improperly lying at anchor without having a proper riding light up. The light which was hung on the *Kjoberharn* as in Art. 3 stated was for all vessels coming up the river equivalent to a proper riding light, and the presence of this light and the absence of any other light did not in anywise contribute to the collision.

The respondents denied that the *Kjoberharn* was at anchor in an unusual or improper place, and attributed the collision to the neglect, default, or mismanagement of those on board the *Mermaid*.

The cause was heard before the learned judge, assisted by two of the Elder Brethren of the Trinity Corporation, and the witnesses were examined orally in open court.

It was proved and found by the learned judge, as a fact, that the *Kjoberharn* was lying at anchor in an improper and unusual place, and evidence was given to prove that she had come into collision with the brig owing to the carelessness of those on board the *Kjoberharn*. The brig was lying at anchor about a quarter of a mile below the Owens Buoy, and about three lengths to the

south of mid channel in the fairway, and in the midst of a thick smoke coming across the river. The defence of the *Kjoberharn* was that by reason of this smoke, her master and crew were unable to distinguish the brig until too late to avoid a collision, and that the brig injured them to such an extent that their steering gear would not act, their lamp room was broken in, their riding lights broken, and that they were compelled to come to anchor at once, and even if they had had another light they had not time to have hoisted it between the two collisions. The master of the *Kjoberharn* in his evidence, admitted that the respondents had paid to the owners of the brig the whole of the amount (£164.) of the damage claimed by the owners of the brig in respect of the collision between the *Kjoberharn* and the brig.

The learned judge of the court below found that the *Kjoberharn* was lying at anchor in an improper place, and that she had not a proper light up, carrying as she did her masthead light, hung 15 or 16 feet higher than an ordinary anchor light; but that this was necessitated by the collision with the brig, which occurred by no fault of the *Kjoberharn*, but rather by the fault of the brig; and that the *Kjoberharn* must be considered as having been reduced to that condition by inevitable necessity, and by no misconduct on her part; that she anchored out of the fairway, and no vessel ought to have come near her; that there was not time to lower the light to the proper level of an anchor light, and even if there was this light could not have deceived the *Mermaid*, or in any way contributed to the collision; and that the *Mermaid* was going at an improper speed when entering the smoke, and ought not to have ported her helm; that she ought to have slackened speed and held on her course, that the effect of porting was to cause the collision; and pronounced the collision in question in the cause to have been solely occasioned by the improper navigation of the *Mermaid*, and by his decree dismissed the suit with costs.

It is from such decree that this appeal was brought.

The appellants submitted that the decree appealed from ought to be reversed for the following amongst other reasons:

1. Because the evidence proved that the *Kjoberharn* was lying at anchor in an improper and unusual place.

2. Because the evidence proved that the *Kjoberharn* was improperly lying at anchor without any proper riding light up, and that she improperly had a masthead light exhibited at a height of thirty-six feet above her deck, being a height exceeding by sixteen feet the height at which anchor lights ought to be exhibited.

3. Because it lay upon the respondents to prove that the collision between the *Kjoberharn* and the brig happened without any negligence on the part of the *Kjoberharn*, and that the *Kjoberharn* was therefore compelled by no fault of her own to anchor where she did, and prevented by no fault of her own from exhibiting a proper anchor light, and the respondents failed to discharge such burden of proof.

4. Because the evidence proved that the said collision with the brig was occasioned or contributed to by some neglect on the part of those on board the *Kjoberharn*.

5. Because those on board the *Kjoberharn* im-

Priv. Co.]

THE KJOENHAVN.

[Priv. Co.]

properly left the masthead light of the *Kjoenhavn* at too great a height from her deck.

6. Because the evidence proved that those on board the *Mermaid* were misled by the position of the *Kjoenhavn*, and by seeing her masthead light, into supposing that the *Kjoenhavn* was under way, and into acting accordingly.

7. Because the evidence proved that the collision was occasioned by the negligence of those on board the *Kjoenhavn*.

8. Because the evidence proved that the collision was not occasioned by any improper navigation on the part of the *Mermaid*.

Butt, Q.C. and *E. C. Clarkson* for the appellants.—The respondents are liable both because their ship was anchored in an improper place, and failed to carry the proper light; they have failed to show excuse for these acts of default, inasmuch as they have not shown that they were free from blame in respect of the collision with the brig. No doubt it was the porting of the *Mermaid's* helm, which brought about the collision, but she was led into that act by the misleading light carried by the other vessel. The *Mermaid* was bound to port, supposing the other ship to be coming down the river, because she was going round the curve of the river, and would expect the other ship to keep outside. The course up and down the river is a line parallel with the banks, and hence the meeting or crossing rules do not strictly apply, but vessels are bound to keep their relative courses with regard to the banks of the river.

The Velocity, L. Rep. 3 P. C. 44; 21 L. T. Rep. N. S. 686; 3 Mar. Law Cas. O. S. 308;

The Ranger, The *Colony*, ante, vol. 1, p. 484; 27 L. T. Rep. N. S. 703.

The *Mermaid* knowing that no large ship anchored in that place properly assumed that the *Kjoenhavn* was coming down the river, and that some action was necessary. The masthead light was easily distinguishable from an ordinary anchor light, and this misled the *Mermaid*.

Sir J. Karslake, Q.C. and *W. G. F. Phillimore* for the respondents.—The *Mermaid* kept a bad look out, and ought to have known that smoke was usually in that place, and to have come through it at a slower speed. They ought not to have ported till they discovered side lights, even if they did mistake the *Kjoenhavn* for a vessel under way. The *Kjoenhavn* cannot be held to blame for the collision with the brig. After that collision there was no time to change the lights, even if it was possible. The *Kjoenhavn* was anchored in a proper place. [*Sir J. W. Colville*.—There can be no doubt that if you had cast anchor in that neighbourhood without being compelled to do so by the first collision, you ought to have gone up beyond the point B, and have anchored on the south side.](a). Their porting was an improper act, even if we were in motion; it would have run them ashore.

Clarkson in reply.—The Merchant Shipping Act Amendment Act 1862 (25 & 26 Vict. c. 63), sect. 27 is very stringent, and enacts that a vessel

(a). The place here referred to is the anchorage ground off Gravesend, which is marked on the charts by a line running from the Beacon Light, in the direction of the Shoreward Battery, as far as a point marked B. At night the Beacon light shows a bright light to the northward of that line, and a red light to the southward of it, and all vessels anchoring there should anchor to the southward of the line. See Thames Conservancy Byelaws, Rule 22.

shall carry the prescribed lights and no others; hence the respondents were carrying not merely a wrong light but a prohibited light. They must show, in order to be excused, that they did this from absolute necessity. In this they have failed, as they admit that they had a global light, and do not show why it was not put up. They were guilty of negligence in getting into such a position, and they have practically admitted this by paying for the damage done to the brig. [*Sir Barnes Peacock*.—The Merchant Shipping Act Amendment Act 1862, sect. 29, provides that a ship guilty of a breach of the regulations which occasions the collision, "shall be deemed in fault, unless it is shown to the satisfaction of the court that the circumstances of the case made a departure from the regulations necessary." If by reason of the first collision the *Kjoenhavn* was compelled to anchor in an improper place, would not that be a circumstance which rendered it necessary to anchor in that place, and, having by the same means lost her lights, to carry the one she did? Could her former negligence, if it existed, render her liable for the second collision? or to follow it out, if the brig was to blame for the first collision could she have been proceeded against for the damage to the *Mermaid*? *Sir Montague Smith*.—A similar case arose here, but I do not think the point was decided.](a) There is no decided case on the point, but the real question is whether the default was occasioned by any negligent act in the first instance. The *Kjoenhavn* was without her lights, and she pleads that this happened without her default; she must therefore show that she was not to blame for that which caused her to be in the fairway without her proper light.

Feb. 17.—The judgment of the Court was delivered by *Sir J. W. Colville*.—The general facts of this case are stated by the learned judge of the Court of Admiralty in the two first paragraphs of the judgment, against which the appeal is brought, as clearly as it is possible for me to state them. He says:—"This is a case of collision between a screw steamship called the *Mermaid* and a screw steamship called the *Kjoenhavn*. It took place between nine and ten o'clock on the night of Friday the 28th March. The place of collision was about half a mile from the Ovens Bnoy off Coal House Point, on the north side of the river Thames, and in Gravesend Reach. The tide was about half flood, running at a speed of between three and four knots. The *Mermaid* was a vessel of 577 tons register, and 90 horse-power, with a crew of 23 hands. She was on a voyage from Shields to London, with a cargo of coals, and was proceeding up the river Thames and rounding Coal House Point. The *Kjoenhavn* was a larger vessel of 700 tons register and 100 nominal horse-power, with a crew of 20 hands; and at the time of this collision she was lying at anchor with 25 fathoms of chain heading to the tide, at the place which has been marked by the witness on the map here, which is close to the Ovens Bnoy and off a bank called Ovens Flac."

There is but one action, namely, the action brought by the *Mermaid* to recover damages from the *Kjoenhavn*, and there being no cross action, it follows that the first and possibly the only material question in the cause is whether

(a). The case referred to was *The Amelia*; *The Aime*, ante, p. 96.—Ed.

the *Mermaid* has established a case of negligence, contributing to this collision, against the *Kjøbenhavn*, because if she has failed to do so, it is immaterial whether the collision was due to inevitable accident or to the fault of the *Mermaid*. On the other hand, if she has established such a case of negligence against the *Kjøbenhavn* then the question arises whether there was not also contributory negligence on the part of the *Mermaid*, in which case, both vessels being in fault, the rule of the Court of Admiralty would apply and the damage would be divisible between them.

There is also this peculiarity in the case, that the vessel complaining, the plaintiffs' vessel, was the only vessel in motion, the *Kjøbenhavn* being admitted to be at anchor; and in all such cases it is incumbent on the vessel which has the power of motion and the means of manœuvring to show some sufficient reason why it should have come in contact with a vessel lying at anchor and incapable of motion.

The negligence attributed to the *Kjøbenhavn* is that she was anchored in an improper place, and that she failed to carry a riding light, pursuant to the seventh article of the sailing rules. Those are the facts in respect of which negligence is imputed to her; but even if those facts are established it will be a further question whether that negligence contributed to the accident.

Now, upon the evidence their Lordships think it has been correctly found in the court below that the *Kjøbenhavn* was anchored in a place in which a vessel of that size ought not, in ordinary circumstances, to have anchored. We have upon that point the evidence of the harbour-master, who is very strong in his general conclusion that the place of anchorage was an improper place for a vessel of that size, although he admits in another part of his evidence that small craft did occasionally anchor on that northern shore, and near the place where the *Kjøbenhavn* was anchored. The greater part of his examination was indeed directed to show that the proper place of anchorage for vessels in the Gravesend Reach which have the power of anchoring in the proper place and intend to remain there for any time, is on the southern shore, above the point marked B. on the chart; but that evidence has no bearing upon the present case, since it was impossible for the *Kjøbenhavn* in her disabled state to get so far into the reach. This witness, however, persistently contended that the place where she did anchor in point of fact was *prima facie* an improper place of anchorage, and it is to be remarked that his evidence on that point is in some degree confirmed by that of Mr. Claxton, the pilot of the *Kjøbenhavn*, who, at page 42, line 39, is asked: "It is not a proper place to anchor in if you can help it, is it?" and answers "No." Their Lordships then will assume that the Judge of the Court of Admiralty has correctly found that the Danish steamer was anchored in that which was *prima facie* an improper place.

Again it is admitted that the *Kjøbenhavn* did not carry the proper riding light; but the amended pleading (Art. 3), which is in the nature of a plea in confession and avoidance, states upon that point: "The *Kjøbenhavn* had not been long at anchor, the bright white or masthead light was when she came to anchor carried on the outer jib stay about thirty-six feet above the hull, and remained there till the collision. It exhibited a clear light to all vessels coming up the river.

Just before the *Kjøbenhavn* had come to anchor as aforesaid, she had been in collision without any fault on her part with a brig riding at anchor. In this collision her riding light had been destroyed. At the time she came to anchor as aforesaid, and up to the time of the collision, she had not any proper riding light and could not exhibit one." Now that pleading seems distinctly to put forward as an excuse for not having the proper light, that she had been, without any fault of her own, in collision with the brig, and therefore it became a material question in the case whether her collision with the brig was due to her default, or whether it was, as her pilot put it, the result of inevitable accident.

Their Lordships have considered the evidence upon that point, and they have also had the benefit of consulting their nautical assessors upon it. They are not disposed to differ from the conclusion of the learned Judge of the court below, who says not only that it has not been proved that she was in fault, but that the contrary is established. It seems to them upon the evidence that the *Kjøbenhavn* was coming up necessarily more or less under a port helm, and that she was coming only at half speed. There is also evidence that there was a considerable fog about that place, either fog or smoke proceeding from the cement factories, and that by reason of that the brig and its riding light must have been more or less obscured. Again, it appears clear to them upon the evidence that the brig was anchored in an improper place, in a place in which she should not have anchored without excuse. The fog seems to have been her excuse for dropping her anchor there, but still she was in a place in which a steamer coming up the river would not reasonably expect to find a vessel at anchor. Taking into consideration these circumstances, the moderate speed at which the vessel was proceeding, that she was proceeding under a port helm, and that owing to the fog she could not see the brig earlier than she did, their Lordships are of opinion that the *Kjøbenhavn* cannot be said to have been in fault in respect of that collision. It was indeed argued by Mr. Clarkson that she ought not to have ported her helm under the circumstances, but as she was going on under a port helm their Lordships think that no fault is reasonably to be attributed to her in respect of that manœuvre. Their conclusion is that the collision between the *Kjøbenhavn* and the brig must be taken for the purposes of this suit to have been the result of inevitable accident.

It then appears that the effect of the collision was such that the *Kjøbenhavn* was compelled to drop her anchor, and that she could not, in the state in which she was, have dropped it in any other place than that where she did anchor. It is clear that she could not by any means have got to the anchorage on the south side of the river. It further appears that the effect of this collision was to knock out one of her side lights, to scatter the paraffine about the deck, to cause considerable damage on the bridge and to bring across the bridge, so as to interfere with her steering power, a considerable portion of the rigging. It is also a material circumstance with reference to the lights that the locker in which the riding light was kept was stove in, and consequently that no proper riding light was forthcoming or capable of being put up. These circumstances appear to their Lordships sufficient to account both for the place

PRIV. CO.]

ATTORNEY-GENERAL V. TERRY.

[CEAN.

of anchorage and for the absence of the ordinary riding light, and to relieve the *Kjobenkarn* from any imputation of negligence upon those two points.

The question however remains, whether she was justified in keeping up her bright mast light and omitting to lower it to that height above the deck, namely, a height not exceeding 20 feet, at which, according to Article 7 of the Regulations for Preventing Collisions, a riding light ought to be carried. Upon that point their Lordships have in the course of the argument felt considerable doubt. It has been said that not having the proper riding light she ought to have taken away the masthead light altogether, and to have put up some globular light, which it is supposed might have been found in the engine room, or the particular globular light which, after the collision which is the subject of this action, was really put up, viz., a lantern ordinarily in use in the forecabin. But considering the state of the vessel, and the short interval of time which elapsed between the two collisions, their Lordships are not satisfied that there was time in which that lantern, supposing it would have answered any effectual purpose, or in any degree have affected the collision, could have been put up. They therefore think that negligence cannot be imputed to the *Kjobenkarn* by reason of her omission to exhibit that forecabin light before the second collision.

It is then said that at least she might have lowered the masthead light? but even if her failure to do this be taken to have been an act of negligence, which their Lordships, considering all the circumstances of the case, are not satisfied it was, the question would remain, whether that negligence can be said to have caused or contributed to the collision?

That question necessarily opens the inquiry into the conduct of the other vessel. Now the *Mermaid* was coming up the river and had gone round the Owens Buoy at a distance of one ship's length from the buoy, at a very high speed, at a speed which has been almost admitted in the reply to have been improper. It cannot be taken upon the evidence to have been less than eight or nine knots through the water, and therefore eleven or twelve miles over the ground. Again the conclusion which their Lordships draw from the evidence is that the look-out kept on board the *Mermaid* was very imperfect. There was nothing in the position of the two vessels to prevent the *Mermaid*, if she had kept a proper look-out, not merely for the buoy, but for the vessels ahead of her, from seeing that bright masthead light at a considerably greater distance than that at which the witnesses agree she first saw it, namely, half a mile. They cannot then acquit the *Mermaid*, coming at this rate of speed upon a vessel with a bright masthead light visible above the fog about her, of culpable negligence in respect to this collision. But the point immediately to be considered is whether the *Kjobenkarn*, by reason of her carrying that bright masthead light, was guilty of negligence contributory to the accident. The case of the *Mermaid* is, that seeing this masthead light at a distance of half a mile and half a point on her starboard side, she came to the conclusion that the vessel that carried that light must be under weigh and coming down the river. She admits that she did not see any side

light. Her master and others on board of her say they supposed that the smoke coming from the factories, or the mist, had obscured those lights; but they admit that they saw no side light. In those circumstances the master chose to assume that the two vessels were meeting end on, and that he was acting in obedience to the sailing rules by porting her helm.

It seems to their Lordships that he was not justified in that conclusion, and that he cannot be said to have been deceived into executing that manœuvre by merely seeing the bright masthead light. The *Mermaid* had this light a little on her starboard bow, and she saw no side lights; and in these circumstances their Lordships are of opinion (and in that opinion they are confirmed by their assessors) that her proper manœuvre, even if those on board of her believed that the other vessel was moving down the river, was to starboard her helm and to go towards the south shore so as to pass in the mid channel outside the *Kjobenkarn*. Not seeing the side lights of the other vessel, she had no reasonable grounds for supposing that that vessel would port her helm so as to cross her course and come into collision with her. Their Lordships are also informed that, according to the ordinary course of navigation, a steamer coming down the river would keep along the north shore until she came to Owens Buoy, and then, but not until then, would stand across the reach.

Therefore it cannot be said that either by reason of a strict adherence to the sailing rules, according to which she would not be justified in coming to the conclusion that the two vessels were meeting end on unless she saw the side lights, or by reason of any general or established course of navigation in that part of the river, the *Mermaid* was right in porting her helm. And since it is clear that had she starboarded she would have gone clear of the *Kjobenkarn*, it follows that the exhibition of the masthead light was not an act of negligence which contributed to the collision.

For these reasons their Lordships are of opinion that the court below was right in holding that the *Mermaid* had failed to establish a case of negligence contributing to the accident against the *Kjobenkarn*, and that if it were necessary to pronounce any opinion on that point, the *Mermaid* was solely to blame for the collision. Their Lordships will therefore humbly advise Her Majesty to affirm the judgment of the court below, and to dismiss this appeal, with costs.

Appeal dismissed and decrees affirmed.

Solicitors for the appellants, Cattara, Jehu, and Cattara.

Proctors for the respondents, Dyke and Stokes.

COURT OF APPEAL IN CHANCERY.

Reported by E. STEWART ROBIN and H. PRAT, Esqrs.,
Barristers-at-Law.

Tuesday, March 3, 1874.

(Before the LORD CHANCELLOR (Cairns) and the LORDS JUSTICES.)

ATTORNEY GENERAL V. TERRY.

Navigable river—Obstruction—Injunction.

Where the owner of a wharf abutting on a navigable river drove pikes into the bed of the river, and

[CHAN.]

ATTORNEY-GENERAL v. TERRY.

[CHAN.]

thus caused an obstruction which diminished by three feet the navigable breadth of the river in the front of the wharf, such navigable breadth having been sixty feet prior to the erection of the obstruction:

Held (affirming the decision of the Master of the Rolls) that this was a substantial interference with the free navigation of the river, and that it ought to be restrained by injunction. (a)

THIS was an appeal from a decision of the Master of the Rolls.

The hearing in the court below is reported ante, p. 174, where the facts of the case are fully stated.

The Master of the Rolls having granted an injunction, the defendant appealed.

Fischer, Q.C. and G. Beaumont, in support of the appeal, contended that no case of obstruction or public nuisance had been established against the defendant; no evidence was produced of any vessel having been impeded or injured by reason of the alleged obstruction. Indeed the works erected by the defendant would be a benefit rather than a hindrance to the navigation of the river. At all events, on the principle of the maxim "*De minimis non curat Lex*," the obstruction, if any, was so infinitesimally slight that the court ought not to interfere by injunction. They cited

Hale de Portibus Maris, Hargreave's Law Tracts p. 85;

Attorney-General v. The Mayor and Corporation of Kingston-on-Thames, 12 L. T. Rep. N. S. 605; 11 Jur. N. S. 506;

Taylor on Evidence, p. 24;

Angel on Carriage by Water, p. 200;

Rees v. Russell, 6 B. & C. 560;

Rees v. Ward, 4 B. & E. 384;

Reg. v. Randall, Car & M. 406;

Attorney-General v. The Sheffield Gas Consumers' Company, 3 De G. M. & G. 504;

Rickett v. Morris, 14 L. T. Rep. N. S. 835; 1 L. Rep.

1 So. App. 47-60;

Attorney-General v. The Earl of Lonsdale, 20 L. T.

Rep. N. S. 64; 1 L. Rep. 7 Eq. 377;

The Sandwich Haven Improvement and Regulation Act, 1847, ss. 12, 37.

Without calling upon

Roxburgh, Q.C., and E. P. C. Hanson, who appeared in support of the order of the Master of the Rolls,

The LORD CHANCELLOR (Cairns).—In disposing of this case I refer merely to facts as to which there is no controversy, and make no reference to facts that are in dispute between the parties.

The river Stour is a navigable river, which seems to be considerably used, especially by ships trading in connection with the town of Sandwich. Its navigation was placed in a special manner under the guardianship of the corporation of Sandwich by an Act of Parliament passed in 1847, by the 12th section of which Act the Mayor and Corporation of that town are themselves prohibited from constructing any work in the river without the consent of the Admiralty, and by the 37th section the water bailiff, an officer of the corporation, is authorised to remove any obstruction. I refer to that Act for the purpose of pointing out that it was considered of great public importance to preserve the navigation of the river Stour unimpeded, and that a special duty devolved upon the rotators to keep the river free from obstruction.

The defendant has a private wharf and a ware-

house, in front of which there is a way for horses and foot passengers, over which the public had a free right of passage, and high up over this way there is a projecting hatch or loft, which forms part of the defendant's warehouse, from which the defendant pulls up and lets down goods. Before the commencement of the works complained of, there had been a row of old piles in front of the wharf, which had been placed there some sixteen years ago, perhaps for the purpose, on the one hand, of preventing injury to ships from their scraping against the river bank, and, on the other hand, of protecting the river from injury which would be occasioned by ships rubbing against and bringing down the banks. These old piles rotted away, and there was no distinct evidence before the court who had placed them there; but it is sufficient to say that if they had occasioned any obstruction to the navigation of the river, no right was thereby acquired by the owners of the ground opposite to them to continue the obstruction.

The defendant, finding that his warehouse was sinking, and that he could not place anything in the nature of a support upon the public way between the river and his warehouse, had driven piles deep into the soil of the river, and erected a platform, resting on a tripod, floored over at the top and boarded on the front parallel to the bank. This projects three feet into the river, and the practical effect of it is that the defendant has provided himself with a wharf three feet in width outside his old wharf. He uses this structure in the first place for the purpose of supporting his warehouse by fixing poles from it to the foundations of the warehouse; and he further proposes to send a shoot from the hatch up above to the floor of the platform erected on the piles, and to use this shoot for the purpose of loading and unloading vessels ranged alongside the platform.

At this part of its course, the breadth of the river Stour, for navigable purposes, is about sixty feet at high water—there is sixty feet of navigable space for ships drawing from eight to eleven feet of water, the ordinary class of ships employed on the river. I think that the evidence clearly establishes that prior to the erection of this structure a ship drawing not more than eight and a half feet of water could at high water have ranged close up to the defendant's wharf and have remained close to that wharf, and that ships drawing more than eight and a half feet of water would probably have grounded. Now, all ships that could have got close up to the old wharf are compelled to range up against the new structure, three feet further out.

The undoubted effect of this is, whether we take the case of ships lying against this new projection, or of ships not lying there at all, that the defendant has lessened the navigable breadth of the river by about three feet; in other words, he has taken and abstracted three feet out of sixty. It has been strongly urged that there is no real obstruction, and that this court ought not to interfere, but I feel bound to say that this is exactly one of those cases in which it is proper that such an act should be challenged at the very outset by the persons appointed to act as conservators of the river. In my opinion, if three feet be taken unchallenged at one time, it is very likely that six feet would be taken at another time, and although I cannot say that there might not be an obstruction of such a very trifling nature that this court

(a) See note (a), ante p. 174.

V.C. B.]

GREAT WESTERN INSURANCE COMPANY v. CUNLIFFE.

[V.C. B.]

would not interfere, I am prepared to hold without any qualification that this obstruction of three feet from the navigable breadth of the river is a tangible and substantial interference with the free navigation of the river, which ought at once to be challenged by the corporation in performance of the duty, with which they had been entrusted, of preserving unimpaired the navigation of the river, and ought to be restrained by an injunction of this court.

The question of the towing path is out of the case; it crept into the decree *per incuriam*. I regret that application was not made to the Master of the Rolls as to that mistake, but that ought not to make any difference in the order to be now made. The appeal must therefore be dismissed with costs.

Lord Justice MELLISH was of the same opinion. This was an indictable nuisance upon which a jury, properly directed by a judge, would give a verdict. The piles were erected in the stream of a navigable river where every foot was required for the purposes of navigation. There might, indeed, be places by the banks of the river where the water was so shallow that it was practically of no use for navigation, and as to such places that which would otherwise be a nuisance might not be such as to make it the duty of this court to interfere to prevent it, but in places which were actually useful for navigation there was no difference between the obstruction of them and of a highway. It was no answer to the bill to say that there was room enough left for navigation, and that if ships were navigated with skill and care they would not suffer from the obstruction. The public had a right to navigate over the whole space of the river. Neither was it any answer to say that the obstruction only occurred at certain states of the tide, that it made no difference to ships drawing eleven feet of water, and that in some respects the works complained of would be advantageous. The advantage of one person could not be set off against the disadvantage of another. If this was, in the ordinary course of navigation, an obstruction, it was in point of law an indictable nuisance, and that being so it was the duty of the Court of Chancery to restrain it by injunction.

Lord Justice JAMES was of the same opinion. He only desired to add that where a public body was entrusted with the duty of being conservators of a river, it was their duty to take proceedings to prevent any obstruction to the navigation of the river. This was eminently a case for their interference.

Appeal accordingly dismissed with costs.

Solicitors for the appellants, *Lovless, Nelson, Jones, and Thomas.*

Solicitors for the respondents, *Prior, Bigg, Church and Adams.*

V.C. BACON'S COURT.

Reported by the Hon. ROBERT BUTLER and F. GOULD,
Esq., Barristers-at-Law.

Feb. 13, 17, and 18, 1874.

GREAT WESTERN INSURANCE COMPANY v. CUNLIFFE.

Marine insurance—Principal and agent—Negligence—Broker's allowance—Jurisdiction.

A marine insurance company, carrying on business in New York, employed C. as their agent in this country, for the purpose of taking risks, and ad-

justing and paying losses, for which he was to receive a commission of 5 per cent. upon the premiums made in each year. The company also effected insurances in this country through C.

On the 8th Dec. 1863, C. received instructions from the company to reinsure fifteen ships upon which their lines were full. C. endeavoured to effect the insurance, but in consequence of news of a disastrous gale he was unable to do so except at exorbitant rates; he therefore wrote the same day to the company, informing them thereof, and stating that he left it to the company, if they deemed it necessary, to insure on their side where it could be done at a profit, instead of here, where it would have to be done at a loss. After sending this letter, C. made no further attempt to insure these ships. Before the company received this letter, one of the ships which C. was directed to reinsure was wrecked and thereby a loss was incurred by the company:

Held, that C. had not discharged the duty cast upon him as the company's agent to reinsure, by writing the above letter, and that he was liable for the loss which had been sustained in consequence of his neglect to insure as directed, and was not entitled to set-off against such loss the amount of the premiums which, by not insuring as directed, he had saved to the company.

Under the "credit" system of conducting marine insurance business, which was the system adopted by C., it is customary for the underwriter to allow a discount of 12 per cent. to the broker upon the balance, if any, owing to the underwriters upon the settlement of accounts with the broker at the end of the year:

Held, that C. was not entitled to retain the discount for his own benefit, but must account for the same to the company.(a)

The plaintiffs, who were a marine insurance company, carrying on business in New York, in 1858 constituted the defendants, Messrs. John Pickering and Son, their agents, the nature of the agency being expressed in certain letters, which, so far as they were material, were as follows:

The first of these letters, dated the 15th June 1858, was from Mr. Lathers, the president of the plaintiff company, to the defendants, in which he stated:

This company, for the purpose of extending its usefulness, proposes to make some of its policies on cargoes of cotton, and other produce destined for Europe, payable in London or Liverpool in case of loss or claim, and in such cases will issue printed certificates on such risks, adjustable and payable there by an agent, to be selected for that purpose. The reputation of your house induces me to tender the appointment to your good selves, and the object of this letter is to ascertain if such an appointment would be agreeable to you, and what compensation you would expect for such service. I send you also a copy of the company's charter containing the last fiscal statement.

In reply to that letter, the defendants wrote, on the 29th June 1858:

We shall have much pleasure in undertaking your agency for settling and paying claims, on the usual terms, say 2½ per cent. on the amount paid.

On the 26th July 1858, Mr. Lathers wrote:

Sir,—I am favoured with yours of the 26th ult., accepting the agency of this company, for the purpose of adjusting and paying losses, the compensation to be 2½ per cent. on the amount actually paid. . . . Perhaps it would be well for you to employ an intelligent clerk, at a moderate salary, and set apart a special desk for his use, at the expense of the company, as, with your permission, we shall

(a) This decision has since been reversed on appeal.—*Ed*

Not 298

V.C. B.]

GREAT WESTERN INSURANCE COMPANY v. CUNLIFFE.

[V.C. B.]

frequently have reinsurance and other business negotiations to make through you. Our Southern cotton business is very large and increasing, and often requires heavy reinsurance on cargoes by British vessels, which we cannot always get covered here. We are compelled to take these large amounts, as they come under our numerous open policies. Indeed, we often have excessive lines from East India and other distant parts, falling under open policies, which cover bankers' credits. Is it practicable to get them reinsured with your underwriters? Could I rely upon being able to place from 50 to 100,000 dols. through you at any time, current rates?

In answer to that letter the defendants wrote, on the 10th Aug. 1858:

We are in receipt of your favour of the 26th ult., appointing us agents in this country for the Great Western Insurance Company. With regard to reinsurance, we do not anticipate any great difficulty in effecting at Lloyd's any may have at the current rates, and on the conditions usual at that establishment, provided that there is nothing very unusual or extraordinary in the risk, and that you give us instructions to reinsure as early as practicable.

The agency so constituted continued until the 26th June 1863, when an agreement of that date was entered into between the plaintiffs and defendants, which, after reciting that the plaintiff company were desirous of appointing agents in this country to take risks on their behalf, and to issue policies to the parties in respect of the risks so taken, and that the defendants had agreed to accept such agency, it was witnessed that the defendants should become and be the exclusive agents of the plaintiffs in London, "for the purpose of taking risks upon ships or freights, or upon goods," &c.; and the defendants were also to act "as such agents, for the purpose of investigating, and settling, and adjusting and paying all claims that might arise upon such policies, and of resisting claims which ought not to be paid."

The defendants were to keep proper accounts "of all moneys received for premiums of insurance, and of all moneys paid and disbursed by them in respect of the settlement of any claims upon policies issued by them," and interest was to be allowed upon the balances from time to time in their hands. In the absence of written instructions to the contrary, the amount to be taken upon any one ship was to be left to the discretion of the defendants.

The defendants were to receive as remuneration "for conducting the business, as such agents," a commission of 5 per cent. upon the premiums made in each year, to be calculated upon the premiums, after deducting therefrom the discount to be allowed to the assured, and the usual brokerage of 5 per cent. allowed to the broker; but in the event of any premium being lost, the commission upon such premium was to be calculated upon the net amount, after deducting the brokerage and discount that would have been allowed had such premiums been duly paid at maturity. These commissions were to include all charges for settling, adjusting, and paying losses, averages, or returns on policies issued in London or Liverpool.

On the 24th Nov. 1865, the plaintiffs wrote to the defendants a letter which, so far as was material, was as follows: "Annexed, please find a list of vessels from Gulf ports upon which we are already full, and should you have taken any risks upon any of them you will please reinsure." The defendants received this letter on the 8th Dec., at which time they had taken risks upon fifteen of the vessels named in this list, amongst them being the *Roger A. Heirn*, upon which they had taken a

risk of 3500*l.* The defendants sent one of their clerks, a Mr. Bullen, to Lloyd's for the purpose of effecting the reinsurances, but in consequence of advices of a most disastrous havoc among shipping, caused by a tremendous gale on the American coast, which advices produced a sort of panic, it was, as the defendants alleged, impossible to insure, except at most exorbitant rates. The defendants accordingly wrote the same day to the plaintiffs (being the day on which the American mail left London), stating:

In consequence of the recent numerous and heavy losses on cotton in the Gulf, there is almost a panic amongst many of the underwriters on this side, and therefore we could not reinsure as you wish, except at extraordinary (and what we consider excessive) rates, if then, especially as some of the vessels sailed about the time of the hurricane in October, and are about due. We therefore think it better to inclose you herein a list of the vessels not arrived by which we have taken lines, and leave you, if you deem it necessary, to effect reinsurance on your side. If we remember rightly you stated, when here, that these risks were freely taken in New York at 1½ per cent., which will enable you to reinsure at a considerable profit, whereas we should have to do so at a loss.

This letter was received by the plaintiffs on the 21st Dec. In the meantime, on the 19th Dec., the *Roger A. Heirn* stranded at Mobile, whereby the risk taken by the defendants on behalf of the plaintiffs was converted into a loss of 3500*l.*

The plaintiffs contended that the order to reinsure, contained in their letter of the 24th Nov., was peremptory, and ought to have been effected at any rate of insurance which would have been obtained for the time being, and they denied that there was any such panic as described in the defendants' letter, and they now sought to make the defendants liable for the loss they had sustained in consequence of the defendants having omitted to reinsure the *Roger A. Heirn*, in pursuance of their instructions.

Another question raised in the suit was, whether the defendants were entitled to retain for their own benefit, in addition to the regular 5 per cent. brokerage on premiums, a discount or allowance of 12 per cent., allowed by the underwriters to brokers upon the sum paid to the underwriters as the balance owing to them upon the settlement of accounts at the commencement of each year.

It appeared that it was the custom for underwriters, when the insurance business was conducted on the "credit" system, which was the system adopted by the defendants, to make this allowance to the brokers as an inducement to them to bring a profitable class of business. The plaintiffs contended that the defendants were their agents for the purpose of reinsuring, and that, as such, they could not accept a gratuity, but must account to the plaintiffs for the amount of discount they had received.

For the defence, it was submitted that the matters in dispute were properly subjects for proceedings at law. That the defendants were justified, in the exercise of their discretion, in refraining from effecting any reinsurance at the ruinous rates at which alone, if at all, such reinsurances could have been effected, especially as the plaintiffs had previously informed them that they could reinsure these risks very cheaply on their own side, but that if they were liable for the loss upon the *Roger A. Heirn*, they ought to be allowed to set off against such loss the amount of the premiums

V.C. B.]

GREAT WESTERN INSURANCE COMPANY V. CUNLIFFE.

[V.C. B.]

which, by not reinsuring as directed, they had saved to the plaintiffs.

As to the discount, they denied that they were the plaintiffs' agents for the purpose of reinsuring, and alleged that they simply executed the plaintiffs' orders for reinsurance upon the same terms as they did those of other persons who employed them as brokers, and that, therefore, they were entitled to the customary brokers' allowances for their own benefit.

Kay, Q.C., Benjamin, Q.C. (of the Common Law Bar), and *Marten, Q.C.*, for the plaintiffs.—As to the jurisdiction of the court, we refer to

Makepeace v. Rogers, 12 L. T. Rep. N. S. 12; on app. 221; 4 De G. J. & S. 640;

Southampton Dock Company v. Southampton Pier and Harbour Board, 23 L. T. Rep. N. S. 696; L. Rep. 11 Eq. 254; 26 L. T. Rep. N. S. 828; L. Rep. 14 Eq. 505.

The defendants were our agents for the purpose of effecting insurances. They were in a fiduciary position, and could not accept a gratuity. They must, therefore, account to us for the discount which they have received:

Turnbull v. Gordon, 20 L. T. Rep. N. S. 218; 28 L. J., N. S., 831, Ch. 1

Queen of Spain v. Farr, 21 L. T. Rep. N. S. 555; 39 L. J., N. S., 72, Ch.

Ritchie v. Cooper, 25 Beav. 344.

As to the defendants' liability for not reinsuring, they were our agents for hire and reward; there was an express contract, and the duty cast upon them by the contract was an absolute duty to effect an insurance, and not merely a *mandatum*: (*Turpin v. Bilton*, 5 Mau. & Gr. 455, 470.) Even an insurance broker is liable, *à fortiori* an agent would be. This is a case of breach of trust, and, therefore, the trustee cannot set-off against the loss the amount that has been saved by his disobedience and breach of trust.

John Pearson, Q.C. and Millar, for the defendants.—There is nothing to justify the allegation in the bill that the accounts are complicated or in dispute; the only questions in dispute are questions which could be more properly tried by a jury in an action at law: (*Mason v. Bright* 20 L. T. Rep. N. S. 961; L. Rep. 4 Ch. 292.) As regards re-insuring, we acted as brokers, and not as agents; there is nothing in the agreement about re-insurance. We were agents for adjusting and paying losses in London, and for taking risks only, and you cannot import anything into the agreement which is not there already. The transactions between the broker and underwriter are distinct and separate from the transactions between the broker and the assured. This is not a question of principal and agent, or of trustee and *cestui que trust*, but two transactions separate and distinct. The practice as to these transactions is very clearly stated by Blackburn, J., in *Xenos v. Wickham* (14 C. B., N. S., 460). The discount allowed is a discount upon the balance of accounts between the underwriter and the broker in respect of all his clients, and not a discount upon any particular premium. With respect to the alleged negligence, an agent must use the same discretion and diligence for his principals as he would for himself. If he finds himself unable to insure as desired, he must communicate at once with his principals (*Callendar v. Oelrichs*, 5 Bing. New Cas. 58), which is the very thing we did, and having written, we could not afterwards reinsure in London; if we did, and the ships came in safe,

the plaintiffs would have been justified in refusing to pay the premiums. The agreement states that we are to exercise our discretion, and there was nothing in the plaintiffs' letter directing us to reinsure which took that discretion away and rendered it imperative upon us to insure at any price. If, however, the court is of opinion that we are liable for the loss occasioned by our not insuring as directed, then in estimating the damages, the amount saved by the same act of negligence must be taken into consideration.

The VICE-CHANCELLOR said:—The bill in this suit is filed by the Great Western Insurance Company against Messrs. Cunliffe, praying that an account may be taken between them, and praying relief upon certain matters specifically mentioned in the bill. The defendants admit the existence of a kind of agency, but say that the particular agency alleged by the bill in respect of which one portion of the relief is sought, and the matters which might have been the subject of account between them and the plaintiffs might and ought to have been the subject of an action at law, and that a court of equity is not the proper forum for deciding such disputes. It becomes, therefore, absolutely necessary to consider the nature of such agency as was constituted.

Now the plaintiffs are an insurance company carrying on business in marine insurance at New York. A portion of that business was and is transacted in this country, and for the purpose of that business it was and is indispensably necessary that the plaintiffs should have agents in this country, persons to carry out their business, which consisted of making such payments as the plaintiffs might have to make upon policies of insurance granted by them payable in England, and for issuing policies in England, and for effecting reinsurances on risks which they had undertaken. And that that is the object with which the agency was constituted seems clear, not only from the nature of the case, but from the evidence which has been adduced, and the admissions and statements on both sides. The agency undertaken by the defendants is expressed in certain letters which were referred to in the course of the proceedings. [The Vice-Chancellor having read the portions of the four first letters set out *ante*, continued:] Now, upon the basis of those letters the agency is constituted, and it seems to me impossible not to say, after reading those letters and having regard to the subsequent transactions between the parties, that an agency, in the full sense of the term—an agency for conducting in this country that business in which the plaintiffs were engaged, but which they could not conduct—was constituted and was undertaken by the defendants.

It seems to me impossible, in the face of the evidence, as well as from the transactions between the parties as they are stated and admitted, to doubt that the defendants did undertake from the beginning the business of reinsurance, as well as whatever other business might be committed to them by their correspondents in New York, and that it is a mistake to call them brokers. It has been convenient for the defendants in their argument to refer to cases and to conduct the argument as if the defendants were insurance brokers. They are not, that I know of, properly called by that name in any instance. They are not brokers; they are described in the

V.C.B.]

GREAT WESTERN INSURANCE COMPANY v. CUNLIFFE.

[V.C.B.]

bill as being merchants; they are addressed as merchants; they admit in their answer that they are merchants, and in the character of merchants, acting as agents for persons in a foreign country, but in their name and on their behalf, they effect insurances at Lloyd's, not *qua* brokers; they are not, as Mr. Millar read to me from the case which he cited last, agents both for the underwriters and the persons insuring; it is a mistake altogether, a fallacy, which I think has pervaded the greater part of the argument I have listened to on behalf of the defendants—to treat these defendants as ever having been in any sense insurance brokers. If the company at New York had been resident in this country, and had desired to reinsure, they would have gone to Lloyd's and have effected the reinsurances—they would want no broker. Brokers may be usefully employed in a variety of transactions relating to insurances and reinsurances; but a shipping broker or an insurance broker has no place in the case I am considering here. It is, in short, an agency in its full terms; it is doing by a hand here that which the company in America was not able to do for itself; it is done for the company, and in a sense by the company.

Now the bill states that, besides the agreement or engagement, whatever it may be called, constituted by the letters and by the course of dealing, there was another agreement entered into between the parties, and that is stated in the bill, and described by the bill as being an extension of the business; and it is admitted in terms by the answer to have been entered into for the purpose of extending the sphere of operations; but it is impossible to read that and to suppose that it was intended to qualify or diminish the authority which had been given in the first instance—extend it, no doubt it does, and prescribes other terms, but it does not in the slightest degree diminish, detract from, or qualify the nature of the agreement or the duties which each party owed the other having entered into that arrangement. That is the agreement of 1863. These are the only documents which it seems necessary to refer to, because upon them the agency was constituted. That agency continued under those agreements until sometime in April 1868, when the agency was resigned.

Before that time came, questions had arisen between the plaintiffs and the defendants, and the principal question which then and now subsists between them, I mean in point of amount, though not the chief in point of principle, was occasioned by the stranding of one of several ships which the plaintiffs had instructed the defendants, as agents, to reinsure for them. By a letter, dated the 24th Nov. 1865, the plaintiffs instructed the defendants, as their agents, to reinsure certain ships. That letter is in very clear and explicit terms, and is beyond the possibility of misconstruction, regard being had to the nature of the business which the plaintiffs had conducted through their agents up to that time. [The Vice-Chancellor read the letter as set out, *ante*, and continued:] Accompanying that letter is a long list of vessels, among which is the *Roger A. Heirn*. That letter was received in London about mid-day on the 8th Dec.; between one and two o'clock on the same day the defendants instructed their clerk, Mr. Bullen, to go to Lloyd's and effect the insurances, according to the instructions they had received from their principals. Mr. Bullen, it appears, discharged that duty by

going and offering a list of the vessels, and having devoted about two hours of that day in endeavouring to effect the reinsurances, and having failed to effect them, nothing more whatever was done to fulfil the instructions. Then by the post of that day the defendants wrote to their principals in America, apprising them that the insurance had not been effected.

I admit, as indeed the cases which were cited yesterday decide, that an agent, if he declines to exercise his power to execute the orders of his principals, may properly refuse to do so, but that cannot be without qualification; he may do so provided he does not break the contract between them, so that he does not frustrate the expectation of his principals. If he were living in the next street he might go and knock at his door and say, "I will have nothing to do with your reinsurance;" but if he is dealing with a principal, at the distance of about twelve or fourteen days' post, it is not sufficient. Surely it would be utterly opposed to all common sense and justice to say that he could write on the 8th Dec. in London a letter, which by no possibility can come into the hands of his principals in less than twelve days, saying, "I refuse to execute your order, and suggest to you, as you once said you could insure in New York for 30s., that you had better do so." I do not say that, consistently with the cases which were referred to, an agent is not at liberty to decline to perform the direction of his principal, but I say that, having constituted himself an agent for such a purpose as this, the duty of reinsuring was, in the first instance, cast upon him, and that he could not get rid of that obligation unless he put his principal in the same position as that in which he was when that commission was given to him; and if he does it under circumstances which make it impossible for the principal to reinsure, then I say he fails in his duty as agent.

[The Vice-Chancellor here read the letter of the 8th Dec. 1865, set out *ante*, and continued:] That letter being dispatched on the 8th Dec., on the 19th Dec. the *Roger A. Heirn*—a ship at Mobile when the directions were given—stranded in or near the port of Mobile, and thereby a loss was incurred of \$5000.

Now, one of the questions in the case is, whether there was such neglect on the part of the defendants as justified the plaintiffs in seeking to be reimbursed for the consequence of that neglect. It may be, if that was the only transaction between the parties, the only subject of difference between them, a bill in equity would not lie for the purpose, but in the relations which existed between this principal and this agent, I cannot take out of the transactions between them any particular topic or any particular article, and say, because that is in its nature separate, that therefore it cannot be included in the prayer for relief which is sought by this bill. If I could, the same might be said of every particular item in every account; you might take out a particular thing and say, "that is no part of the account, that is the purchase of goods, not advances of cash," and so on, and a variety of such like excuses might be made. If it is, as I think it is, a part of the duty of the agent to reinsure the ship, upon that letter which he received; and if the reinsurance formed any part of the general agency, it must be covered by the general agency accounts, and is to be taken into consideration when those accounts are settled.

[V.C.B.]

GREAT WESTERN INSURANCE COMPANY v. CUNLIFF.

[V.C.B.]

The cases which were referred to do not in the slightest degree touch this principle. The case of *Terpin v. Bilton* (*ubi sup.*) was a case in which a man had employed a broker, not an agent in any other sense, to effect an insurance for him, and he had done it in such a clumsy way, so negligently, as that the assured could not bring an action against the insurance company, therefore he brought his action against the broker for his neglect to put him in the position which he ought to have been put in, and he succeeded in that action. The decision in the case was plain and distinct, and founded upon principles which no one can question for a moment. The other case which was referred to I have already mentioned, that which does justify an agent, upon certain conditions, in refusing to execute the commission of his principals. That does not apply to this case.

The reasons suggested for not re-insuring are, a storm which happened in the Gulf of Mexico, which it is said prevented the possibility, after the receipt of the American mail upon that day, of any reinsurance being effected, "except at most exorbitant rates of premium." The agents in this country had nothing to do with exorbitant rates of premium; they were ordered to reinsure, and from the evidence, showing the manner in which the defendants had previously conducted reinsurance business, it is clear that they considered themselves bound to reinsure. I have not heard a suggestion why, on the 9th or 10th Dec., or some subsequent time, efforts were not made to reinsure these vessels, and the evidence satisfies me that if the duty undertaken by the agents had been properly discharged no such loss as that of which the plaintiff complains, could by possibility have happened.

Well then, the agency being constituted, the instructions being complete, the duty is cast upon the defendants to show why they did not comply with them. In my opinion they have totally failed to do so, and they have failed by suggesting excuses which are not true in fact, as I must say, upon the evidence. They have failed to do so, by writing a letter, which could be of no use for the purpose of the business in which the principals and agents were concerned, until after the loss had taken place. I think, therefore, upon the principles not only of the cases that have been referred to and other cases, but upon the commonest principles of justice and honesty, the defendants have occasioned this loss by neglecting their duty as agents, and that they are liable to make it good. From the time when the agency began, the plaintiffs had their agents, bound to conduct their business prudently, properly, and above all faithfully, and they find out that there are certain things in the accounts which they are entitled to complain of, and they file the bill for an account, and I do not know any reason why they should not. I have heard no reason. It is said, because it has been decided in the case of a particular agent in a particular instance, the demand against whom might be settled at law, that that course should be taken, that therefore there could not be any approach to this court in any case where the agent is a defendant, where the principal has a right to have an account from him. The law is well settled as to that: it is that a principal has a right to have an account from his agent. Of course he takes it at his own risk. All that can be expected, or that can reasonably be required from him, is that he should state a case to satisfy the court that there is some

reason to dispute the accounts that have been rendered.

Now as to the question of allowance, that goes upon very delicate ground, because nothing is better settled in this court than that if a man is an agent—that is, in other words, a trustee—an agent in a fiduciary character, it is incompetent for him to receive a gratuity of any sort or kind. That cannot be disputed as a general principle. The question is, whether that applies to this particular case. Now what is this case? I have said this is simply the case of a man who cannot be bodily present in this country, but who employs another to go in his name and person, and enter into certain commercial engagements for him. Can anything be more strictly within the description of a fiduciary employment than that? He stipulates for his hire, he agrees to the commission he shall pay him, and then says, "Now go in my name, in my person, on my account, for my interest—not for your own; go and do this thing for me," and the agent goes; and in discharge of that duty he stipulates for or receives a benefit for himself not included in the contract between himself and his principal. Is there an instance to be referred to where that has been endured in a court of equity? There are plenty of instances to the contrary. If Mr. Lathers had been here in his own person, as president of the society, he would have gone to Lloyd's and would have effected the insurance for himself. He did not want a broker. There would be no account between them, because if it suited this gentleman in the course of his business to have dealings on another footing, well and good; he was perfectly competent to do that, but he was not competent to take an allowance which but for his stipulation, if it was made at all, would have been made for his principal. If it was his intention to do so, then the observation of Lord Justice James in the case referred to yesterday, applies directly. "If you thought that was right, why did you not say so, and why did you not state that you were taking the allowance?"

Then it is said because this was discovered in 1866, and the bill has not been filed until 1869, there has been acquiescence. One can understand that there was not any great disposition to quarrel or make any great fuss between persons who had been so long connected together in important transactions of this kind. I cannot think that the lapse of time furnishes the least reason why the plaintiffs should not, when they desired it, have the accounts overhauled and put upon the right basis, and made consistent, not only with the principles of this court, but with the principles of fair dealing between parties. I cannot think that the lapse of time which occurred should preclude them from the right which they insist upon; and, therefore, I think that the plaintiffs are entitled to a declaration that this loss happened in the course of transactions which cannot be severed from the ordinary agency subsisting between the parties; and that they are entitled to the relief asked in that respect, and it must be ascertained what the damage is which they have sustained. I should have been very much pleased if a jury had had to consider this, rather than I should, but the law requires me to consider it, and it is a position from which I cannot retire.

The accounts must be taken as prayed by the bill, and in taking those accounts, the defendants

[Ex.]

BLANCHET v. POWELL'S LEANTWIT COLLIERIES COMPANY (LIMITED).

[Ex.]

must be charged with the loss upon the risk taken by them on account of the plaintiffs on the ship *Roger A. Heim*, and must also be charged with the discount or allowances, and all other benefits obtained by them from the underwriters, over and above the customary commission of 5 per cent; and the defendants must pay the costs up to the hearing.

Solicitors for the plaintiffs, *Thomas and Holmes*.

Solicitors for the defendants, *Walton, Bubb, and Walton*.

COURT OF EXCHEQUER.

Reported by T. W. SAKNESS and H. LEIGH, Esqrs.,
Barristers at Law.

Friday, Feb. 13, 1874.

BLANCHET v. POWELL'S LEANTWIT COLLIERIES
COMPANY (LIMITED).

Bill of lading—Delivery of less quantity than that stated in bill—Whether lump freight payable without deduction—French law—18 & 19 Vict. c. 111, s. 3.

The whole freight named in the bill of lading is payable to the shipowner carrying under it, although a less quantity of goods than the quantity named in the bill of lading be delivered, if the quantity delivered be no less than the quantity received by the shipowner.

By French law the whole freight is payable whether the whole quantity named in the bill of lading be carried or not, and therefore, in the case of a bill of lading executed in France, it is immaterial whether or not the shipowner received the whole quantity named in the bill of lading.

By 18 & 19 Vict. c. 111, s. 3, "every bill of lading is conclusive evidence of the shipment as against the person signing it."

Seemable that by this statute the bill of lading is not conclusive evidence as to the accuracy of measurements, and does not estop the person signing from disputing those measurements.

DEMURRER to a plea, and to a replication.

The declaration stated that one M. A. Parangue in parts beyond the seas at L'Orient in the Republic of France, delivered to the plaintiff certain goods, that is to say a cargo of pitwood to be by the plaintiff carried and conveyed in a certain ship of the plaintiff's, from L'Orient to Cardiff, under a certain bill of lading, dated the 2nd Jan., a.d. 1873, signed for the same by the plaintiff, and there delivered (accidents and dangers of the sea excepted), to the holder of the said bill of lading, or his order, he or his said assignee paying the plaintiff for freight the sum of 3441s. sterling, and 4l. gratuity to the plaintiff, amounting together to 1764. 1s. and after the said 2nd of Jan. 1873, the said M. A. Parangue indorsed the said bill of lading to the defendants, in order to pass the property in such goods to the defendants, and thereupon, and by reason of such endorsement, the property in the said goods passed to the defendants, and all conditions were fulfilled, and all things were done, and happened, and all times elapsed necessary to entitle the plaintiff to have the said freight and gratuity paid according to the said bill of lading, and to sue the defendants for the non-payment thereof. Yet the defendants have made default in paying the said freight and gratuity.

Pleas—(1.) Except as to so much of the above count as related to the carrying and delivery by the plaintiff to the defendants of 217 tons of pitwood being a portion of the cargo in the said count mentioned, that the bill of lading was in the words and figures following: [The plea then set out the bill in French], which is properly rendered in the English tongue by the words and figures following:

I, Blanchet, master of the ship named *Christopher Columbus*, of Granville, being at present at the port of L'Orient in order at the first opportunity to go in the direct road to Cardiff, acknowledge to have received and stored on board my ship under the free deck thereof, of you, Madame A. Parangue, 256,782 kilogrammes at 1015 —253,783 kos., payable the whole safe and in good condition, marked and numbered as in the margin, which I bind myself to carry and convey in my said ship, perils and wrecks of the sea excepted, to the said place of Cardiff, and to deliver to the bearer, or his order on his paying me for my freight, the sum of 3441 shillings sterling, plus 4l. gratuity to the captain, according to the uses and customs of the sea, and to hold and accomplish this, I bind myself body and goods with my said ship, freight, and tackle thereof. In faith of which I have signed three bills of lading of the same tenor, one of which being accomplished, the others of no value.

Signed at L'Orient the 2nd. Jan., 1873.

ppon. M. A. Parangue.
E. Parangue.

A. E. BLANCHET.

Indorsed.

Received of M. A. Parangue the sum of 241. sterling, on account of my freight, including insurance.
L'Orient, 2nd Jan., 1873.

A. E. BLANCHET.

ppon. M. A. Parangue, E. Parangue.

and that the plaintiff did not carry and deliver to the defendants the goods in the said bill of lading mentioned, but a proportion of the same only, to wit, the quantity of 217 tons, and, except the said quantity of 217 tons, the defendants say that the plaintiff did not carry the said goods and deliver the same to the defendants.

(2.) As to the carrying of the 217 tons, payment into court of 217l. 16s. 10d.

Replication—(3.) As to the first plea that the plaintiff did carry and deliver to the defendants the whole of the said goods, which were delivered to him under the said bill of lading, and which were intended to be thereby described, and that the said goods so delivered, and which are in the said bill of lading described as weighing 256,782 kos., a weight exceeding 217 tons, in fact weighed 217 tons only, and no more, and that the said weight mentioned in the said bill of lading was a mere misdescription of the goods to be carried inserted in the said bill of lading, without fraud or default on the part of the plaintiff.

(4.) As to the first plea that the bill of lading was made at L'Orient, in the Republic of France, and that according to the law of France the whole of the said freight was and is payable, notwithstanding that the said part only of the said goods was carried and delivered as in the first plea mentioned.

(5.) Repeating the third replication that the said bill of lading was made at L'Orient, in the Republic of France, and that according to the law of France the whole of the said freight was and is payable.

Demurrer to the first plea on the ground that it does not set out the French law on the subject, and affords no answer even by English law.

Demurrer to the third and fifth replications, on the ground that they do not allege a misrepresent-

[Ex.]

BIDDULPH AND OTHERS V. BINGHAM.

[Ex.]

tation caused wholly by the fraud of the shipper, or of some person under whom the defendants claim; and to the fourth and fifth that the contract set out in the first plea was to be performed in England, and that the French law is inapplicable thereto.

Joiner in demurrer.

R. E. Webster for the plaintiff.—The question here is whether the defendant is entitled to deduct some proportion of the freight in respect of non-delivery, or whether he must resort to a cross-action in order to obtain any deduction to which he may be entitled. It is submitted that the freight cannot be apportioned upon the record; it being clear law that if the ship be not fully laden, the whole of the lump freight is nevertheless recoverable.

The Norway, 2 Mar. Law Cas. O. S. 17, 168, 254; *Brown & Loah*, 226; 12 L. T. Rep. N. S. 57, aff. on app. 3 Moore, P.C., N. S., 245; 13 L. T. Rep. N. S. 50;

Robinson v. Knight, ante, p. 19; 28 L. T. Rep. N. S. 820; 1 Rep. 6 C. P. 465.

Merchant Shipping Co. v. Armitage, ante, pp. 51, 185.

[He was then stopped.]

E. Clarke for the defendants.—The just principle is that an indorsee of a bill of lading is not bound to pay the full amount if the full quantity has not been shipped or carried. The delivery of a complete cargo is not a condition precedent to the payment of the freight, and what is to be looked to is the intention of the parties.

Ritchie v. Atkinson, 10 East, 295;

Gibson v. Sturge, 10 Ex. 662.

"If the shipowner fail to carry the goods to the destined port the freight is not earned," says *Willes, J.*, in *Dakin v. Odey* (2 Mar. Law Cas. O. S. 6; 33 L. J. 119, C. P.; 10 L. T. Rep. N. S. 268), and he adds, "If he carry part, but not the whole, no freight is payable in respect to the part not carried, and freight is payable in respect of the part carried, unless the charter-party make the carriage of the whole a condition precedent to the earning of any freight—a case which has not within our experience arisen in practice." By 18 & 19 Vict. c. 111, s. 3, (a) the bill of lading is made conclusive against the captain of the amount shipped. The decision in *The Norway* (ubi sup.) turned upon these words, "freight for the use and hire" of the vessel, being used in the charter-party. He also cited

Meyer v. Dresser, 2 Mar. Law Cas. O. S. 27; 10 L. T. Rep. N. S. 268; 33 L. J. 289, C. P.

BRAMWELL, B.—I think that the plaintiff is clearly entitled to our judgment in this case. The plea is ambiguous, but the ambiguity is cleared up by the statement in the third replication, that the plaintiff delivered all that was delivered to him. If this was an action for non-delivery, per-

(a) By 18 & 19 Vict. c. 111, s. 3, "Every bill of lading in the hands of a consignee or indorsee for valuable consideration representing goods to have been shipped on board a vessel shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same that the goods had not been in fact laden on board: Provided that the master or other person so signing may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder, or some person under whom the holder claims."

haps the statute 18 & 19 Vict. c. 111, would bind the master in respect of the freight, but I don't think extremely whether the statute was intended to be conclusive in such a case as this. If it were not for the third replication, the plea would be a defence, and if I am to say that whether the third replication be good or not, I say that it is good. However that may be, I think that the fourth replication is clearly good. The original parties were bound by the French law by virtue of the contract having been made in France. The fifth replication is even better still. [The learned judge read the fifth replication.] The plaintiff there shows that he has done that which would entitle him but for the statute to recover, and he then proceeds to show that the statute does not apply. Very clearly, therefore, the fifth replication is good, clearly the fourth, and I think also the third.

PIGOTT, B.—I agree. I will not say anything about the construction of the statute, except that I agree with what my brother Bramwell has said upon that head.

CLEARY, B.—It is not easy to arrive at the meaning of this plea, but it should be read with a view to what it abstains from stating as much as to what it actually states. The effect is, applying the established rule of construction of pleadings, that an ambiguity is to be construed against the person who uses it, that we have an action upon a contract by the defendant to pay the plaintiff a lump sum for freight. The plaintiff has performed his part of the contract, and is therefore entitled to the lump sum. The only way to defeat his claim, is to apply the statute against him, but I am of opinion that the statute cannot be so applied. If the contract had been to deliver ten horses and ten cows, it would have been different. But the statute does not apply to measurements, which vary infinitely from many causes, so that it would be quite unreasonable to maintain that the captain is estopped from saying that a measurement is not accurate. If an exaggeration partaking of the character of fraud could be shown it would be otherwise.

Judgment for the plaintiff.

Attorneys for the plaintiff, *Ingledeu, Ince, and Greening.*

Attorneys for defendants, *Gosling, for Luard and Sherley, Cardiff.*

Friday, Feb. 13, 1874.

BIDDULPH AND OTHERS V. BINGHAM.

Verbal chartering—No bill of lading—Mate's receipt not conclusive evidence against master of quantity shipped.

The plaintiffs having verbally chartered the ship of the defendant to carry iron from Glasgow to Swansea, the ship was loaded with iron bought by the plaintiff from W. and Co. The iron was weighed by the agents of W. and Co., to whom the mate gave a receipt signed by him for 330 tons, but there was no bill of lading. On delivery at Swansea the quantity of iron was discovered to be 326½ tons only, but the mate deposed, and was not contradicted, to the delivery of all that had been shipped. The plaintiffs having paid on the full amount of 330 tons to W. and Co., who refused to repay them the difference, sued the defendant for short delivery.

Held that there was no evidence of negligence in the

EX.]

PURKIS v. FLOWER.

[BAIL.

defendants, and that if there had been, it would not be negligence causing loss to the plaintiffs, and a County Court judgment in favour of the plaintiffs for short delivery reversed.

This was an appeal from the County Court of Glamorganshire, upon the following case stated by the learned judge of that court.

1. The action was for 21l. 7s., on the following particulars:

Short delivery of cargo per <i>Jane Bingham</i> ,	
Scotch pig iron, 3½ tons, at 45s.	£20 2 6
Freight paid on above at 7s.	1 4 6
	£21 7 0

2. The plaintiffs chartered the *Jane Bingham*, of which the defendant is owner, to carry a cargo of iron from Glasgow to Swansea, at a freight of 7s. a ton. No charter-party was signed, and the agreement was a verbal one.

3. The *Jane Bingham* thereupon proceeded to Glasgow, and was loaded with iron purchased by the plaintiffs from Messrs. Watson and Co., of that city, at 11s. a ton, free on board. As the iron was put on board it was weighed by Messrs. Connell and Co., who acted as shipping agents to Messrs. Watson and Co. The mate of the *Jane Bingham* watched the iron put on board, and when the loading of the cargo was completed, gave Messrs. Connell and Co. a receipt, of which the following is a copy:

Jane Bingham. Received of Connell and Co. 330 tons numbers 1 and 3 pig iron, account of James Watson and Company.

GEORGE HOPKINS, mate.

4. The master of the *Jane Bingham* sailed from Glasgow on the evening of the day on which the cargo was loaded without seeing the consignors, and there was no bill of lading.

5. The mate's receipt was forwarded by Messrs. Watson and Co. to the plaintiffs, and on the arrival of the *Jane Bingham* at Swansea it was produced to the master, who obtained payment of freight on the quantity of iron (namely, 330 tons) acknowledged in the receipt to have been shipped. The plaintiffs thereupon remitted to Watson and Co. the price of the quantity so acknowledged to have been shipped.

6. The quantity of iron delivered to and received by the plaintiffs from the *Jane Bingham* was subsequently found to be 3½ tons less than the quantity acknowledged to have been shipped; but it was admitted by the plaintiffs that about 7cwt. of this deficiency was due to an intermixture of sand. It was stated by the mate and uncontroverted that he watched all the iron being put on board, and that he delivered at Swansea all but the dross. On discovering the deficiency of 3½ tons, the plaintiffs applied to Watson and Co. to repay the price of the 3½ tons. This Watson and Co. declined to do, whereupon this action was brought.

7. The learned County Court Judge having decided that the plaintiffs were entitled to recover from the defendants the amount which they had paid to Watson and Co. as the price of 3 tons 3 cwt. of the 3½ tons deficient in quantity (7 cwt. being allowed for sand), as well as the sum which they had paid to the defendant as freight for that quantity,

The question for this court was whether his judgment was correct.

Wood Hill, for the appellants, the defendants below.—The defendant having delivered all the

iron which was in fact shipped, there was no short delivery. The mate's receipt is only *prima facie* evidence of the quantity of iron shipped, and this evidence is rebutted by the uncontroverted evidence of the mate that all that was shipped was delivered. He admitted that the plaintiffs were entitled to judgment for the 1l. 4s. 6d. claimed for overpayment of freight.

Arthur Williams, for the respondents, the plain-
tiffs below.—The position of the parties has been clearly altered by the act of the mate in giving an incorrect receipt. [Pigott, B.—Does not the statement in paragraph 6 of the case amount to a finding against you?] The plaintiffs have acted upon the receipt, and suffered damage from acting upon it.

Bramwell, B.—I am of opinion that this judgment should stand for the 1l. 4s. 6d. on account of freight, and for nothing more. There is no evidence of negligence, and if there were negligence, it would not be negligence causing loss to the plaintiffs. The receipt was probably given in order that the ship might sail away as soon as possible, and when the plaintiffs come forward to complain of its incorrectness, the answer is that they should not have believed it to be true. If the plaintiffs have paid more money than was due by them upon the faith of the receipt, they may recover it, so that no damages are attributable to any act of the defendant.

Pigott and Cleasby, BB. concurred.

Judgment reversed, *quoad* the alleged short delivery, but to stand for 1l. 4s. 6d. No costs.

Attorney for plaintiffs, W. M. Hacon.

Attorneys for defendant: Williamson, Hill, and Co. for Field, Swansea.

BAIL COURT.

Reported by R. A. KINGLAKE, Esq., Barrister-at-Law.

Monday, Nov. 24, 1873.

PURKIS v. FLOWER.

Admiralty jurisdiction of County Court—Collision in the body of a county—Ship injured by barge—Costs.

The *Admiralty Court Acts* (3 & 4 Vict. c. 65, s. 6; 24 Vict. c. 10, s. 7), confer upon the High Court of Admiralty of England over causes of damage arising within the body of a county the jurisdiction which that court originally possesses over such causes arising on the high seas; and the jurisdiction given to the County Courts, having admiralty jurisdiction over causes of damage, by the County Courts Admiralty Jurisdiction Acts 1868 and 1869 (31 & 32 Vict. c. 71, s. 3, sub-sect. 3; 32 & 33 Vict. c. 51, s. 4), is so large (where the amount claimed does not exceed 300l.), as that possessed by the High Court of Admiralty.

By the County Courts Admiralty Jurisdiction Act 1868, sect. 9, if any action is brought without leave of the court in a Superior Court, which might have been brought in a County Court having admiralty jurisdiction, and the plaintiff shall not recover a sum exceeding the amount to which the jurisdiction of the County Court is by the Act limited, he shall not be entitled to costs, and shall be liable to be condemned in costs, unless the judge before whom the case is tried certify for costs.

Damage to a ship by a barge (propelled by oars

[BAIL.]

PURKIS v. FLOWER.

[BAIL.]

only, would be within the jurisdiction of the High Court of Admiralty if it occurred on the high seas, and (by the Admiralty Court Acts) if it occurred on a tidal river within the body of a county; hence the County Courts having admiralty jurisdiction would have jurisdiction over such damage.

The *Sarah* (Lush. 549) followed.

A plaintiff proceeding without leave in a Superior Court for damages to his ship by a barge (propelled by oars only), taking judgment by default, and having his damages assessed by the sheriff at an amount under 300*l.*, is not entitled to his costs. (a)

This was a rule calling upon the plaintiff to show cause why the master should not be at liberty to review his taxation of costs, and disallow the plaintiff's costs, on the ground that the action was brought improperly in the Superior Court.

The facts were briefly as follows:

The plaintiff's vessel, the *Silent*, was lying at her moorings at Chalk Stones, in the river Thames, where the defendant's barge, through improper and unskilful handling, came into collision with the *Silent*, and the plaintiff in consequence brought an action to recover compensation for the injury to his vessel.

The defendant admitted his negligence, and no plea being entered, the damages were assessed in favour of the plaintiff upon a writ of inquiry at 15*l.* The plaintiff claimed costs, which were allowed by the master upon taxation.

Webster obtained the above rule, contending that this was a cause over which the Admiralty Court would have jurisdiction, that the admiralty jurisdiction in claims of damage not exceeding 300*l.* was given to certain County Courts by the County Courts Admiralty Jurisdiction Acts 1863 and 1869, and that under the Acts, if a plaintiff failed to recover in a cause of damage brought in a Superior Court a sum exceeding 300*l.*, he was not entitled to his costs. (b)

(a) This decision and that of the *Sarah* ruling that the Admiralty Court has jurisdiction over a claim for collision by a ship against a barge, and the *Malvina* (Lush. 403; Bro. & Lush. 57; 1 Mar. Law Cas. O. S. 218, 341) ruling that the court has jurisdiction over a claim by a barge against a ship, it is obvious that any collision occurring in a tidal river between a barge and a ship is within the jurisdiction. These decisions do not in any way conflict with the decision in *Everard v. Kendall* (3 Mar. Law Cas. O. S. 321), where the collision was between two barges. In that case, however, the judges expressed some opinions which are scarcely consistent with the present decision. They seem to indicate that for the Admiralty Court to have jurisdiction over a collision, it must have occurred between two ships, that is, two vessels not propelled by oars only. This might have been the case within the body of a county before the 24 Vict. c. 10, s. 7 (see the *Rifles*, Lush. 151; 1 Mar. Law Cas. O. S. 5), but it certainly is not so now.—Ed.

(b) By the County Court Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71) it is enacted: Sect. 3. Any County Court having admiralty jurisdiction shall have jurisdiction, and all powers and authorities relating thereto, to try and determine, subject and according to the provisions of this Act, the following causes (in this Act referred to as admiralty causes): . . . As to any claim for damage to cargo or damage by collision, any case in which the amount claimed does not exceed 300*l.* Sect. 9. If any person shall take in the High Court of Admiralty of England, or in any Superior Court, proceedings which he might, without agreement, have taken in a County Court except by order of the judge of the High Court of Admiralty or of such Superior Court, or of a County Court having admiralty jurisdic-

tion, *W. G. F. Phillimore* now showed cause.—The collision being within the body of the county, the Admiralty Court would have no jurisdiction, unless it were given by an Act of Parliament passed in the present reign. Neither 3 & 4 Vict. c. 65, s. 6 (a), nor 24 Vict. c. 10, s. 7 apply to the case. "Damage received by a ship" in the first of those statutes must mean damage received by a ship "from another ship," for at the time it was passed process in personam was practically obsolete, and process in rem would have been useless, except against a ship. In *Everard v. Kendall* (3 Mar. Law Cas. O. S. 321; 1 Rep. 5 C. P. 428; 22 L. T. Rep. N. S. 408), it was admitted by Day, *arguendo*, that there was no case to be found where the Court of Admiralty has dealt with a case of collision between two barges; and there it was held, on a motion for a writ of prohibition to the judge of a County Court who had assumed to exercise jurisdiction in a case in which two barges had come into collision on the river Thames, that the admiralty jurisdiction of the County Court in cases of collision was not more extensive than that of the High Court of Admiralty. As to the second question, which is whether the County Court can entertain this action under its admiralty jurisdiction, the jurisdiction was conferred on the County Courts by 31 & 32 Vict. c. 71, and extended by 32 & 33 Vict. c. 51. But the County Court has no jurisdiction where the Admiralty Court would have none. In *The Douce* (3 Mar. Law Cas. O. S. 424; 22 L. T. Rep. N. S. 627; 1 Rep. 3 Adm. 135), "necessaries," in the County Courts Act (31 & 32 Vict. c. 71, s. 3, sub-sect. 2) was held only to refer to such claims as the Admiralty Court had jurisdiction over. The Act (32 & 33 Vict. c. 51) should be construed as the previous Act, so as to limit it to such matters as the Admiralty Court have jurisdiction over—and this was decided in *Simpson v. Blues* (ante vol. 1, p. 336; 26 L. T. Rep. N. S. 697; 1 Rep. 7 C. P. 292). *Cargo as Argos and The Huswags* (ante vol. 1, pp. 360, 519; 1 Rep. 3 Adm. 568; 27 L. T. Rep. N. S. 64; 28 L. T. Rep. N. S. 77), are distinguishable, as they were decided on a different section. [Lush, J.—The second Act was only an extension of the first, which was clearly

tion, and shall not recover a sum exceeding the amount to which the jurisdiction of the County Court in that admiralty cause is limited by this Act . . . he shall not be entitled to costs, and shall be liable to be condemned in costs, unless the judge of the High Court of Admiralty, or of a Superior Court before whom the cause is tried, shall certify that it was a proper admiralty cause to be tried in the High Court of Admiralty of England, or in a Superior Court. By the County Courts Admiralty Jurisdiction Act Amendment Act 1869 (32 & 33 Vict. c. 51), it is enacted: Sect. 4. The 3rd section of the County Courts Admiralty Jurisdiction Act 1868, shall extend and apply to all claims for damage to ships, whether by collision or otherwise, when the amount claimed does not exceed 300*l.*

(a) By the 3 & 4 Vict. c. 65, s. 6, it is enacted that the High Court of Admiralty shall have jurisdiction to decide all claims and demands whatsoever in the nature of salvage for services rendered to or damage received by any ship or sea-going vessel, or in the nature of towage, or for necessaries supplied to any foreign ship or sea-going vessel, and to enforce the payment thereof whether such ship or vessel may have been within the body of a county or upon the high seas, at the time when the services were rendered or damage received or necessaries furnished in respect of which such claim is made. By the 24 Vict. c. 10, s. 7, it is enacted that the High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship.

[ADM.]

THE VILLAGE BELLE.

[ADM.]

limited, in respect of causes of damage at least, by the admiralty jurisdiction.]

R. E. Webster in support of the rule.—In the case of the *Sarah* (1 Lash. 549), the Court of Admiralty held that it had jurisdiction over a barge in a collision on the high seas, independently of the present Acts; and I rely upon that case, and the words of the Act of 3 & 4 Vict. c. 65, s. 6. I also contend that the words in the second Admiralty Act (24 Vict. c. 10), s. 7, "damage done by any ship," cover all kinds of damage. Independently of the Admiralty Court, the County Courts have jurisdiction under the words of the County Courts Acts. The case of *Simpson v. Blues* (*ubi sup.*) decided that the County Courts had not a jurisdiction which the Court of Admiralty never possessed; but that case was subsequently fully considered in the Privy Council, and that court refused to follow the decision without attempting to distinguish it: (*Cargo ex Argos, ubi sup.*)

LEACH, J.—The plain object of the Admiralty Court Acts was to give jurisdiction over acts committed within the body of a county where such jurisdiction already existed upon the high seas. It is not necessary to decide this question upon the interpretation of the County Courts Acts. I am clearly of opinion, and that opinion is strengthened by the case of the *Sarah* (1 Lash. 549), that the Admiralty Court would have had jurisdiction under 3 & 4 Vict. c. 65, s. 6.

ARCHIBALD, J.—I am also of the same opinion. The moment it is shown, as it is by the case of the *Sarah*, that the Admiralty Court would have had common law jurisdiction on the high seas, the case is clear, and it is unnecessary for us to decide between the conflicting decisions of the Privy Council and the Court of Common Pleas.

Rule absolute.

Attorneys for plaintiff, *Dyke and Stokes*.
Attorney for defendant, *Farnfield*.

COURT OF ADMIRALTY.

Reported by J. P. ASPHALL, Esq., Barrister-at-Law.

Monday, Feb. 9, 1874.

THE VILLAGE BELLE.

Charter-party—Demurrage—Exceptions—Civil commotion—Onus of proof.

Where a charterer by his charter-party undertakes to load a ship within certain given lay days, "accidents or causes occurring beyond the control of the shipper or freighters, which may prevent or delay her loading or discharging, including civil commotion, strikes, riots, stoppage of trains, &c., always excepted," or to pay demurrage, he cannot excuse default in loading within the lay days by giving evidence of general disturbance and cessation of work in the district about the time; but to exempt himself from liability must show a disturbing cause, actually preventing the loading of the particular ship.

This was an appeal from a decree of the judge of the County Court of Glamorganshire, hidden at Swansea.

The suit was instituted under the 2nd section of the County Courts Admiralty Jurisdiction Act Amendment Act 1869, by the owner of the *Village Belle* against the charterer of that vessel, to recover damages for breach of the charter-party. The shipowner claimed demurrage, in respect of

detention of the ship after the lay days had expired, for thirty-nine days. The defence of the charterer was, that the default in loading during the lay days was excused by the happening of certain events excepted by the charter-party in favour of the charterer (civil commotion, strikes of pitmen and workmen, &c.). At the time of the arrival of the *Village Belle* at Bilbao, that place was threatened by the armed forces of the Carlist party in Spain. The facts of the case will be found fully set out in the judgment.

The County Court judge held that there was evidence of general disturbance and civil commotion delaying the loading of vessels, and this was sufficient to excuse the charterers from the performance of their contract. From this decree the shipowner appealed. (a)

(a) The exact amount of evidence required to establish the existence of such a civil commotion as would prevent or delay the loading of a particular ship is not evenly arrived at. The charterers are aware that they have great difficulty in obtaining the necessary cargo, and that the difficulty is created by the exception named in the charter-party, but when they attempt to prove that all the sources of supply have been affected by that exception, they find it almost an impossibility to produce any testimony of a stronger character than of general disturbance of trade; the merchants do not altogether abandon their work, but cannot, in face of the public panic, carry it on with their usual rapidity. Still this general disturbance affecting particular trades must affect the loading of a particular ship whose cargo is to be of goods forming the staple of that trade. The difficulty of proof in these cases is so well pointed out by the learned County Court judge (*Thos. Falconer, Esq.*) that we give his judgment.

His Honour, after stating the facts, said, "It was stated that the defendant could not have chartered the vessel unless he had protected himself from the probable effect of civil commotions in Spain. Of the necessity of such a course there can be no doubt. In countries where educated men influence the multitude, and society is protected by legal equality—the only equality which in this world can be perpetuated or even exist—there is necessarily continued security. Contracts can be made and entered into in such countries without reference to any expectation of a disturbance of the ordinary business of life. In Spain, however, revolution succeeds revolution, general after general, ecclesiastic after ecclesiastic, stimulate to frequent civil strife the desperate and fierce passions of an ignorant population. Against the effects of such events even private contracts require the protection of exceptional conditions. But in the expression of the terms of exceptional conditions, such as 'civil commotions,' charter-parties are defective in not declaring what shall be received as sufficient evidence of the facts connected with such conditions. What, for example, shall be sufficient evidence of a 'civil commotion?' A claim for demurrage may relate to 50l. or 100l., and the claim, if contested, though perfectly just, may involve the expenditure of a very large sum of money to sustain it, and an equally large expenditure to oppose it if it be unjust. A 'civil commotion' means much more than a local riot. It means attacks by force on the authority of the government through measures which disturb the ordinary trade or business of a locality or a district. The occurrence of such an event, from its publicity and importance, it may have been assumed, would not be disputed. But suppose it is disputed, see what expense may be incurred! Witnesses must be brought from a great distance, and as the knowledge of each witness can extend only over a limited space of ground, many witnesses must be summoned. At one end of a disturbed district all may appear to be peace; at another place there may appear to be the activity of business, and yet what is seen may be only hasty efforts to preserve what may be threatened with destruction; and in another locality the heats of harden which may usually be employed to supply a port or city with its common articles of trade may be driven off. The bolt

[ADM.]

THE VILLAGE BELLE.

[ADM.]

Wood Hill, for the appellant.—To exonerate the charterer it must be shown, not only that there was civil commotion, but that it prevented the loading of the ship during the lay days. This the

of war may fall on one place, and the effect of its explosion may shake the whole district. One witness might relate little, and several might appear to contradict each other when even an real ground of disagreement existed. In the case of the *San Roman* (ante, vol. 1, p. 603), where a ship had been delayed by its captain at Valparaiso, under the apprehension of being captured, the evidence seems to have included reports respecting the movements of a vessel of war and newspaper reports, which might have been correct or incorrect, and the advice of a counsel not to sail. The evidence of the most justly apprehended danger must oftentimes be imperfect. But surely there would be no difficulty to provide in charter-parties that those who are the parties to them shall be bound by local official statements of fact relating to causes of delay, matters of regular turn in loading, the amount of cargo; or such other facts as are connected with what are usually called 'exceptional clauses.' This could be especially done when the evidence relates to events of a public character. Commissions to examine witnesses abroad are the source of a great money outlay, and the testimony of witnesses brought from abroad is frequently enormously expensive. It is thus that the great difficulty in this case arises—What is sufficient evidence of 'civil commotions' disturbing the trade of a port? The plaintiff, through his agents, may know what occurred. He should, as a just man, disclose it. He may be ignorant, and then it is the duty of the defendant to exonerate the non-performance of his contract. The seamen on board the *Village Belle* can tell us little. Their knowledge is limited to the business of their own vessel, and to what they can imperfectly observe from its deck. Neither the master, mate, nor seamen could relate what is passing on the not distant mountains which may interfere with the trade they are engaged in. They may know nothing of the injury done to the railway leading to Miranda, though they may have heard where were the chief quarters of the Carlists. John Jones, the mate of the *Village Belle*, says, 'There were 400 or 500 vessels at Bilbao; those were late arrived after us.' 'Did they get away before you?' 'Yes—once; she loaded before us.' Surely such an accumulation of ships at the end of February and in March, and down to near the end of April, is strong evidence of great disturbance of trade, caused by those political events referred to by the witnesses. The ship *Daniel* was at Bilbao in February, but the master was not able to get away till April—though it was early in April. The payment to him of demurrage is of no importance, no his delay might not have been excused by any exception contained in his charter-party. The ship *Campanie* was a steamer, and it is admitted that a preference is given to the loading of steamers; perhaps even 'regular turn' might permit such a preference. The evidence of Mr. Warburton and of vice-consul Tinter, proves a state of commotion and disturbance, extending from February to April—that is, to the time of the departure of the *Village Belle*. How, in such a state of affairs, could there be order or regularity in the transaction of business? Some merchants of San Nicholas, or persons having private wharves, or who were placed in favourable positions on the river, between the first loading-place on the river Nervion to Bilbao, may have loaded vessels. 'All accidents and causes occurring beyond the control of the affreighters preventing or delaying loading' are specified in the exceptional clause as well as 'civil commotions.' Is there not sufficient evidence of general commotion and disturbance of the trade delaying the loading of vessels? The case of *Tendeloven v. Hardcastle*, heard by me at Cardiff so far back as the year 1857, has been cited. That case, in its principle, has been sustained by several decisions of the Superior Courts: (*Adams v. Royal Mail Steam Packet Company*, 28 L. J. 33, C. P.). The charter-party in the Cardiff case provided that the freighters should not be held to be liable for any delay in loading caused by frost, floods, strikes of workmen or accidents. I held that a strike at a particular colliery was no defence to the action, the general market for the purchase of coal not

respondent has failed to establish, having given evidence of general disturbance only, and the onus lies entirely upon him.

Clarkson, for the respondent.—There is enough evidence to establish the fact that there was such a general disturbance in the Bilbao district as to prevent the procuring of the usual quantity of ore. It is shown that vessels were kept waiting for ore, and that the miners were taken away by the Carlists. The fair inference from this is, that the delay in loading was occasioned by the general disturbance. [Sir R. PHILLIMORE.—You must show, not merely that there was a general commotion, but a particular disturbance, by which the loading of the ship during this time was affected. In the German war cases, I held that positive evidence of the presence of French men of war must be given (a); so here evidence of actual prevention must be given.] It is clear on the evidence that there was not enough ore to enable him to fulfil this stipulation. If the charterer had had all the ore there was to be got in Bilbao, this exception would have applied. Why should it not apply equally when the deficiency is spread among several charterers?

Wood Hill was not called upon to reply.

Sir R. PHILLIMORE.—This is an appeal from the County Court of Glamorganshire, under the provisions of the County Courts Admiralty Jurisdiction Act 1869 (32 & 33 Vict. c. 51). The action in the court below was brought by David Rees, the owner of the *Village Belle*, against the charterer of that vessel, William Henry Thomas, of Swansea, merchant. The charter-party is dated Swansea, 9th Dec. 1872, and is made between David Rees and William Henry Thomas and Co., as agents for the merchant. The charter-party set forth that the *Village Belle* should proceed to Bilbao, and there load, from the agents of the freighter, a full and complete cargo of iron ore in bulk; it then proceeds in the usual language, till it comes to a clause expressed in these words: "Eight working days to be allowed for loading the said ship at Bilbao, and to be discharged in regular turn, and in the customary manner, with all such despatch as the usage of the port will permit;" and here follow certain excepted perils in favour of the charterer: "All accidents and causes occurring beyond the control of the shippers or affreighters which may prevent

being affected by the strike. The strike at a particular pit did not prevent the obtaining of coal in the ordinary course of the coal trade, and now it is need to meet such a case by a special provision in charter-parties referring to the particular pit or pits from which it is intended to procure coal. If, however, vessels are laden in a port during the general disturbance of trade from some general cause, or during civil commotions, such cases of loading are exceptional. The existing cause is to be a general disturbance in the business of the port, caused by civil strife. The inference I draw is that there was a prevalent general cause of delay, arising from circumstances named in the exceptional clause existing up to the time the ship was laden, as well as at the time of her arrival. There were clearly disturbances in those districts from which the customary supply of ore at the port of Bilbao came. The disturbances were not merely local riots which could be suppressed by the ordinary civil power of the town, and this was shown by the preparations made for the defence of the town of Bilbao itself. Judgment for defendant."

It is to be regretted that this question, considering its great importance in point of principle, did not go up to the Privy Council. Ed.

(a) See the *San Roman* (ante, vol. 1, pp. 347, 603.—Ed.

ADM.]

THE GLENGARRY.

[ADM.]

or delay her loading or discharging, including civil commotion, strikes of any pitmen or workmen, riots, frost, floods, stoppage of trains, accidents to machinery, &c., always excepted." Demurrage (if any) was payable at the rate of fourpence per register ton per day.

The vessel arrived at Bilbao on the 23rd Feb. On the 26th Feb. the captain gave notice that he would be ready to take in cargo on the 27th. Then for the purpose of loading the cargo there were eight working days allowed by the charter-party, and these expired on the 6th March. The actual loading did not begin till the 7th April, when fifteen tons were put on board for stiffening. The loading was continued on the 12th April, and was completed on the 16th April, when the vessel sailed. The shipowner claims thirty-nine days' demurrage, at 4d. per register ton per day.

It cannot be denied—that is really an important principle of law in these cases—that the burden of proving that the non-compliance with the terms of a charter-party similar to the present was occasioned by one of the exceptions in favour of the charterer therein contained lies upon the charterer, that is, upon the respondent in the present case. The whole question seems to lie in a very narrow compass, and it is: Has he produced such adequate proof that he is within the exceptions of the above clause of the charter-party as will reasonably satisfy the mind of the court? What is the proof he has produced? He called two persons only, although he had abundant opportunity to produce other evidence. The case was instituted on the 8th Jano, and heard on the 8th Aug. No application was made for any adjournment before the hearing, but at the hearing, for good and sufficient reason I have no doubt, the case was adjourned until November, and this sufficient postponement afforded ample opportunity for the introduction by the respondent of any further evidence which might appear necessary.

Now the plaintiff had produced several witnesses who said, in substance, that there were commotions and that there was a stoppage of the line of railway for four days—but that that stoppage took place on the 18th, 19th, 20th, and 21st March, long after the time for loading had expired. It was shown that iron ore was brought down every day except those four days. That evidence had been produced by the plaintiffs, but it must not be forgotten that the burden of proof was on the defendant, the present respondent. The respondent produced a Mr. Warburton, who said he was an iron merchant, and in the beginning of the year 1873, from January to April, he was at Bilbao, as general manager of the Eva Iron Works; that there were great disturbances in the district generally; his mines were near the town, and they were affected, although they were under more protection than mines in the country; the miners absented themselves, and being in fear of the Carlists did not work; on the 18th March the Carlists cut the Deputation Railway which brings ore down from the mines; for four or five days the line was cut, and it was cut again for a day, later; he loaded a good many ships at Bilbao during the time; his ore was from the Eva Mines close to the town, and was all brought down in barges; the Eva Mines were never stopped during this time. No evidence was given why the vessel could not have got ore from this mine. The

respondent also called a Mr. Tutor, Spanish Vice-Consul, I presume at some English port, and partner of the other witness. Now, this gentleman says that he was resident at Bilbao during the time this ship was there; that the disturbed state of the country interfered with hauling of the ore, and that the interruption was such as to make a sensible difference in the quantity brought up; during the time he loaded a good many vessels, and but for the disturbances he should, without doubt, have loaded more.

Now, does this kind of evidence, so entirely general and vague, satisfy the burden of proof and show that there was any civil commotion or other interruption within the exception, preventing the loading of this vessel during the lay days? The learned judge of the court below thought it did, but I cannot see the force of his reasoning. It is admitted that the cases cited by the learned judge are not in point, and his reasons are in effect summed up at the end of his judgment, where he says, "The existing cause is to be a general disturbance in the business of the port caused by civil strife. The inference that I draw is that there was a prevalent general cause of delay, arising from circumstances named in the exceptional clause existing up to the time the ship was laden, as well as at the time of her arrival. There were clearly disturbances in those districts from which the customary supply of ore at the port of Bilbao came. The disturbances were not merely local riots which could be suppressed by the ordinary civil power of the town, and this was shown by the preparation made for the defence of the town of Bilbao itself."

In my opinion the burden of proof is not satisfied by the respondents' producing, as he has done, evidence of general commotion. It is not sufficient to show that there is a general civil disturbance and a stoppage of the railway for a short period. The respondent was bound to show that between the 27th Feb. and the 7th March there was a disturbing cause of such a character as would prevent the loading of this vessel, that it did actually prevent the loading, and so brought the respondent within the excepted perils.

The question then narrows itself to this, whether such proof has been produced. I am clearly of opinion that the proof is not adequate to show that the loading was prevented by the above perils. That being my opinion, and having the same evidence before me as there was in the court below, I must, however reluctantly, reverse the sentence and pronounce that the plaintiff is entitled to thirty-nine days' demurrage and the costs of this appeal.

Appeal allowed, and decree below reversed.

Solicitors for the appellants, *Ingledeu, Ince and Greming*.

Solicitors for respondent, *Nelson and Son*.

Monday, Feb. 9, 1874.

THE GLENGARRY.

Collision—Launch—Precautions required—River Mersey.

It is the duty of those who launch a vessel to do so with the utmost precaution, and to give such notice as is reasonable and sufficient to prevent injury happening to other vessels from the launch,

ADM.]

THE GLENGARRY.

[ADM.]

and the burden of proving that these things have been done lies upon them.

What is reasonable and sufficient notice depends upon local circumstances; the size and breadth of the river or waters in which the launch takes place, the amount of shipping, and other like things.

Where in launching a vessel in a river the usual precautions taken in that river have been taken, and the usual general notice that the launch was about to take place has been given, the persons having charge of the launch have performed all they are required to do by law, and no specific notice of the exact moment of the launch is required.

In the River Mersey to give notice of a launch taking place it is customary to have the ship dressed in flags for an hour or more before high water (about which time the launch takes place); to have tugs, one at least also dressed in flags, plying about some time before the launch in front of the yard where the ship is lying; and there are usually a number of small boats lying off ready to pick up timber when the ship comes away.

Thus was a cause of damage instituted by the Bridgewater Navigation Company, owners of the flats or barges *Industry* and *Atlas*, and of the cargo lately laden therein, and of the freight payable in respect thereof, against the ship *Glengarry*, her tackle, apparel, and furniture, and against the owners thereof intervening. The petition filed in behalf of the plaintiff was as follows:

1. The *Industry* was a flat plying on the River Mersey, of tons register. The *Atlas* is a flat of tons register. The *Glengarry* is an iron ship of 3000 tons barthen, register 1860.

2. At about 11.45 a.m. on the 23rd Oct. 1873, the plaintiff's steam tug *Bridgewater* left the Moryeth Dock, Birkenhead, and proceeded to steam up the River Mersey, having a train of four flats in tow over her starboard quarter, and a train of five flats in tow over her port quarter. The *Industry* was the second flat in the port train, and the *Atlas* was the second flat in the starboard train.

3. The weather was fine and clear, with a light breeze from the south-east. The tide was flood, about half an hour off high water.

4. When the *Bridgewater* was about opposite the Tranmere Beach and near mid-river, the *Glengarry* was suddenly launched, stern foremost, from the ship-building yard of Messrs. Royden, on the Liverpool shore, and ran at great speed across the river towards the flats which the *Bridgewater* had in tow.

5. The helm of the *Bridgewater* was at once put hard-a-port, and the helms of the flats were also ported. When the master of the *Bridgewater* saw that it was impossible to draw the flats clear of the *Glengarry* he hailed the flatmen to cast off the tow ropes between the first and second flats in each train.

6. This was done at once, but the *Glengarry* came on and struck the *Industry* with great force on the port bow and drove her against the *Atlas*. The *Industry* shortly afterwards sank, in consequence of the injuries she had received in the collision; the *Atlas* also received considerable damage.

7. The said collision was caused wholly by the negligence and improper conduct of those having the charge and control of the *Glengarry*.

8. They negligently permitted the *Glengarry* to be launched when her course across the river was not clear.

9. They negligently omitted to give proper and sufficient notice or warning of the said launch.

10. They improperly neglected to keep a good lookout.

11. They negligently omitted to take proper measures or precautions for controlling, directing or arresting the course and speed of the *Glengarry*.

The answer filed on behalf of the owners of the *Glengarry* was as follows:

1. The *Glengarry* is an iron ship of one thousand eight hundred tons register, and belongs to the Port of Liverpool.

2. Previous to the 23rd Oct. last, the *Glengarry* had been building in the defendants' building yard on the Liverpool side of the River Mersey, and it had been determined to launch her on that day.

3. Accordingly, the necessary preparations were made for the launch on that day, the *Glengarry* had a flag flying on each of three poles erected on her deck, and two tugs, which had been engaged to take her into dock, when launched, and one of which was decorated with flags, were manœuvring off the building yard.

4. About 12.15 p.m., the wind being about S.E., a gentle breeze, the weather being fine and clear, and the tide flood, but slack water in shore, it being high water at 12.24 p.m., those in charge of the launch, having first ascertained that the river abreast of the said building yard was clear, gave orders to knock away the daggere and the *Glengarry* had begun to move down the ways, when the tug *Bridgewater*, towing a double string of flats, eight or nine in number, and altogether about six hundred to seven hundred feet in length, was observed to the westward of mid river, and in a north-westerly direction from the *Glengarry*, coming up the river bending to the southward, so as to cross the course of the *Glengarry*; she was going at a speed of about four knots, and was distant between a quarter and half a mile from the *Glengarry*.

5. It was then too late to stop or check the *Glengarry*, and she took the water stern foremost, and as her stern got into the flood tide, she made a south-westerly course.

6. Although those on board the *Bridgewater*, and the flats, saw, or might have seen that the *Glengarry* was being launched, they continued their course, and as the *Bridgewater* neared the *Glengarry*, she appeared very much to increase her speed, and although loudly hailed by those on board the *Glengarry* to stop and let go the flats, she went on and crossed the course of the *Glengarry*, taking with her the two headmost flats, but the flat *Industry*, which was next in line astern of the leading flats, came into collision with the rudder of the *Glengarry*. The flat *Atlas*, which had been towing abreast of the *Industry*, did not come into collision with the *Glengarry*, but was damaged by the *Industry*.

7. Nothing could be done by those on board the *Glengarry* to avoid the collision.

8. Proper and sufficient notice and warning was given by those having charge of the *Glengarry*, that the launch was about to take place, and it was the duty of those in charge of the *Bridgewater* and the flats to leave the course of the launch clear.

9. Those on board the *Bridgewater* and the flats improperly neglected to keep a proper lookout.

10. Those on board the *Bridgewater* and the flats improperly neglected to leave the course of the *Glengarry* clear.

11. Those on board the *Bridgewater* and the flats neglected to keep out of the way of the *Glengarry*.

12. Those on board the *Bridgewater* improperly neglected, before the said collision, to slacken her speed, or to stop and reverse, and improperly increased her speed, and crossed the course of the *Glengarry*.

13. Those on board the *Bridgewater* improperly neglected in proper time to port her helm, and to cast off the said flats.

14. Those in charge of the *Industry* and *Atlas* neglected to cast off or cut their tow ropes in time to avoid the said collision.

15. The said collision was caused wholly by the negligence or default of those in charge of the *Bridgewater* and the said flats, and was not caused in any way by any negligence or default on the part of those on board or in charge of the *Glengarry*, and so far as the latter are concerned the said collision was an inevitable accident.

16. Except so far as they are herein admitted, the defendants deny the truth of the several allegations in the plaintiff's petition.

The pleadings were thereupon concluded.

The main facts in dispute between the parties were first the position in the river of the *Bridgewater* and the flats, when the *Glengarry* was launched; and secondly the precautions which it is

[ADM.]

THE GLENGARRY.

[ADM.]

usual to take in the River Mersey when a ship is launched.

The plaintiffs produced evidence in support of the allegations of their petition. High water on that day was about 12.44 p.m. The tug in going to the Morpeth Dock, to fetch the flats had passed the yard from which the launch was afterwards made about an hour before the collision, but had seen no flags indicating that a launch was about to take place. There was nothing however to prevent the crew of the tug seeing Royden's yard from the inside of Morpeth Dock. The master of the tug did not actually see the *Glengarry* until just after he left the Morpeth Dock, and then knew she was going to be launched about high water, but could not tell the exact time. It was alleged by him that it was usual when there was a launch in the river Mersey, not only to dress the launch in flags, but to have a steam tug dressed in flags in the middle of the river to warn passing vessels of the time when the launch was coming off; if he had had this warning he would have kept farther over to the westward. The tug and flats were as alleged by the plaintiffs about one hundred yards to the westward of mid river and abreast of Tranmere ferry when the *Glengarry* was launched. Launches always take place about high water, but according to the plaintiffs they took place any time within an hour before high water.

Evidence was given for the defendants in support of their answer, and thence it appeared the usual precautions taken on the Mersey to give warning of a launch are that the ship is dressed with flags, and has in attendance on her one or two tugs, according to her size; one of these tugs is dressed with flags, and manoeuvres off and on at the entrance to the building yard till shortly before high water, and then prepares to follow the launch, which takes place about that time; small boats are also in attendance to pick up timber as the ship comes away. From Mr. Royden's yard launches always took place at about 10 minutes before high water, as the yard abutted on to the river, and it was consequently necessary to wait until the tide ceased to flow, in order to avoid having the ship twisted on the ways as she took the water. There were two tugs in attendance on the *Glengarry*; one was dressed with flags and was up and down the river in front of the yard for an hour before the launch; the *Glengarry* had flags flying for an hour before the launch took place. The pilot in charge of the *Glengarry* alleged, that when the word was given to let go the river was clear abreast the yard, but that no sooner had the ship begun to move than he saw the tug and flats coming up the river; it was then too late to stop the launch. From the time the ship left the ways to the time of the collision eight minutes elapsed. When the tug and flats were first seen from the *Glengarry* they were about opposite Monk's Ferry. The *Glengarry* when launched went about three quarters of the way across the river.

Aspinall, Q.C. (*W. C. Gully* with him) for the plaintiff, contended that the general notice that there was going to be a launch about the time of high water was not sufficient, but that a special notice of the approximate time ought to be given by means of a tug flying flags in the middle of the river, lowering or raising a flag, firing a gun, or some such act calculated to attract particular

attention. The defendants have no right to require that vessels shall keep out of their way for an hour before high water; that is practically to block up the navigation of the river for an hour. The plaintiffs were using a highway in a proper manner, and had the right to suppose it safe, and no negligence can be imputed to them, except upon the supposition that they ought to have expected the defendants to be negligent. There is evidence that there is a custom to give particular notice of the approximate time of the launch, and even if the evidence on this point is not very strong, such a course is so reasonable that I submit that this court ought to hold that such notice should be given.

The Benkenim, 4 Notes of Cases 383;

The Vienna, Swab. 405;

The United States, 2 Mar. Law Cas. O.S. 166.

The launch might have been delayed if they had had a good look out, or they ought to have given the plaintiff notice. The plaintiff had a right to go ahead, or receive notice. The defendants saw us in time, or ought to have seen us in time, and yet let the ship go; this was negligence on the part of the defendants, even if the tug and flats were wrong in being where they were:

Dorries v. Mann, 10 M. & W. 540.

Myburgh (*Bull* Q.C. with him) for the defendants. —The notices of the launch being those which are usual in the Mersey were sufficient on the authority of the cases quoted. There was no reason why the tugs and flats should not have kept further over to the westward on seeing the flags; the Mersey is sufficiently broad for both the launch, and the free passage of vessels. There was nothing to prevent the tug from waiting in the Morpeth Dock till the launch was over.

Aspinall, Q.C., in reply.

Sir R. PHILLIMORE. —On the 23rd Oct., in last year, shortly before high water, between twelve and a quarter past twelve, or twenty minutes past twelve, in the river Mersey, the *Glengarry*, which was then launched from the Liverpool side of the river, went stern foremost into the port bow of the *Industry*, forcing her into the port side of the *Atlas*, they being two out of a number of vessels called flats, which were on the port and starboard side of a tug called the *Bradyender*, and the question for the court is who is to blame for this collision? Whether the tug which had these flats in tow is to blame, or whether the *Glengarry*, the launch, is to blame, having regard to all the circumstances of the case?

It may be almost unnecessary to make any observations on the general law relating to these cases of vessels launched, after the full discussions which they have undergone in the three cases, to which reference has been made, the case of *The Benkenim* (4 N. of C. 383), the case of *The Vienna* (Swab. 405) and the more recent case before the Privy Council (*The United States*, 2 Mar. Law Cas. O.S. 166). There is no doubt whatever as to the law which has been laid down for a considerable period, and always observed in this court—viz. that it is the duty of those who launch a vessel to do so with the utmost precaution, and to give such a notice as is reasonable and sufficient to prevent injury, happening from that event, and that the burden of proof lies on them. There is no doubt at all that those who appear for the launch have the obligation cast upon them of showing that it took place in such circumstances, which ought, with

[ADM.]

THE GLENGARRY.

[ADM.]

reasonable precautions on the other side, not to have brought her into collision. What is reasonable notice must of course depend very much on the facts of these cases. It was very well said in the case of *The Blenheim*, "what is reasonable notice depends on local circumstances; the breadth of the river, the number of vessels passing, and other circumstances of that kind. It must be not a mere general notice of a launch on a particular day, the notice must so specify the time of the launch, that vessels navigating up and down the river may not be damaged or incur danger."

The first subject which the court must consider is whether, according to the evidence in this case, there was such reasonable notice as the law requires, given by those who launched the *Glengarry*? Now the *Glengarry* was a very large vessel, I think of 3000 tons. She was launched from the slip of Mr. Royden, on the Liverpool side of the Mersey, and it appears from a variety of evidence, which at this late hour of the evening it is not necessary to go into in detail, that it is customary in the river Mersey before a launch takes place, that a certain number of flags should be put on poles, which are placed where the masts are to be—if it is a barque or a ship, three poles, a brig two poles, a schooner one pole, and so on—but that there should be a certain number of flags put on poles in the vessel, as indicating that the vessel is about to be launched. It appears also that it is customary to have two steam tugs in attendance on the vessel, and for one of the steam tugs to have hunting, or flags of various kinds, on it; and it appears also that it is customary to have small boats called gigs, pulling about, in order to pick up some of the timber, which would otherwise be lost, when the operation of launching takes place. All these precautions were taken in this instance, and it is not denied, and could not be denied, that the proper and usual general notice was given that the launch was about to take place. It is said that a more specific notice was required, and various suggestions were made as to what the specific notice should be, but no evidence was produced before me at all, that any such specific notice is habitually given in cases of this description. One witness indeed did say that it was usual that a tug should be in the mid river, just before the vessel is launched, but that witness stood almost alone in his opinion, and the pilot who was produced on behalf of the plaintiffs in this case, in enumerating what precautions were necessary to be taken in order that a launch should take place in safety, did not mention that it was a necessary circumstance that there should be a boat in mid-river, but he did recapitulate all these precautions, which, as a matter of fact, were taken in this case. The yard or slip, from which this launch took place, is one in which it appears from the evidence a great number of vessels are built, and I think the evidence was that a considerable number were launched every year. I think Mr. Royden, who was examined, said twelve or thirteen.

Therefore, putting all those circumstances together, I am of opinion that the principle of the law to which I have referred, justifies me in saying that there was not only a general notice, but a sufficient notice according to the usage of the place, that a launch was about to take place at this time. It was known perfectly well that the launch could only take place very near to the time

of high water. Now high water was about twenty-four minutes past twelve on this occasion. The collision I think took place somewhere about a quarter past twelve, and the launch took place about six or seven minutes after twelve, according to the best calculation one can arrive at. I must mention what has made a considerable impression on the mind of the court. It appears not only from the evidence produced on behalf of the plaintiffs, but also from that produced on behalf of the defendants, especially the evidence of the master of the tug *Bridgewater*, that this vessel, the *Glengarry*, stood very high on the ways, and that there was nothing to prevent his seeing it from the Morpeth Dock, and that in fact he did see it from there and must have seen that she had her proper flags up.

It becomes necessary to make some short statement with regard to the plaintiffs in this case the tug and the flats. The *Bridgewater* came out of Morpeth Dock, with I think eight or nine flats in tow, so many on her port side, and so many on her starboard side. Now, according to the statement of the master, before she came out of Morpeth Dock, the *Glengarry*, with the flags indicating an approaching launch, was visible to her, and she knew, for the reasons which I have already stated, that the launch would take place very nearly about high water, and I admit the proposition that was contended for by the counsel for the plaintiff in this case, that it is not competent to those who are about to launch a vessel to block up the navigation not only for a day, but any considerable period of time. But in this case the evidence satisfies the court that the tug must have been aware that the launching would take place within a very short time of high water—say twenty minutes or a quarter of an hour; and that being made plain to her when she was within the Morpeth Dock, it was her duty—as it appears to the court after consulting with the Elder Brethren of the Trinity House, who are entirely of the same opinion—it was the duty of the tug when in Morpeth Dock, either to wait a quarter of an hour or twenty minutes, if she thought there was any danger to be incurred by the launch; or it was her duty when she came out (she had full option to choose which course she would take), to have ported her helm, and to have kept up on the west shore, in which case the collision would not have happened. According to the evidence we believe that she did not take this course, and indeed it seems to be perfectly well proved in the case that she came out into mid-channel.

Now what precautions were taken besides those general precautions I have mentioned? What precautions were taken by those who were about to launch the *Glengarry*? Really it seems every precaution that could be required was taken. The look-out, so far from being as suggested a bad look-out in this case, appears to us to have been of a very good description. The pilot says he was aft on the ship; there were two steamers in attendance, the *Rattler* and the *Garter*, flying about for an hour before. Then the pilot says he looked to see if the river was clear, he saw three flats, and he waited till they got clear; he looked again to see if it was clear, and then he gave the order to let go, and when he had given the order to let go, Mr. Royden, who was on a stage under the bows, performed what I believe is the usual ceremony on these occasions of cutting the rope

[ADM.]

THE JOHN EVANS.

[ADM.]

himself, and the vessel began to move. After the vessel had so began to move the pilot called out, "Hold on," or "stop the launch," and it has been contended that if he had discharged his duty properly he would have said that before the vessel began to move, and before the last rope had been cut, but we are not of that opinion at all.

It may very well be, as was very ingeniously suggested by Mr. Myhring, that as this tug and the flats came out of Morpeth Dock, they came in a direct line and did not present themselves, until the tug had ported, to the view of the pilot; but, be that as it may, there was no necessity for any collision in this case if the tug had taken the proper course of porting to keeping herself along the west shore. We believe upon the evidence—there is great conflict as there always is in these cases—but we believe that the tug when reported had arrived a quarter of a mile N.N.W. of Mr. Royden's slip in mid channel, and was not, as she represents herself to have been, off Tramore Ferry. The launch had to go 800 yards to the place of collision, and she was stopped in mid river against the barge, into which she ran. In fact, when the whole case comes to be examined, it resolves itself into this, that in our judgment the tug steamed right across the path of the launch, and that she did nothing but go on full speed, and took no measure whatever to avoid the collision in this case.

Having arrived at this conclusion, it becomes unnecessary in my judgment to go into the other parts of the case, and I have no hesitation in pronouncing, under the advice that I have received, that the plaintiffs in this case have failed to establish the averments in their petition, and that I must reject that petition.

Solicitor for plaintiffs, *Isham H. E. Gill*.

Solicitor for defendants, *Bateson and Co.*

Friday, Feb. 27, 1874.

THE JOHN EVANS.

Salvage—Bond given to Receiver of Wreck—Leave to proceed in Admiralty Court—Jurisdiction of County Court—County Courts' Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71) sect. 3, 9, 21—Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), sect. 468.

As it is a matter of grave doubt whether the County Courts having admiralty jurisdiction have power to enforce salvage bonds given to Receiver of Wrecks under the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104) sect. 468, the High Court of Admiralty will, on the application of a salvor in respect of whose services such a bond has been given, grant leave to proceed in the High Court under the County Courts' Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71), sect. 9.

Seemly, that even where leave is so given to proceed in the High Court, that court is not thereby precluded from condemning the plaintiff in costs, if at the hearing of the cause it should appear that the cause was improperly instituted in the court.

This was an application by the defendants to rescind an order made by the Judge of the High Court of Admiralty, giving leave to institute a suit in that court, or to order that the suit should proceed subject to costs in the same way as though such order had not been made.

The plaintiffs, who were the owners, master, and

*crew of the lugger, Wild Boy, moved the court on the previous motion day "for liberty to institute a cause of salvage on behalf of the owners, master, and crew of the lugger Wild Boy against the ship or vessel John Evans, her cargo and freight, and to direct that the bond given to the receiver of wreck at Ramsgate in the sum of 600*l.* in respect of such salvage services may be brought into the registry of this honourable court."* In support of this motion, an affidavit was filed stating that salvage services had been rendered by the plaintiff to the *John Evans* and her cargo; that a bond had been given to the receiver of wreck at Ramsgate in the sum of 600*l.* to secure the payment of compensation for such services; that by the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104) sect. 468, power is given to the Admiralty Court to adjudicate upon the amount of salvage, and enforce bonds given under the foregoing circumstances; and that the County Courts have no such power, nor has any other court except the Admiralty Court. Upon these facts and allegations the Admiralty Court gave leave to institute the suit. The order was made upon the *ex parte* application of the plaintiff. The defendants now moved to rescind the former order, and in support of their motion filed an affidavit alleging that, although a notice of the former motion had been served upon the defendant, it had come too late for them to instruct any one to appear on their behalf; that the services were of a very trifling character, and deserving of a small reward, and that the cause ought to have been brought in a county court. In reply to this affidavit the plaintiff filed another denying the plaintiff's statements of fact, and calling the attention of the court to the fact that similar orders had on many previous occasions been made by the court although opposed by the owners of the saved property. (a) The ship was actually at Monmouth of the commencement of the proceedings.

W. G. F. Phillimore for the defendants in support of the motion.—The plaintiffs applied for leave to proceed here in order to avoid being condemned in costs under sect. 9 of the County Courts' Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71) if they should recover a less sum than 300*l.* The reason alleged for their application is that the County Courts cannot enforce a salvage bond given under the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104) sect. 468, (b) I

(a) Similar orders were made in *The Onelia*, *The Snarebrook*; *The Zeland* and *The Clotho*. In the last mentioned case leave was given to proceed in the High Court although opposed by the owners of ship, cargo, and freight.—*Ed.*

(b) This section is as follows:—"468. Whenever any salvage is due to any person under this Act, the receiver shall act as follows; (that is to say)

First if the same is due in respect of services rendered in assisting any ship and boat, or in saving the lives of persons belonging to the same, or the cargo or apparel thereof,

He shall detain such ship and boat and the cargo and apparel belonging thereto until payment is made, or process has been issued by some competent court for the detention of such ship, boat, cargo, or apparel. . . .

But it shall be lawful for the receiver, if at any time previously to the issue of such process security is given to his satisfaction for the amount of salvage due, to release from his custody any ship, boat, cargo, apparel, or wreck so detained by him as aforesaid; and in cases where the claim for salvage exceeds two hundred pounds it shall be lawful to England for the High Court of Admiralty of England.

ADM.]

THE JOHN EVANS.

[ADM.]

submit that there was no need of the order as the bond might have been enforced in the county court. The County Court Admiralty Jurisdiction Act 1868, sect. 3, gives County Courts having admiralty jurisdiction power to try "as to any claim for salvage—any cause in which the value of the property saved does not exceed one thousand pounds, and in which the amount claimed does not exceed three hundred pounds." [Sir R. PHILLIMORE.—Does that Act give a plaintiff an absolute right to costs if he obtained leave to proceed here in the first instance? Sect. 9 would appear to bear that construction. The plaintiff would be entitled to his costs unless the court positively ordered him to pay them, and in practice this is never done in salvage cases. The Merchant Shipping Act 1854, simply provides a mode in which salvors can get security for the payment of their claims without detaining the property. The receiver is to arrest and take security instead of waiting for the warrant of the court, the amount of salvage is to be settled afterwards. The taking security in this form is only another mode of getting bail. The proceeding to recover salvage remained the same as it was before the Act in claims exceeding 200*l.*, the security only being changed. The jurisdiction of this court in such a case is over a claim of salvage and that jurisdiction is transferred by the County Courts Act to the County Court. Bonds under the amount of 200*l.* given as security for salvage reward are not under the Act within the jurisdiction of any named court; still it is to be presumed that some court has jurisdiction over them. This court has not power over them. It must be concluded that the justices have power by implication to enforce them under sect. 460 of the Merchant Shipping Act 1854. Hence a reason can be found for the express words, giving jurisdiction over bonds over 200*l.*; the justices would refuse under sect. 460, to entertain a claim where there was a bond for a greater amount, and yet in the Admiralty Court the plaintiff might be condemned in costs if he recovered less than that amount, although he was obliged to introduce his suit there. This is the reason why express power is given to this court; but this does not alter the nature of the claim which still remains a salvage claim. Otherwise the magistrates, having no express power given to them, could not enforce bonds under 200*l.* If those are ordinary salvage claims they are transferred to the County Courts where under 300*l.* The bond can be enforced in the County Court in those districts the bond is given. The bond is no more than bail or security given to an officer of the court.

Clarkson for the plaintiffs, contra.—This court is the only court which has power to enforce a bond, given to the receiver of wreck in such a case as this. The object of the bond is to release the ship, and

in Ireland for the High Court of Admiralty of Ireland and in Scotland for the Court of Session, to determine any question that may arise concerning the amount of the security to be given or the sufficiency of the sureties; and in all cases where bond or other security is given to the receiver for an amount exceeding two hundred pounds, it shall be lawful for the salvor or for the owner of the property saved or their respective agents, to institute proceedings in such last mentioned courts for the purpose of having the question arising between them adjudicated upon, and the said courts may enforce payment of the said bond or other security, in the same manner as if bail had been given in the said courts.

to enable her to leave the port where the bond is given. Now, by the County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71) sect. 21, proceedings in an admiralty cause in the County Court must be commenced "in the County Court having admiralty jurisdiction within the district of which the vessel or property to which the cause relates is at the commencement of the proceedings," provided that this rule is applicable; which is the case here, as the ship is at Monmouth within the district of a County Court having admiralty jurisdiction. Hence the suit in this case must be begun, if in any County Court, at Monmouth. What jurisdiction can the County Court at Monmouth have over the receiver at Ramsgate, to require him to produce and to enforce a bond given there, or pay over a deposit of money? On the other hand the Admiralty Court has jurisdiction over all receivers of wreck, and can compel the bonds or deposits to be sent to the registry of this court. There is no difficulty as to bonds for amounts under 200*l.*; the justices on the spot where those bonds are given can enforce them. [Sir R. PHILLIMORE.—If the justices have, without express words and by implication only, jurisdiction over bonds for amounts under 200*l.*, why have not the County Courts jurisdiction by implication also over bonds for amounts under 300*l.*?] Because the County Courts have no power over receivers of wreck out of their own jurisdiction, and could not enforce a bond given out of their own circuit, even if they could within it. [Sir R. PHILLIMORE.—The County Court Admiralty Jurisdiction Act 1868 does not prevent me, if it should turn out that this suit was improperly instituted in this court, from condemning the plaintiff in costs even if this order stands. The order for leave to proceed is given on an *ex parte* application, and if I have given it improperly I am not bound by it, and I should be at full liberty to give no costs or less salvage reward. It is a question of considerable doubt whether the statutes have given jurisdiction over receivers of wreck and these bonds in every part in England to the County Courts, whilst there is no doubt that this court has such jurisdiction. That alone is enough to entitle me to give leave to proceed here.] Besides it is doubtful whether the County Courts can have, under any circumstances, jurisdiction in these cases. Their jurisdiction in causes of salvage is *in rem* or *in personam* only. This is not a proceeding *in rem*; nor can it be strictly called a proceeding *in personam*. It is not against the owners alone; it is against the obligee of the bond, who may or may not be the owner. The general terms of the County Courts Act cannot embrace the jurisdiction given by express terms to this court by the Merchant Shipping Act. If such a transfer of jurisdiction had been intended, the Legislature would at least have effected it by giving to the County Courts in express terms jurisdiction over the receivers within their district.

W. G. F. Phillimore in reply.—There is nothing to prevent an agreement being entered into to try at Ramsgate, and then the County Court there would have jurisdiction over the receiver and the bond. The receiver is an officer of the court, and would be of any court where the cause was instituted, and could be punished for not bringing in the bond. This is a cause of salvage, and the County Court has clearly jurisdiction in such cases.

Sir R. PHILLIMORE.—This is a cause of salvage,

ADM.]

THE JOHN EVANS.

[ADM.]

in which under the provisions of the County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71), I made an order permitting the salvors to institute proceedings in this court. An application is now made to me by the defendants to rescind the order.

The words of the 9th section are: "If any person shall take in the High Court of Admiralty, or in any superior court proceedings, which he might without agreement have taken in a County Court, except by order of the judge of the High Court of Admiralty, and of such superior court, or of a County Court having admiralty jurisdiction; and shall not recover a sum exceeding the amount to which the jurisdiction of the County Court in that admiralty cause is limited by this Act; and also if any person without agreement shall, except by order as aforesaid, take proceedings as to salvage in the High Court of Admiralty, or any superior court in respect of property saved, the value of which when saved does not exceed 1000*l.*, he shall not be entitled to costs, and shall be liable to be condemned in costs, unless the judge of the High Court of Admiralty, or of a superior court before whom the cause is tried or heard, shall certify that it is a proper admiralty cause to be tried in the High Court of Admiralty of England, or in a superior court."

Now I am of opinion that this section contemplate proceedings being taken by order of this court upon an *ex parte* application by the plaintiff. At the same time it is competent to the other parties in the suit to apply to have any order so made rescinded; and, moreover, although the section apparently gives alternative modes of avoiding condemnation in costs, the alternatives must be taken together, and there is nothing to prevent the court—if need be and justice should require it—from condemning the plaintiffs in costs at the hearing, notwithstanding that they may have obtained an order of the court to take proceedings here, and that the court had refused to rescind that order on the application of the defendants.

The grounds asserted in the first instance, why an order under the transfer sections should be granted in this case, were that there was a salvage claim against property valued at 600*l.*, which had been placed in the hands of the receiver of wreck at Ramsgate; that the receiver, exercising the power given to him by the 468th sect. of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), had taken from the owners of the property, in lieu of bail, a bond in the amount of 600*l.*; that the County Court had no jurisdiction to enforce that bond, and that it was therefore necessary to bring the suit in this court.

I know that there are no reported cases to be found with respect to the practice of the court on this point, but I remember that in many cases orders for proceedings to be taken here have been made by the court where applications have been based upon the same grounds as upon the present occasion, namely, that neither the County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71), nor in the County Courts Admiralty Jurisdiction Act Amendment Act 1869 (32 & 33 Vict. c. 51) are there any express words giving to County Courts jurisdiction over bonds, or any power to enforce them, or to compel the receiver to deliver up the bonds or security he may have received from salvors, under the powers given to him by the Merchant Shipping Act 1854. It is

clear that this court had no original jurisdiction, or power over bonds given to a receiver of wreck, and that it was thought necessary to confer this power by express words; and accordingly the Merchant Shipping Act 1854, sect. 468, having given salvors the right to institute proceedings in this court, where the claim for salvage exceeds 200*l.*, gives the power to the court to enforce the bonds in these words:—"and the said courts may enforce the payment of the said bond or other security, in the same manner as if bail had been given in the said courts." It has been argued that, although the County Courts have not acquired jurisdiction in such cases by express words, yet it is given by necessary implication from the words of the County Courts Admiralty Jurisdiction Act 1868, sect. 3, which says, "Any County Court having admiralty jurisdiction shall have jurisdiction, and all powers and authorities relating thereto, to try and determine, subject and according to the provisions of this Act, the following causes (in this Act referred to as admiralty causes): (1) As to any claim for salvage—any cause in which the value of the property saved does not exceed one thousand pounds, or in which the amount claimed does not exceed three hundred pounds, &c." It has been contended that under these words the power in question has been sufficiently given to the County Courts, having admiralty jurisdiction, and it has been pointed out that if this were not the case there would be a *casus omissus* in the Merchant Shipping Act, because, if express words are necessary to confer the jurisdiction, by that Act the Justices have no power to enforce these bonds or to adjudicate upon salvage disputes, where security has been given to the receiver of wreck, even though the value of the security is under 200*l.*

It is undoubtedly true that a great many imperfections exist in the County Courts Admiralty Jurisdiction Act, and that many difficulties may be suggested arising out of the mode in which those Acts have been drawn, without accurate knowledge of the subjects they were going to affect, and it is at least a matter of grave doubt whether the County Courts having admiralty jurisdiction would be held to have the jurisdiction contended for. This, however, in my opinion furnishes good reason why the proceedings should be commenced in this court; moreover, it should not be forgotten, I am not thereby prevented in any way from visiting the applicant with costs if it should appear that the suit has been improperly instituted.

I shall refuse this motion; but I do not mean that my refusal to rescind the order will in any way bind the hands of the court as to costs or prevent it from condemning the plaintiffs in costs, if it should become necessary to do so by reason of the plaintiffs having proceeded in this court when they might have proceeded in an inferior court, or otherwise improperly instituted the suit.

As the question in this case is novel, and raised in court for the first time, I shall order the costs of the motion to be costs in the cause.

Solicitors for the plaintiffs, *Lowless, Nelson, and Jones*.

Proctors for the defendants, *Pritchard and Sons*.

ADM.]

THE C. S. BUTLER; THE *BALTIC*.

[ADM.]

Wednesday, March 4, 1874.

THE C. S. BUTLER; THE *BALTIC*.*Collision—Damage done by sailing ship—Right to salvage reward.*

Where damage is inflicted upon a ship by another engaged in rendering salvage services to the former, the Court of Admiralty regards the negligence of the sailor less severely than it does the negligence of a vessel wholly unconnected with the injured vessel, but will condemn the sailor in the damage where he has been guilty of gross negligence and want of proper navigation.

A sailor whose ship succeeds in bringing an injured ship into safety, but in so doing inflicts damage upon her by coming into collision through negligence and want of proper navigation, which are gross but not wilful, is not thereby deprived of his right to a reward which has been agreed upon between the masters of the respective vessels.

These two causes were respectively a cause of collision instituted by the owners of the barque *Baltic*, against the steamship *C. S. Butler*, and a cause of salvage by the owners master and crew of the *C. S. Butler* against the *Baltic*. The cause of collision was instituted in the High Court of Admiralty on 8th Dec. 1872. The cause of salvage was instituted in the County Court of Hampshire, and was on 27th June, 1873, transferred to the High Court on the ground that the cause of damage was there pending. It was agreed between the solicitors of the respective parties that pleadings should be filed in the damage cause only, and that the two suits should be heard at the same time, and upon the same evidence, and that if the court should decide that the *C. S. Butler* was entitled to salvage reward an award in respect of such reward should be made for 100*l.*, the amount agreed upon by the respective masters of the two vessels, and costs. The facts will be found sufficiently stated in the pleadings in the damage cause.

The petition filed on behalf of the owners of the *Baltic* against the *C. S. Butler*, and against the owners of the said steamship, the defendants intervening, was as follows:

1. Between 5 p.m. and 6 p.m. on 27th Oct. 1873, the barque *Baltic* of 456 tons register, laden with a cargo of deals, and bound from New Brunswick to Hull, and carrying a crew of eleven hands was off Beachy Head in the English Channel.

2. The *Baltic* during the previous night had lost her jibboom and foremast, and had suffered other damage by collision, and was at such time proceeding down channel on the starboard tack with a view to getting into port to repair damages; she had a signal for a pilot flying.

3. At such time the above-named screw steamship *C. S. Butler*, which was steaming up channel, turned to the northward and came round under the stern of the *Baltic* and on to her starboard quarter, and after some hailing between the two vessels the *C. S. Butler* again passed the stern of the *Baltic* and came on to her port side.

4. The mate and afterwards the master of the *C. S. Butler* boarded the *Baltic* by means of the *C. S. Butler's* boat, and after a good deal of bargaining an arrangement was made for the *C. S. Butler* to take the *Baltic* in tow. It was then between 7 p.m. and 5 p.m., the weather was fine and clear, the wind was light from about north to north-north-east, and the *Baltic* was close-hauled on the starboard tack, making about two knots an hour. The *Baltic* had her proper regulation green light duly exhibited and burning brightly. Her red lamp had been carried away, and by arrangement with or at the suggestion of the master of the *C. S. Butler* a globe lantern covered with red bunting was exhibited and burning in the port fore-rigging of the *Baltic*.

5. The tow rope of the *Baltic* was got ready, and her mainyard was laid aback, and the boat of the steamer, having put the master and mate of the *C. S. Butler* on board their vessel, came back to the *Baltic* and lay alongside her on her port side, and there the boat proceeded to coil in her the hauling line of the *Baltic*.

6. Whilst this was being done the *C. S. Butler*, instead of keeping clear of the *Baltic*, as she could and ought to have done, ran against and with her starboard quarter struck the *Baltic* on her port quarter, doing her some damage.

7. The *C. S. Butler* then steamed ahead, and turned round and ran against and with her stem struck the *Baltic* a violent blow on her port bow, and did her so much damage that she filled with water in a very few minutes, and was only saved from sinking by her cargo of deals.

8. The *C. S. Butler* subsequently took the *Baltic* in tow, and proceeded with her towards the Downs, but the master of the *Baltic*, not thinking it prudent to proceed to the Downs, arranged with the master of the *C. S. Butler* to tow the *Baltic* to Cowes. On the following day, at about noon the two vessels on their way to Cowes were just inside the Isle of Wight, and the *C. S. Butler* was towing ahead of the *Baltic* with two hawsers fast to her when one of such hawsers parted. The *C. S. Butler* backed astern with a view to the remaining hawser being shortened in, but in consequence of the want of care and skill of those on board her she with her starboard side ran against the bowsprit of the *Baltic* and broke it, and did further damage to the *Baltic*. The *C. S. Butler* subsequently towed the *Baltic* to Cowes.

9. The said collisions between the *C. S. Butler* and the *Baltic*, and the damages and losses consequent thereon, were occasioned by the negligence or want of skill of the master or crew of the *C. S. Butler*.

10. The same collisions were not in any way occasioned by any negligence on the part of those on board the *Baltic*.

The answer filed on behalf of the *C. S. Butler*, the defendants, was as follows:

1. Shortly before 6 p.m. of 27th Oct. 1873, the screw steamship *C. S. Butler*, of the burthen of 516 tons nett register, propelled by engines of 80 horse-power and navigated by William Dodds, her master, and a crew of sixteen hands, was about ten miles distant from the Owers Light Vessel, which bore about north-north-west, proceeding in the prosecution of a voyage from Southampton to Shields in water ballast.

2. The wind at this time was from north-east to north-north-east and the weather was fine and clear, the tide was flood and approaching high water and of the force of about a knot and a half an hour. The *C. S. Butler* was steering east by south half-south, her proper course up channel, and she was making about eight knots an hour. A good look-out was being kept, and the Admiralty regulation lamps were duly exhibited and burning well and brightly on board her.

3. Whilst the *C. S. Butler* was so proceeding a flash light was seen on board a vessel on the port bow, and the cause being ascertained that it was believed to be the *C. S. Butler* to be a signal from some vessel requiring assistance. The *C. S. Butler* then proceeded towards such vessel and found her to be the *Baltic*.

4. The *Baltic* was then in a damaged condition and had had all her yards forward carried away and her upper mainmast yard was broken and hanging down; she had only her foretopmast-staysail and lower mainmast; her mainmast was in the brail, and the clews of it were holed up. She was heading about north-west and was making scarcely any headway.

5. The *C. S. Butler* proceeded to the *Baltic*, and upon getting near her the engines were stopped and she hailed the *Baltic* and inquired if assistance was wanted, and was informed that the *Baltic* required assistance. The boat of the *C. S. Butler* was thereupon lowered and the chief mate went in to the *Baltic*, and the master of the *Baltic* then endeavoured to make an agreement with such chief mate for the amount to be paid for the services required, but the chief mate of the *C. S. Butler* asking 200*l.*, and the master of the *Baltic* only offering 50*l.*, no agreement was then come to.

6. The mate of the *C. S. Butler* proceeded to leave the *Baltic*, and her master then requested to see the master of the *C. S. Butler*, and he afterwards proceeded on board

[ADM.]

THE C. S. BUTLER; THE BALTIC.

[ADM.]

the *Baltic*. The master of the *Baltic* then again offered \$50., but the master of the *C. S. Butler* refused to take less than \$100., and was about leaving the *Baltic* when her master offered \$125. to have the ship towed to the Downs; this the master of the *C. S. Butler* ultimately agreed to accept and went again on board his vessel.

7. The engines of the *C. S. Butler* were then set on slowly ahead and she proceeded on to the port side of the *Baltic*, and the head of the *C. S. Butler* proceeded with lines to the *Baltic* to be made fast to the hawser of that vessel. The lines were made fast and the *C. S. Butler* then lay stopped, and her crew commenced hauling in the towline of the *Baltic*; owing to the line having been improperly secured to the hawser the same slipped off just as it was being got to the taffrail of the *C. S. Butler*. The hawser then had to be hauled in on board the *Baltic*, and whilst this was being done the *C. S. Butler* was steamed slowly round the *Baltic*, and back again to her port quarter for the purpose of again getting her hawser.

8. By this time the night had got very dark, and as the *C. S. Butler* passed under the stern of the *Baltic* the mizen-boom of the *Baltic*, which was adrift, came in contact with the starboard bulwark of the *C. S. Butler*. After the *C. S. Butler* had steamed round the *Baltic* her engines were stopped about 100 feet off the *Baltic* on her port side; the boat then went with the lines again to the *Baltic*, and to keep the *C. S. Butler* in position her engines had to be put on ahead and sailed slowly. The *Baltic* now and again burned the flash light. Whilst the *C. S. Butler* was thus attempting to get the rope of the *Baltic*, the *Baltic* fell off from the wind a little, and the stem and port bow of the *C. S. Butler* struck the port bow of the *Baltic*; the blow was so light that the effect of it was not felt and the vessels cleared almost immediately. The rope was then got on board the *C. S. Butler* and secured to her sampson post, and she proceeded to tow the *Baltic* for the Downs.

9. After the *C. S. Butler* had been towing about half an hour the master of the *Baltic* hailed to the *C. S. Butler* and wished to be towed to Cowes. The course was accordingly changed for Cowes, and both vessels proceeded on such course for about a quarter of an hour, and then the rope parted. The *C. S. Butler*, after making unsuccessful efforts to get the rope again made fast, went under the stern of the *Baltic* and her master told those on board the *Baltic* that he would lay by the *Baltic* all night, and he did so. During the night some of the crew of the *Baltic* came on board the *C. S. Butler* and refused to return to their vessel.

10. At daylight on the following morning the master of the *C. S. Butler* boarded the *Baltic*, and the master of the *Baltic* then said that as the distance to Cowes was shorter than to the Downs, that he, the master of the *C. S. Butler*, ought to accept \$50. for the towage of the *Baltic*; this offer was declined, but the sum of 1000. was subsequently agreed upon between the two masters, and a written memorandum of agreement to that effect was made out by the master of the *Baltic* in pencil.

11. A towrope belonging to the *C. S. Butler* and a small warp belonging to the *Baltic* were then made fast on board the *Baltic*, and at 8 a.m. the *C. S. Butler* commenced towing the *Baltic* again, and continued to do so for about four hours. When the two vessels were almost off Spithead the pilot on board the *Baltic* ordered the towropes to be shortened, and the engines of the *C. S. Butler* were accordingly stopped and the ropes hauled in and shortened and then made fast, and in commencing to tow the *Baltic* again the two vessels came into collision, the bowsprit of the *Baltic* coming into contact with the starboard side of the bridge of the *C. S. Butler*.

12. The *C. S. Butler* afterwards towed the *Baltic* in safety, and arrived in Cowes Roads at about 4 p.m., where the *Baltic* came to anchor.

13. Neither the regulation starboard side light, nor the globe light mentioned in the fourth paragraph of the petition were exhibited on board the *Baltic* until after the collision in the seventh paragraph of the petition mentioned.

14. The flash light shown from time to time on board the *Baltic* during the time the *C. S. Butler* was endeavouring to get the towropes made fast dazzled the sight of those on board the *C. S. Butler*, and greatly embarrassed them in the management of their vessel.

15. The defendants deny that the collisions in the petition mentioned were occasioned by any negligence or

want of skill on the part of the master or crew of the *C. S. Butler*.

16. The said alleged collisions are attributable to the unmanageable condition of the *Baltic*, and to the difficult nature of the services the *C. S. Butler* was called upon to render.

17. The said alleged collisions, so far as concerns the *C. S. Butler*, resulted from inevitable accident. The said alleged collisions took place under circumstances which absolve the *C. S. Butler* from all blame in respect thereof.

18. The defendants deny the several allegations in the petition, save as appears by this answer.

The pleadings were thereupon concluded.

Butt, Q.C. and *Clarke* for the owners of the *Baltic*.—The damage done was the result of gross negligence on the part of the master and crew of the *C. S. Butler*. It was their duty as salvors, and under their agreement, to perform the service in a proper and seamanlike manner, and their neglect so to do renders them liable for negligence: (*The Thetis*, L. R. 2 Adm. & Ecc. 365; 22 L. T. Rep. N. S. 272; 3 Mar. Law Cas. O.S. 357.) The negligence was of such a gross character that the *C. S. Butler* has forfeited all claim to salvage.

Milward, Q.C. and *R. E. Webster* for the owners, master and crew of the *C. S. Butler*.—There was no negligence on the part of the defendants; the collisions were the result of the difficulty of the service they had agreed to perform. A salvor cannot be held liable for damage done in performing a difficult service in the same way, or with the same strictness, as another ship, having no such duty to perform, nor is *The Thetis* (*sup*) any authority against this proposition. No liability for damage done can be imposed upon a salvor except in case of gross negligence. A salvor, who brings property into safety, is not deprived of his salvage reward, for services rendered, because he has inflicted damage on that property, unless it can be shown that that inflicting of the damage was in the nature of a criminal act, or done wilfully for the purpose of increasing the gain.

Butt, Q.C., in reply.

Sir R. Phillimore.—On the night of the 26th Oct. a barque called the *Baltic* of 458 tons register, and as it fortunately turned out laden with a cargo of deals, suffered damage by collision with two sailing vessels, which left her without rendering any assistance or revealing their names. On the next evening, after receiving this damage, she was off Boschy Head, and about six or seven o'clock she made signals of distress to the screw steamship *C. S. Butler*, which was steaming up channel. There is no doubt that the *Baltic* had received considerable damage, and was in need of assistance, but at the same time it must be remembered that she was in no danger of sinking. In answer to her signals of distress the *C. S. Butler* came to her assistance, but in rendering assistance came into collision with her three separate times, and did her much damage. This damage I should observe may be said to be the result of negligence of the *C. S. Butler*, but there is no suggestion that it was the result of anything but clumsy navigation on her part; it could not be said that the injuries were in any way wilfully inflicted with the design to increase the danger of the *Baltic*, and so increase the value of the salvage service.

Now I think there is a difference in principle between a collision, which is caused by the clumsiness of the salvor, whose assistance is requested and entreated, and carelessness on the part of a

ADM.]

THE CITY OF CAMBRIDGE.

[PRIV. CO.]

vessel wholly unconnected with the vessel which is injured. And I do not think that I said anything in the *Thetis* (*ubi sup.*) at variance with that position. At the same time that opinion only goes this length, that the court will look with a less severe and austere eye at damage caused by the unintentional clumsiness of a salvor whose services have been invoked than it would at damage done by a vessel not so engaged, and not in any way connected with the injured vessel.

Therefore the question I have had to take the opinion of the Elder Brethren on is this, whether this damage, on all these three occasions, but especially on the second, when the material damage was done, can fairly be excused on the ground of accidental mishap, having regard to the size of the vessel, and other circumstances, or whether it does show *crassa negligentia*, as we are in the habit of saying, a gross want of proper navigation, in which latter event she certainly would, in my judgment, although acting as a salvor, be liable for the damage she thus caused. We are of opinion, having regard to the state of the weather and to the fact that the *C. S. Butler* was a steamer with full power to take whatever course was most expedient, that this is a case of negligence of that gross kind which entitles the salvor vessel to redress and reparation; that the *C. S. Butler* ought to have brought herself parallel, instead of going nearly stem on, as she did on the occasion of the second collision; and also that the other two, though slight in their effect, are not to be justified on the principles which I have laid down.

I then asked the Elder Brethren, whether it was a fair suggestion to make that the burning the flare on board the *Baltic* had any effect in bringing about the collision, and the Elder Brethren are of opinion that the flare shown by the *Baltic* in no way excused the collision in this case, and that that charge appears to us to have been an afterthought on the part of the *C. S. Butler* to furnish some excuse for a very gross piece of clumsy navigation.

In the result, the conclusion the court has arrived at is, that in the first case, the case of collision, the *Baltic* must recover against the *C. S. Butler*, and the damages must be assessed in the usual way by the Registrar and merchants.

With regard to the second case, the cause of salvage, I do not think the negligence was of that character which would deprive the *C. S. Butler* of her right to salvage reward, and I am of opinion that it would be a very harsh and unjustifiable proceeding to pronounce that she should forfeit her claim. The amount she will recover will be the amount agreed upon—viz. 100*l.* The costs in the collision cause must be given against the *C. S. Butler*; in the salvage cause against the *Baltic*.

Solicitors for the *Baltic*, Stokes, Saunders and Stokes.

Solicitor for the *C. S. Butler*, Thomas Cooper.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY OF ENGLAND.

Reported by J. P. ASPINALL, Esq., Barrister-at-Law.

March 18, 19, and 20, 1874.

(Present the Right Hon. Sir J. W. COLVILLE, Sir BARNES PEACOCK, Sir MONTAGUE E. SMITH, and Sir R. P. COLLIER.)

THE CITY OF CAMBRIDGE.

Collision—Compulsory pilotage—Mersey Docks and Harbour Board Act 1858 (21 & 22 Vict. c. xxi.) sects. 138, 139—"Proceeding to sea"—Duties and responsibility of a pilot—Ship at anchor—Length of chain—Parting cable—Right to summon pilot to take charge.

Where a ship ready and about to proceed to sea leaves one of the Mersey Docks at night in charge of a licensed pilot, and casts anchor in the river so as to be ready to cross the bar at the mouth of the river on the next morning's tide at an earlier hour than she could if she left the dock in the morning, the going into and casting anchor in the river is a step in the "proceeding to sea," within the meaning of the Mersey Docks and Harbour Board Act 1858 (21 & 22 Vict. c. xxi.) sect. 139, and the employment of the pilot is compulsory under that section from the time of leaving dock, and if the ship breaks away from her moorings, and damages another vessel through the pilot's sole default the owners will not be responsible.

The fact that the pilot becomes entitled under sect. 138 of the Act to a payment, beyond the amount payable for compulsory pilotage, of five shillings a day for every day save the day on which the ship actually leaves the Mersey, does not render the pilotage any the less compulsory.

Where a ship in charge of a licensed pilot is anchored in pilotage waters, the length of cable at which the ship rides is a matter entirely within the province of the pilot, and it is his duty, when the ship swings to the tide to superintend that manœuvre, and to regulate the helm, and it is negligence on his part to go below before the ship is fully swung, leaving the helm amidsheeps without orders as to its regulation; and if, through want of length of cable and of regulation of the helm, the ship sheers and so parts from her anchor in swinging during his absence, the pilot will be alone responsible, provided that the watch on deck take the right manœuvre to counteract the sheering.

Where a ship at anchor in pilotage waters and in charge of a licensed pilot parts her cable, the necessity for letting go another anchor is a matter within the discretion of the pilot, and the manœuvre should be directed by him: and if the pilot is below at the time, the officer of the watch will be justified before giving any orders to bring up the ship in calling the pilot on deck to take charge, provided that there be no immediate necessity for action, as for instance to prevent a collision which is imminent.

This was an appeal from a decree of the learned Judge of the High Court of Admiralty of England (Sir R. Phillimore) in a cause of damage lately pending in that court brought by the appellants, the owners of the ship *Birmah*, and the owners of cargo laden therein, and of the freight payable in respect of the said cargo, and the master and crew proceeding for their money, clothes, and private

effects against the steamship, *City of Cambridge*, of which the respondents are owners for the recovery of damages in respect of losses sustained by the appellants by reason of a collision between the *Birmah* and the *City of Cambridge* in the River Mersey, at about 2.30 a.m. on 27th Feb. 1873. The *Birmah* was at anchor off Egremont Ferry, in the River Mersey. The *City of Cambridge* left Morpeth Dock at about 11 p.m. on 26th Feb. in charge of a licensed Liverpool pilot on a voyage to Calcutta. She was fully equipped and ready for sea, but her master and pilot not deeming it prudent to cross the bar that night, brought her to anchor abreast the Woodside Landing Stage. It was then flood tide. At about 11.30 p.m. the tide turned, and the *City of Cambridge* began to swing. At 12.25 a.m. on the 27th Feb. the cable parted, and the *City of Cambridge* began to drift stem foremost down the river, and after about two hours came into collision with the *Birmah*.

The pleadings and facts will be found fully stated in the report of the case in the court below, ante, p. 193; and in the judgment of the Judicial Committee.

The main questions in the case were whether the pilot of the *City of Cambridge* was compulsorily employed, whether the collision was due to the default of the pilot alone, or to the joint default of the pilot and crew of the *City of Cambridge*, and whether the *Birmah* contributed in any way to the collision.

Sir R. Phillimore held that the *City of Cambridge* was alone to blame for the collision, but that the collision was caused by the default of her pilot alone, and hence dismissed the *City of Cambridge* from the suit. (See report of the case below).

From this decree the owners of the *Birmah*, her cargo and freight appealed on the following grounds: First, because the *City of Cambridge* was not at the time in question in charge of a licensed pilot by compulsion of law; secondly, because the *City of Cambridge*, at the time in question, had not proceeded to sea, and was not proceeding to sea within the meaning of the 138th section of the Mersey Docks and Harbour Act 1858 (21 & 22 Vict. c. xcii.); thirdly, because the pilot was at the time in question employed on board the *City of Cambridge*, under the provisions of sect. 138 of the last named Act; fourthly, because the orders or the pilot were not promptly and duly obeyed; fifthly, because the master and crew of the *City of Cambridge* contributed by their neglect and default to cause the said collision.

March 18 and 19.—*Bull*, Q.C. and *W. C. Gully* for the appellants.—Under the Mersey Docks and Harbour Board Act 1858 (21 & 22 Vict. c. xcii.) sect. 138, there is no compulsion to take a pilot unless a vessel is proceeding to sea. In this case the master of the *City of Cambridge* had no intention of proceeding to sea that night on leaving dock; his avowed intention was to remain at anchor in the river for the night. A vessel could only be said to be proceeding to sea when she unmoored or weighed anchor for the last time, with the intent of going, without stopping, to sea. The master, in deciding to anchor in the river, would have been entitled to dispense with the pilot's services, until he actually left the river, and his retention was a purely voluntary act for which he paid a voluntary rate under sect. 138: (*Attorney-General v. Case*, 3 Price, 302; *Rodriguez v.*

Melhuish, 10 Ex. 117; 24 L. J. 26, Ex.) Under the Merchant Shipping Act 1854, sect. 362, there can be no compulsory pilotage for moving a ship from one part of a port to another; these sections of the local Act evidently carry out that provision. The respondents have failed to prove that there was no act on the part of their crew contributing to the collision. There was a clear want of attention to the helm whilst the ship was sheering; secondly, there was negligence on the part of the officer in charge, in not letting the starboard anchor go at once when the port cable parted, and before the pilot came on deck; thirdly, there was a failure on the part of the look-out to warn the pilot of the position of the *Birmah*: (*The Iona*, L. Rep. 1 P. C. 426.) The sheering in the first instance was the cause of the accident, and in ordinary weather when a vessel sheers that goes a long way to establish negligence on the part of those in charge. The onus of showing that the crew did not contribute to the collision lies upon the respondents; it is not for the appellants to show negligence on the part of any particular person on board the respondents' ship. Although the pilot may have acted wrongly, yet the primary negligence of the crew in not counteracting the sheer, and in not letting go the second anchor renders the owners responsible: (*Scott v. Shepherd*, 2 W. Bl. 802.) This negligence is not too remote, the acts of the crew before the collision must be considered.

Sir John Karslake, Q.C., and *Milward*, Q.C. (*E. C. Clarkson* with them) for the respondents were asked by the court to confine themselves to the questions of compulsory pilotage and of negligence of the crew in not letting go the second anchor.—The *City of Cambridge* anchored in the river only for the purpose of enabling her to proceed to sea with greater facility; she was fully equipped and ready for sea, and her going into the river was only a step in proceeding to sea. In *Rodriguez v. Melhuish* (24 L. J. 26, Ex.) it is intimated that if a ship were fully equipped and ready for sea, the mere fact of anchoring would not render the employment of a pilot the less compulsory. If the appellants' contention is right there can be no compulsion until the ship gets to sea, for not until then is she proceeding to sea in their sense. The 138th section really contemplates a pilot being taken from the commencement of the voyage. It cannot be competent to a master to refuse a pilot, because he may say that he is going to anchor on his way down the river; if that were the case, a master might anchor for the night, and because he did not find a pilot immediately in the morning, weigh anchor and go over the bar without one. Even if he had waited for three or four days, and had paid the river rate all that time the pilotage would still be compulsory. Sect. 138 does not apply only to the case of a ship at anchor in the river; it applies equally to vessels moving about in the river. The words "provided that the pilot who shall have charge of a vessel" seem to contemplate this very case, and to meet the possibility of a pilot compulsorily in charge being detained beyond the ordinary time necessary for taking a ship to sea. In *The Annapolis—The Johanna Stoll* (4 L. T. Rep. N. S. 417; Lush. 295; 1 Mar. Law Cas. O.S. 69) it was held under a similar enactment that the mere payment of a voluntary river rate to a pilot who was once compulsorily employed, did not put an end to the

PRIV. CO.]

THE CITY OF CAMBRIDGE.

[PRIV. CO.]

compulsion, and that clearly shows that the court then considered that the convenience attaching to the continuing of the pilot's services did not destroy the compulsory nature of his service; it was a reasonable thing that he should have extra pay, but this was for his benefit, and did not alter his position. A pilot must have been employed at some period, and if more convenient to employ him in dock he was as much compulsory then as at any other time. Now as to the anchor; the pilot being close at hand it was obviously the duty of the officers of the ship to consult him on the steps to be taken, and in fact he was on deck before any order could have been given by the officer in charge. The ship was broadside on to the tide, and the anchor could only have been dropped on her being straightened in the river.

Butt, Q.C., in reply.

March 20, 1874.—Judgment was delivered by Sir MONTAGUE E. SMITH.—This is a suit brought by the owners of the ship *Birmah* against the owners of the steamship *the City of Cambridge* to recover the damages occasioned by a collision between the two ships. The collision was of a disastrous character, for the effect of it was that the *Birmah* with a valuable cargo was sunk. The questions in the appeal relate to the construction of certain pilotage clauses in the *Mersey Docks Consolidation Act, 1858*, and to the relative duties of the crew and pilot who were on board the *City of Cambridge*.

The facts are that the *Birmah*, a homeward bound vessel, had anchored in the Mersey off Egremont. She was lying there at anchor at the time of the collision, and no blame is attributable to her. The *City of Cambridge* left the Morpeth Dock, on a voyage to Calcutta, at or about 11 o'clock on the night of the 29th February in charge of a licensed pilot of Liverpool. She was fully equipped and prepared for sea. It appears that the pilot had been hired whilst the vessel was in the dock to take her out to sea, and he came on board and took charge of her before she left the dock. It had been arranged between the master and the pilot that the ship should not cross the bar on that night, but should go into the Mersey and be anchored there ready to cross the bar on the morning tide, and it is in evidence that the state of the weather was such that she could not have crossed the bar on the following morning's tide, unless she had been taken out of dock and placed in the Mersey so far on her way. The *City of Cambridge* having been taken out of the dock, was brought up opposite Woodside Ferry and was there anchored by a single anchor, the port anchor. The vessel was swung first to the flood, and then to the ebb tide, but had not been brought to her proper state, and on to the ebb tide, when the pilot left the deck to go to the chart house to lie down. Shortly afterwards the vessel took a heavy sheer, the effect of which was to throw her across the tide, and the strain upon her anchor broke the chain, and the vessel went adrift. There was a strong wind at this time, and a heavy tide running down, and the wind and tide were opposed. The ship's anchors and chains were of usual size and strength. The mate and a proper number of the crew were on deck. As soon as the cable parted, the mate went to the chart-house, which was under the bridge, to tell the pilot, who had left directions as to how he should be called in case anything went amiss. The pilot came at once upon deck and

finding the state of the ship, and that she was drifting broadside down the river, or nearly broadside, he thought the right course was to put her under steam and endeavour to bring her end on to the tide. He was not successful in that manoeuvre, and he afterwards dropped the star-board anchor. That anchor did not hold. It appears to have nipped the ground only, and the pilot in that state of things allowed the vessel to drift down the river. He had her so far under command, that he used the steam power and the helm to avoid the various vessels which he passed in his downward course, but ultimately the vessel drifted between the *North Star* and the *Birmah*. He was able to avoid the *North Star*, but the vessel whilst so drifting was driven against the *Birmah* with such violence that the *Birmah* was sunk. It was not disputed upon the argument that the collision was due to the negligence of some persons on board the *City of Cambridge*.

There are two questions to be considered in the case: first, whether the employment of the pilot before and at the time of the collision was compulsory by law, and, secondly, assuming it to be so, whether the collision was attributable exclusively to the want of care or skill of the pilot.

Now it is admitted that the pilotage would be compulsory in this case, and that the owners would be entitled to the exemption from liability provided in the 388th section of the Merchant Shipping Act, if the circumstances were such as to bring the case within the 134th section of the *Mersey Docks Consolidation Act 1858*. That section is ill drawn, and the construction of it is by no means free from difficulty. But it is the legislation under which the pilotage in the great river Mersey has been conducted for many years, and the construction put upon the clause has been, that when the circumstances bring a vessel within it, and the employment of a pilot is under its provisions, such employment is compulsory. The clause is this,—“In case the master of any vessel, being outward bound, and not being a coasting vessel in ballast, or under the burden of 100 tons, for which provision is otherwise made, shall proceed to sea, and shall refuse to take on board or to employ a pilot, he shall pay to the pilot, who shall first offer himself to pilot the same, the full pilotage rate that would have been payable for such vessel if the pilot had actually piloted the same into or out, as the case may be, of the said port of Liverpool, together with all expenses incurred in recovering the same.”

The question is, whether this vessel was proceeding to sea so that the employment of the pilot was compulsory before and at the time of the collision. When the ship left the dock, the object of the master was to prosecute his voyage by getting to sea as soon as he could. It is true it had been arranged between the pilot and himself that the vessel should anchor in the Mersey for the night, but that was done to further the object of getting out to sea by going so far on the way as would enable her to cross the bar on the next morning's tide, which the vessel could not have done if she had remained in dock, or at least she could not have crossed it so early. Their Lordships think that under these circumstances the ship was proceeding to sea within the meaning of the Act at the time she left the dock, and that the anchoring was not a discontinuance of her progress to the sea, but an act proper and reasonable to be done in the course of it.

It was argued that the employment of the pilot

[PRIV. CO.]

THE CITY OF CAMBRIDGE.

[PRIV. CO.]

fell under the 138th section which relates, it was said, only to the voluntary engagement of pilots. That clause is, "If the master of any vessel shall require the attendance of a pilot on board any vessel during her riding at anchor, or being at Hoyleke, or in the River Mersey, the pilot so employed shall be paid for every day or portion of a day he shall so attend the sum of 5s. and no more." This part of the clause no doubt relates only to the voluntary employment of a pilot; but the latter part of it relates not only to such voluntary employment, but to the extra remuneration to be given to a pilot when he is compulsorily employed under the 139th section. The proviso is this, "Provided that the pilot who shall have the charge of any vessel shall be paid for every day of his attendance whilst in the river, but no such charge shall be made for the day on which such vessel being outward bound shall leave the River Mersey to commence her voyage, or being inward bound, shall enter the River Mersey." Now the pilot in the present case was not hired under the first part of this clause. His attendance was not required for the sole purpose of remaining on board during the time the vessel was riding at anchor. He was engaged to take the vessel to sea. The proviso in the section may be applicable to his remuneration, because, although he was hired to take the vessel to sea, if, in the course of taking her to sea, any delay took place by which she remained a day in the river, he would be entitled to the extra payment which is provided by that section. So far from such a payment being necessarily an incident of a voluntary employment only, it is obvious that the clause assumes that the pilot may be compulsorily employed; that the rate fixed for taking the vessel out to sea, which is fixed according to a scale having relation to the size of the vessel, may be insufficient to remunerate him; and provides when he is delayed for an extra remuneration. It by no means follows that the pilotage was not compulsory under the 139th section, because the pilot might be entitled to extra remuneration under section 138. It was said that the 139th clause would not have been infringed if the employment of the pilot had been delayed until the vessel left her anchorage on the following morning. But if the employment be compulsory upon the vessel proceeding to sea, and a fixed remuneration to the pilot be also obligatory on the master, he surely must be entitled to have the services of the pilot at the commencement of, and throughout the vessel's progress to sea, so as to get the full benefit of the compulsory payment.

The view taken by their Lordships of this Act does not in the least conflict with the decisions in the *Attorney-General v. Case* (3 Price, 302, and *Rodriguez v. Melhuish* (10 Ex. 117; 24 L. J. Ex. 26). Those were both cases of vessels remaining at anchor, intending to remain at anchor, and not instances of vessels proceeding to sea. In the case of *Rodriguez v. Melhuish*, this passage occurs in the judgment of the Lord Chief Baron Pollock. He says, "It was contended by one of the learned counsel on the part of the owners, that if a pilot were taken on board a vessel previous to her leaving the dock, whilst she was in the act of quitting it with the intention of going to sea, no step being necessary except the different operations requisite for her to go on, the vessel in such case would be said to be proceeding to sea. If

this vessel had had all her cargo on board, and the master had been ready to get on board, and she had had everything ready to commence her voyage forthwith, and had left her berth with that intention, it might no doubt have been said that she was proceeding to sea from the time she first left her berth." The case supposed by the Lord Chief Baron is very like the actual case here. Their Lordships think that the *City of Cambridge* was proceeding to sea from the time she first left her berth, and that there was no break in the continuity of her progress to sea after she so left it and before the collision.

The next question is whether, assuming the employment of the pilot to have been compulsory, the collision is solely attributable to the default of the pilot.

Now the remote cause of the disaster was the vessel parting from her anchor by the breaking of the chain cable, and the proximate cause was allowing the vessel to drift down the river so as to come into collision with the *Birmah*. The breaking of the cable was caused by the vessel having sheered when being swung to the tide and bringing too great a strain upon the cable. This was found in the court below to be mainly due to the improperly short length of cable which had been let out, 60 fathoms only. Allowing the vessel to drift in a crowded river like the Mersey was also found by the court below to have been an improper and unskilful mode of managing the vessel which brought about the collision. It was also the opinion of the judges of the Admiralty Court that this drifting of the ship was not a necessary consequence of the first parting with the anchor, inasmuch as there was sufficient steam-power at hand to have allowed of her being navigated into a safe anchorage. Their Lordships see no reason to disagree with any of the above conclusions of fact, and they concur in the opinion of the court below that the pilot is alone to blame for the mismanagement of the ship in the instances just referred to. Indeed, it was not disputed that the length of the cable proper to be let out, and the manœuvring of the ship after she parted with her anchor were matters entirely within his province. It was contended, however, that the master and crew were to blame, or partly to blame in three respects. It was said the quartermaster ought not to have allowed the vessel to sheer when at anchor. It has been already stated that the pilot left the deck before she had fully swung to the tide. Upon this point the court below found as follows:—"The Elder Brethren think also that the pilot was to blame for leaving the deck when he did; that he ought not to have gone away into the chart room when she was three quarters swung to the obb tide; he ought to have waited till she was fully swung, and himself superintended that manœuvre, and seen that her helm was properly put. He left her helm amidst ships. No blame attaches to the *City of Cambridge* with respect to the men that were left on deck; there seem to have been sufficient men and they were properly placed. It is to be observed, that when the vessel swung, the wind and tide were opposed, and no blame at all attaches, in the opinion of the Elder Brethren, with which I agree, to Boyle, the quartermaster, in the manœuvre which he effected. He executed the right manœuvre in counteracting the sheer the vessel had taken, and there was no delay in executing it,"—what he did was to starboard

PRIV. CO.]

GEORGE v. WATTS.

[C. P.]

the helm,—“nor is there any reason to suppose that the pilot, if he had been on deck instead of in the chart room, would have directed anything to be done different from what was done in his absence.” Their Lordships concur in that finding.

Another ground of blame is that a good look-out was not kept by the crew when the vessel was drifting, and particularly that they did not report the *Birma*. It is unquestionable that, as a rule, it is the duty of the crew of the ship to keep a good look-out, and to assist in that way the pilot in charge. But in the present case the court below have found that there was no want of look-out, and their Lordships agree with this finding. The master was on the bridge with the pilot, and the *Birma* was seen and reported by him to the pilot, and both had her in view for a considerable time before the collision.

The only remaining imputation on the crew is, that as soon as the chain of the port anchor broke, the starboard anchor ought to have been at once let go. This may have been a right manœuvre, or it may be, that as the vessel was athwart the tide, it was better to use the steam at command, so as to get her head to the tide, as the pilot afterwards attempted to do. She was to some extent athwart the tide when she originally sheered and the cable snapped, and no doubt at the moment when the cable snapped her head flew still further to the west. She was therefore to a great degree broadside to the tide at the time when it is suggested that the anchor ought to have been dropped. But, however that may be, it was a manœuvre that was properly within the province of the pilot to judge of and direct. If he had not been at hand, it would have been the duty of the officers of the ship at once to have acted, and dropped the anchor, if it had been a proper measure; but in this case the pilot was at hand. It is true that he had gone to the chart-house to lie down, but he had given directions to be called if anything went amiss. In point of fact he felt the jerk caused by the snapping of the cable, and came to the chart-house door as soon as the mate, who instantly ran to him, reached it, and very shortly afterwards he was on deck.

Now, although it would have been the duty of the officers of the ship to act at once if there had been immediate necessity for so doing, as, for instance, to prevent a collision which was imminent, their Lordships think it cannot be said that the emergency was so pressing, or the measures to be adopted so plain, that they were not justified in resorting to the pilot in charge of the ship when he was so near at hand. The dangers of a divided command are great, and must be taken into account in dealing with questions of this kind. The relative duties of the crew and pilot were discussed in two cases, which are to be found in 7 Moore P.C.C. The first is *The Christiansa* (p. 171). In that case Baron Parke, in giving the judgment of the Committee says, “The duties of the master and the pilot are in many respects clearly defined. Although the pilot has charge of the ship, the owners are most clearly responsible to third persons for the sufficiency of the ship and her equipments, the competency of the master and crew, and their obedience to the orders of the pilot in everything that concerns his duty, and under ordinary circumstances we think that his commands are to be implicitly obeyed. To him belongs the whole conduct of the navigation of

the ship, to the safety of which it is important that the chief direction should be vested in one only.” Then there being a question about the neglect to set the staysail and jib under the circumstances in which the ship was placed, the learned judge says:—“The pilot has unquestionably the sole direction of the vessel in those respects where his local knowledge is presumably required. The direction, the course, the manœuvres of the vessel when sailing belong to him; and the Trinity Masters therefore rightly decided that the neglect to set the staysail and jib, after the *Christiana* was driven from her anchorage, was the fault of the pilot alone. It was also his sole duty to select the proper anchorage place and mode of anchoring and preparing for anchoring, as was held to be clear in the case of *The Gipsy King* (2 W. Rob. 537.)” And in the case of *The Lochlilo* (7 Moore P.C.C. 430), Lord Kingsdown in giving the judgment of the Committee in that case, it being a question whether the vessel ought to have sailed through the Downs, says:—“It was contended at the bar that in this case the impropriety of sailing through the Downs was so manifest that the captain ought to have refused, in spite of the pilot’s opinion, to permit the ship to proceed, but we cannot assent to this. It would be very dangerous to hold that there can be any divided authority in the ship with reference to the same subject; and whether the ship was to anchor or to proceed was a matter which we think belonged exclusively to the pilot to decide.”

Their Lordships, therefore, have come to this conclusion that as regards this point of blame, none is properly imputable to the crew. Being of this opinion, it becomes unnecessary to consider the further points urged by the respondent’s counsel, namely, that this default, if established, was too remote from the immediate cause of the collision to render the respondents liable for the consequences of it. But it is to be observed that in the interval between the time when the vessel parted from her anchor and the collision she was under the control of the pilot, who might, if he had employed the engine power at his command, have given her a new and independent course which would have avoided the collision.

In the result their Lordships will humbly advise Her Majesty that the judgment of the court below ought to be affirmed, and this appeal dismissed, with costs.

Appeal dismissed and decree affirmed.

Solicitors for the appellants, W. W. Wynne, agent for Simpson and North, Liverpool.

Solicitors for the respondents, Gregory and Co., agents for Duncan, Hill, and Dickinson, Liverpool.

COURT OF COMMON PLEAS.

Reported by ETHELINGTON SMITH and J. M. LELY, Esqrs.
Barristers-at-Law.

Wednesday, Jan. 28, 1874.

GEORGE v. WATTS.

Action for negligence—General allegations of negligence.—Application for particulars.—Negligence in the navigation of a ship.

Where the declaration in an action against the defendant for negligent navigation of his ship, causing injury to the plaintiff, contains only general allegations of negligence on the part of

C. P.]

HENDRICKS v. AUSTRALASIAN INSURANCE COMPANY.

[C. P.]

the defendant in respect of navigation, and of keeping the machinery and the ship in good repair, the court will not require the plaintiff to give particulars of matters which he may suppose to constitute the negligence of the defendant, because these matters are within the knowledge of the defendant and his servants, and not necessarily within the personal knowledge of the plaintiff.

THE declaration in this action alleged that the plaintiff was received as a passenger, to be safely and securely carried on the defendant's steamer for reward to the defendant, and that the defendant did not find or provide a suitable cabin, or proper and sufficient food or accommodation, or do what was necessary for the personal comfort of the plaintiff, though not prevented by perils, &c., and that the defendant did not use proper care that the ship should be kept in proper repair, or that it should be navigated with due skill, &c., whereby the plaintiff was injured.

An order was obtained by the defendant for particulars to be delivered of the negligence and injuries complained of under this declaration, and this order was made by the master in very wide terms, ordering the plaintiff to give particulars to the defendant of the wounds, bruises, and injuries mentioned in the declaration, of the number of days the plaintiff was kept without food, and of the expenses he had incurred, and of the negligence alleged in respect of the navigation and repair of the ship, and of its machinery.

L. Kelly, on a previous day, obtained a rule calling on the defendants to show cause why so much of the order should not be rescinded as required the plaintiff to give particulars of the negligence in navigation and repair of the ship and machinery. In moving for the rule *nisi* he cited *Brown v. The Great Western Railway Company* (26 L. T. Rep. N. S. 388) and *Peppiat v. Smith* (11 L. T. Rep. N. S. 139; 3 H. & C. 129).

Gainsford Bruce now showed cause.—If these particulars are not given to the defendant he will have no intimation of what is the negligence complained of, and will be unable to prepare evidence to disprove it. There has been a Board of Trade inquiry in this case, so that the plaintiff will have had his attention drawn to the circumstances of the shipwreck, and we want to know on what, among the facts there elicited, he relies as evidence of negligence. Some time, sooner or later, it must be stated; why is he not before the trial to give us this reasonable information? The judge at the trial will amend particulars if something is omitted in them which the defendant ought to have been prepared to meet; but now we shall be prevented from knowing at all what sort of evidence will be produced against us, while the plaintiff will be practically unfettered. Where negligence in navigation and in repair of a ship is alleged, questions involving scientific witnesses may arise on numberless little points, and we are entitled to know beforehand what points are intended to be raised. [Lord COLERIDGE, C.J.—It is for you to know what your own servants' negligence is, not for the plaintiff to guess at what it may have been.] This will entirely prevent particulars being given in actions of this kind, and the plaintiff will never know before the trial what is complained of, what he has to go into court to meet. This is surely contrary to the general practice hitherto, which tends to make the issue between the parties as distinct as possible. The two cases cited are

totally beside the question. In *Brown v. The Great Western Railway Company* the particulars of injuries were refused because no affidavit had been filed of want of knowledge of the nature of those injuries. In *Peppiat v. Smith* the question related to interrogatories, and not to particulars. Interrogatories are for the purpose of establishing a plaintiff's or defendant's own case, whilst particulars are given by a defendant to define his claim.

L. Kelly, in support of the rule, was not called on.

LORD COLERIDGE, C.J.—I think this rule must be made absolute, rescinding the order of the master to the extent to which we are asked to do so. That is, the plaintiff ought not to be required to give particulars of the alleged negligence of the defendant in respect of the navigation and machinery and repair of the ship. In the case in the Exchequer, cited when this rule was moved, the court would not give the particulars which are here given by consent, or at any rate not objected to as included in this order, viz. as to the injuries sustained by the plaintiff: *a multo fortiori* as it seems to me, the court would not give particulars of the defendant's negligence. The plaintiff does not object to specify everything within his personal knowledge, but he does reasonably object to speculate on things within the knowledge of the defendant; he might easily make a wrong guess, and the defendant might so evade the decision of the true issue. We do not mean to lay down a rule that in actions of tort particulars will not be allowed, but what is asked for here seems to go beyond anything that is proper or necessary.

KEATING and DENMAN, JJ., concurred.

Rule absolute.

Attorney for plaintiff, J. H. Wrentham.

Attorney for defendant, A. B. Hoyle.

April 23 and 27, 1874.

HENDRICKS v. AUSTRALASIAN INSURANCE COMPANY.

Marine insurance—English and Dutch policy—Whether implied—Implied reference in one policy to the other—Particular average—Meaning in English policy of "to pay losses on Dutch terms"—"Stranded"—Whether parties to English policy bound by Dutch average statement.

The plaintiff having insured goods with Dutch underwriters upon a Dutch policy, afterwards insured the same goods with the defendants, being English underwriters, upon an English policy, which latter policy contained the words, "to cover only the risk accepted by the clause warranted free from particular average unless the vessel be stranded, sunk, or burnt. To pay all claims and losses on Dutch terms, and according to statement made up by the official *dépêcheur* in Holland." The defendants, at the time the policy was effected, knew that the goods had been already insured somewhere, but had no notice either of the terms or of the existence of the Dutch policy.

The vessel "stranded," according to English law, but not according to Dutch law. An average statement was made up according to the terms of the English policy, but according to the principles of the Dutch law, showing a particular average loss:

Held, upon a special case, first, that the terms of the

C. P.]

HENDRICKS v. AUSTRALASIAN INSURANCE COMPANY.

[C. P.]

English policy, did not amount to notice to the defendants of the Dutch policy, and that the English policy was to be construed independently thereof; but,

Secondly, that the defendants were bound by the average statement, and the plaintiff, consequently, was entitled to judgment.

Harris v. Scamanga (ante, vol. 1, p. 339; 26 L. T. Rep. N. S. 697; L. Rep. 7 C. P. 481), and **Stewart v. West India and Pacific Steamship Company** (ante, vol. 1, p. 528; vol. 2, p. 32; 28 L. T. Rep. N. S. 740; L. Rep. 8 Q. B. 362), discussed and followed.

This was an action to recover the sum of 500*l.*, the amount of a particular average loss alleged to be sustained by the plaintiff, as owner of a cargo of sugar, and the following case was stated by consent of the parties for the opinion of the court, without pleadings, pursuant to sect. 46 of the Common Law Procedure Act 1852.

CASE.

1. The plaintiff is a merchant carrying on business at Amsterdam, in Holland, and the defendants are a company carrying on business as underwriters in the city of London.

2. On the 1st March 1870, the plaintiff, under the name of A. Hendricks and Co., effected with the defendants a policy of insurance upon sugars, the cargo of the British ship *Perpetua*.

3. In that policy the insured voyage is described as follows:—"Lost or not lost, at or from any port or ports and, (or) places in Java, and (or) Sumatra, in any rotation backwards and forwards, and forwards and backwards, to the vessel's port or ports of discharge in Holland;" and the subject matter insured and the risks insured are described as follows:—"The said ship, &c., goods, and merchandise, &c., for so much as concerns the assured, by agreement between the assured and the said company in this policy, are and shall be rated and valued at 2000*l.* on 6715 bags unclayed brown sugar (being in 22 series of 300 bags each, and 1 series of 115 bags), valued at 4000*l.*, to cover only the risks only excepted by the clause, 'warranted free from particular average, unless the vessel be stranded, sunk, or burnt;' to pay all claims and losses on Dutch terms, and according to statement made up by official *dépêcheur* in Holland, being warranted free from particular average, unless amounting to 10 per cent. on each series." A copy of this policy marked A, will be found in the appendix to this case, and may be referred to as part of this case.^(a) The risk so

described, as hereinbefore stated, except as to the words commencing with "to pay," and ending with "series," is a risk well known among English underwriters as a P. A. risk only. The term P. A. only means that the insurance is to cover only the risks excepted from what is called a F. P. A. policy. The term F. P. A. means that the insurance contains an exception in the following terms: "Warranted free from particular average, unless stranded, sunk, or burnt." The P. A. risk only, with the addition of "Dutch terms," or an exception of average under 10 per cent., is not a usual insurance.

4. Previously to the making of the before mentioned policy, the plaintiff had effected a policy of insurance upon the same cargo with Dutch underwriters in Amsterdam. A translation of the last mentioned policy, marked B(a), will be found in the appendix to this case, and may be referred to as part of this case.

5. At the time when the defendants executed the

the said ship with all her ordnance tackle apparel &c. and goods and merchandise or profits on goods and merchandise whatsoever shall be arrived at as above. Upon the said ship &c. until she hath moored at anchor twenty-four hours in good safety and upon the goods and merchandise or profits on goods and merchandise until the same be there discharged and safely landed, and it shall be lawful for the said ship &c. in this voyage to proceed and sail to and touch and stay at any ports and places and whatsoever for necessary or customary purposes without prejudice to this insurance. The said ship &c. goods and merchandise &c. for so much as concerns the assured by agreement between the assured and the said company in this policy are and shall be rated and valued at 2000*l.* on 6715 bags unclayed brown sugar, being in 22 series of 300 bags each, and 1 series of 115 bags valued at 4000*l.* To cover only the risks excepted by the clause warranted free from particular average unless the vessel be stranded sunk or burnt. To pay all claims and losses on Dutch terms and according to statement made up by official *dépêcheur* in Holland, being warranted free from particular average unless amounting to 10 per cent. on each series. Touching the adventures and perils which the said company are contented to bear and do take upon them in this voyage they are of the seas men of war fire enemies pirates rovers thieves felonious letters of mart and counter mart surprisals takings at sea arrests restraints and detentions of all kings princes and people of what nation condition or quality cover heretofore of the masters and mariners and of all other perils losses and misfortunes that have or shall come to the hurt detriment or damage of the said goods and merchandise &c. and ship &c. or any part thereof. And in case of any loss and misfortune it shall be lawful to the assured their factors servants and assigns to sue labour and travel for in and about the defence safeguard and recovery of the said goods and merchandise &c. and ship &c. or any part thereof without prejudice to the insurance to the charges whereof the said company will contribute according to the rate and quantity of the sum herein assured. . . . And further it is agreed by the said company that this writing or policy of assurance shall be of as much force and effect as the nearest writing or policy of assurance heretofore made in Lombard-street or in the Royal Exchange or elsewhere in London and so the said company are contented and do hereby promise and bind themselves . . . for the true performance of the premises in consideration of a premium being paid unto the said company for this assurance by the assured sea and after the rate of 5*l.* per cent.—N. B. Corn fish flour saltpetre salt fruit and seeds are warranted free from average unless general or the ship be stranded. Sugar tobacco skins hides spirits lump flux rice are warranted free from average under 5*l.* per cent. and all other goods also the ship and freight are warranted free from average under 5*l.* per cent. unless general or the ship be stranded."

(a) It will be seen from the judgment that it is not necessary to set out policy B.

(c) The following is the material part of policy A.—"In the name of God Amen. A. Hendricks and Co. . . . doth make assurance and cause themselves and them and everyone of them to be assured lost or not lost at and from any port or ports and (or) places in Java (and) or Sumatra in any rotation backwards and forwards and forwards and backwards to the vessel's port or ports of discharge in Holland. With leave to touch at all ports and places on either side of and at the Cape of Good Hope for all purposes including risk of craft to and from the ship. Upon any kind of goods and merchandise or profit on goods and merchandise whatsoever taken or to be laden and also upon the body tackle apparel ordnance munition artillery boat and other furniture of . . . the *Perpetua* . . . beginning the adventure upon the said goods and merchandise and profits on goods and merchandise from and immediately following the loading thereof on board the said ship at as above upon the same ship &c. and shall so continue and endure during her abode there upon the same ship &c. and further until

C. P.]

HENDRICKS v. AUSTRALASIAN INSURANCE COMPANY.

[C. P.]

policy A, being the policy now sued upon, they knew that the goods had already been insured, but they had no notice where the previous insurance was effected, or what were its terms, unless the court shall be of opinion that the terms of the policy amount to such notice.

6. On the 6th Jan 1870, the *Perpetua* sailed on the insured voyage from Probolinggo, in Java, bound for Amsterdum, and while descending the river, about midnight of the 11th Jan. 1870, took the ground at Oosthoek, near the mouth of the river.

7. The following extract from a protest made by the master at Sourabaya correctly describes the means used to get the ship off:

Got the gig out and ran the stream anchor out with seventy fathoms of a 4 lbs. warp, and hove a strain on it, when the ship canted with her head to the eastward; the water falling, could do no more till the next flood. At eight, strong gales and squally, with rain from S.W.; at ten, same weather—sudden calm, so that could draw the ship striking but very slightly—hoisted the long boat out and sounded round the ship, and found deep water all round. Pumps attended all the while, the ship making one inch of water per hour, being half an inch more than before striking. Noon, squally, with rain; wind from the S.W. The 12th Jan. began with squally weather from the W. to the S.W. At 1 p.m. the ship drew ahead about ten or fifteen feet, and held fast again; got the starboard bower in long boat with fifty fathoms of strain chain; ran it out and hove a strain upon it, but without any effect, the ship to all appearance laying fast a little before the mizen rigging upon the port side, the ship making ten inches of water per hour from midnight to 4 a.m., the ship striking heavily on the stern post; being past high water could do no more till the next flood. About 2 p.m. heavy rain and squalls. The 13th Jan. began with heavy squalls of wind and rain; every stick set. At 1 p.m. the ship began to move; manned the windlass and hove all possible strain, when a heavy squall coming on at the time, the ship slipped off and swung to her anchor, the pumps all the time constantly going. Clewed up all the small sails, veered away upon the starboard anchor to fifty fathoms, and seventy fathoms upon the warp.

8. The ship having been got off in the manner described in the last paragraph, sailed for Sourabaya. The cargo was there discharged, and the repairs to the hull of the ship rendered necessary by her taking the ground at Oosthoek were effected. The cargo was then reloaded, and about the end of March 1870 the ship sailed for Amsterdam, where she arrived in due course, and delivered her cargo.

9. The sugars, on being unshipped at Amsterdam, were found to have received damage from the ship having taken the ground at Oosthoek, and thereupon the owners of the ship *Perpetua*, and the plaintiff, as owner of the cargo, made an application to Dr. James Wertheim to draw up a statement of average. Dr. Wertheim is an official *dépêcher* at Amsterdam, that is, an average adjuster appointed to prepare average statements by the Association of Underwriters and Shipowners at the Exchange at Amsterdam.

10. In pursuance of the before-mentioned application, Dr. Wertheim prepared, amongst other things, and signed a statement, dated the 28th March 1871, of particular average, shewing a sum of 503*l.* as payable by the defendants to the plaintiff under the policy A now sued upon. A copy of this statement, marked C (a), will be found in the

(a) This statement was headed, "Account particular average on unclayed brown sugar, per *Perpetua*," &c., and after setting out the facts and figures, and showing a sum of 503*l.* due from the defendants to the plaintiff, concluded as follows:—

"Considering that the sugar was insured free from

appendix to this case, and may be referred to as part of this case. The figures upon which this adjustment is made are to be taken, for the purposes of this case to be correct.

11. By the expression "series," in the policy A, was meant the packages in which the sugars were packed. The loss amounted to or exceeded 10 per cent. on each series, upon which a loss has been adjusted in the statement so prepared by Dr. Wertheim.

12. At Amsterdam and Rotterdam, there are regulations in force as between underwriters and shipowners. These regulations are made by the Association of Underwriters and Shipowners in each of those towns, and are altered from time to time. These regulations are recognised by the Dutch law as binding in the sense that they are taken to be imported into every policy of insurance made at Amsterdam and Rotterdam respectively, unless the terms of the policy exclude them. The regulations of Amsterdam, at the times of the making of the policies hereinbefore mentioned, contained and still do contain provisions as to particular average, of which the following is a translation:—"In insurances contracted with the condition, 'free from particular average,' the insurer has to indemnify the damage that has occurred only when the vessel has suffered shipwreck, the ship and cargo, or the cargo alone, has taken fire, or in case of stranding, provided that such damage amounts to 10 per cent. or more."

13. By stranding is understood that a ship having got aground remains fixed, and can be got off only by extraordinary measures. In the sense of this clause are regarded as extraordinary measures the cutting of masts, the heaving overboard or landing of the cargo, &c.; and as ordinary measures, the winding on the anchors or on the shore, the working with the sails, and the like. The regulations of Rotterdam contain provisions identical with these, except that for 10 per cent. is substituted 3 per cent. It is agreed that according to the regulations, assuming them to be applicable to the policy A now sued upon (which the defendants deny), the ship had not, under the circumstances stated in this case, stranded.

14. At the time of the making of the policy A now sued upon, and at the time of the commencement of the risk, and until and at the time of the happening of the loss described in this case, the plaintiff was interested in the sugars to the amount of the valuation in and of the sum insured by the policy.

15. It is well known among underwriters that the adjustment of particular average in Holland is more favourable to the underwriters than an adjustment in England. The court may draw inferences of fact.

The question for the opinion of the court is, whether the plaintiff is entitled to recover in this case? If the court shall be of opinion in the affirmative, then judgment shall be entered up for the plaintiff for 503*l.*, together with such interest thereon, as the court may direct, and costs of suit.

particular average, according to Amsterdam Exchange conditions, and that risk covered by the English insurance.

"Considering that the aforesaid damage, however, the ship stranded, but (sic) was floated by no extraordinary measures, cannot be claimed from the Dutch underwriters, the insured is entitled to recover the said damage under the English policies.

(Signed) "JAS. WERTHEIM, LL.D."

C. P.]

HENDRICKS v. AUSTRALASIAN INSURANCE COMPANY.

[C. P.]

If the court shall be of opinion in the negative, then judgment of *non pro.* shall be entered for the defendants, with costs of defence.

The plaintiff's points were, that by the terms of the policy sued on the defendants had notice that the risks intended to be covered by the policy sued on, were risks excepted out of a Dutch and not out of an English policy of sea insurance; that the expression, "Dutch terms," used in the policy sued on, means the law and regulations recognised and observed as between underwriters and assured in Holland; that the defendants, by agreeing to pay all claims and losses on Dutch terms, became liable to pay all such claims and losses as would be valid and binding on them according to the law and regulations recognised and observed as between underwriters and assured in Holland; that according to such law and regulations the ship was not stranded; that according to such law and regulations, and upon the facts stated in the case, the plaintiff sustained a particular average loss, the amount of which the plaintiff is entitled in this action to recover against the defendants; that under the terms of the policy sued on, the plaintiff and the defendants agreed to accept and be bound by the statement to be made up by an official *dépêcheur* in Holland, and such statement having been in fact made up by an official *dépêcheur* in Holland, is both in principle and details absolutely conclusive between the plaintiff and the defendants, and that it is not open to the court to inquire into the propriety of such statement.

The points of the defendants were: That the loss in question is not within the terms of the defendants' policy, but is one from which the defendants are expressly exempted; that the defendants' policy is to be construed with reference to the law of this country, and that the disaster to the ship was a stranding according to English law; that the terms of the defendants' policy were no notice to the defendants that the goods were already insured by a Dutch policy, and that if the defendants were intended to be bound by the Dutch law it was material that they should have had notice of the law of Holland when they took the risk; that the regulations referred to in sect. 12 of the case have no operation upon the defendants' policy; that the clause in the policy, "To pay all claims and losses on Dutch terms," &c., cannot be construed to extend the defendants' liability to a risk already excepted from the policy; that the statement referred to in sect. 10 of the case (Dr. Wertheim's average statement), was not such an adjustment as was contemplated by the policy; that the official adjustment contemplated by the policy was not one which could not operate to extend the risks described in the policy, but only to ascertain the amount of admitted losses.

Bull, Q.C. (with him *Cohen, Q.C.* and *Witt*), for the plaintiff.—The object of the policy sued upon is plainly to supply the defects of the Dutch policy, which did not protect the defendants against particular average losses. This object must have been known to the defendants, and the terms of policy A are notice to them of the terms of policy B. The cargo insured was Dutch, the owner was Dutch, the average adjuster was to be Dutch, and the cargo was deliverable in Holland. [BRETT, J.—Would not the words of the English policy be equally effective without any Dutch policy?] An underwriter must be taken to exercise his own

knowledge, so that the defendants must have known practically of the Dutch policy. They were in fact put upon inquiry by the use of the expression, "Dutch terms," which is found to be an unusual expression by par. 3 of the case, while at the same time it is found by par. 15 that it is well known that average adjustment is more favourable in Holland than in England. [BRETT, J. referred to *Potter v. Rankin* (3 Mar. Law Cas. O. S. 122; 18 L. T. Rep. N. S. 112; L. Rep. 3 C. P. 562). Lord COLERIDGE, C.J.—The policy seems to stipulate not only for Dutch customs, but for payment of losses on Dutch terms; the question is, what does that expression mean? The meaning is that the Dutch law is to be applied by the Dutch average adjuster. [BRETT, J.—Supposing the ship had stranded in English waters, would the losses be settled according to English law or Dutch law?] According to Dutch law. [DENMAN, J.—The court may draw inferences of fact.] That being so, it is a reasonable inference that policy A was intended to cover the defects of policy B. It is impossible otherwise to account for the insertion of the clause relating to "Dutch terms."

Secondly, the defendants are precluded from contesting the statements of the average adjuster. That is the effect upon this case, of

Harris v. Saramanga, ante, vol. 1, p. 339; 26 L. T. Rep. N. S. 797; L. Rep. 7 C. P. 481; 41 L. J. 170, C. P.;

Stewart v. The West India and Pacific Steamship Company, ante, vol. 1, p. 323; vol. 2, p. 32; 27 L. T. Rep. N. S. 620; 28 L. T. Rep. N. S. 740; L. Rep. 6 Q. B. 58, 362.

In *Harris v. Saramanga* (*ubi sup.*), a cargo of rye was insured for 416*l.* from Tagarrag to Bremen. The policy contained the memorandum, "Corn, &c., are warranted free from average unless general, or the ship be stranded," &c.; and in the margin were the words, "To pay general average, as per foreign statement, if so made up. Warranted free from particular average, unless the ship or craft be stranded, sunk, or burnt." The underwriters were held to be bound by average statements admitted to be accurate and correctly made up in accordance with the law in force in Bremen in respect of a loss treated at Bremen as a general average loss and not as a particular average loss. In *Stewart v. West India and Pacific Steamship Company* (*ubi sup.*), the question was, what was the proper construction of the terms "average, if any, to be adjusted by British custom," and it was held that the plaintiff had by those terms made the admitted practice of British average adjusters part of his contract, and was therefore bound by such practice, although erroneous; and this was a point on which the judgment of the Court of Queen's Bench was expressly affirmed by the Exchequer Chamber, while that court guarded itself from pronouncing whether or not the loss was according to the law of England the subject of general average contribution. Both *Harris's* case and *Stewart's* case are in point for the plaintiff, but especially the latter.

Watkins Williams, Q.C. (with him *J. C. Mathew*), for the defendants.—The policy is an English policy, and must be construed according to English law, so that "particular average" must mean particular average as defined by English law. [He referred to the judgment of Lord Ellenborough, C. J. in *Burnett v. Kensington* (7 T. R. 210; 1 Esp.

C. P.]

HENDRICKS v. AUSTRALASIAN INSURANCE COMPANY.

[C. P.]

416; Peake's Add. Cas. 71.) The words, "to pay all losses," &c., cannot extend the risk defined by the words preceding them; they only define the manner in which that risk is to be ascertained. The decision in *Harris v. Scaramanga* (*ubi sup.*) can be supported upon different grounds from those stated in the judgments. [Lord COLERIDGE, C. J.—The court is inclined to support that decision upon its own grounds. DENMAN, J.—"Stranded" is an ambiguous word known in different countries to have a different meaning. After the word "stranded" in this policy we have "Dutch terms" occurring in the very next sentence.] That is so; but to give that expression the meaning contended for would be to incorporate Dutch law into an English policy. [BRETT, J.—The average adjuster would have to say whether there was a stranding or not. In this case there was no stranding by Dutch law. How are the "Dutch terms" to operate if your contention be right? It is submitted that neither in Holland nor anywhere else can an average stater have the power to determine whether there has been a stranding or not, either in law or fact. [Lord COLERIDGE, C. J.—In one sense that may be right, but in another it is wrong. The average stater decides neither law nor facts, but he must have both the law and the facts before him. It seems to me that both in *Harris v. Scaramanga* (*ubi sup.*) and *Stewart v. The West India and Pacific Steamship Company* (*ubi sup.*), the average stater did in fact what you say he cannot do. In both these cases it was found that he was correct both in law and fact. It is not contended that he was wrong in his view of his own, the Dutch law, here.] His average statement is not a statement at all; it is an opinion, with, as it were, judicial reasons. [DENMAN, J.—Supposing those reasons to be wrong, that will not make the decision wrong.] *Stewart's* case (*ubi sup.*) is distinguishable, because there was an express agreement to be bound by British custom. [BRETT, J.—In that case it had been strongly argued before the Exchequer Chamber that the practice of average adjusters cannot alter the law. I was very unwilling to hold this to be so, and, therefore, I drew up the judgment of the Exchequer Chamber in the form in which it now is.] The words in the policy are, "unless stranded, sunk, or burnt." Suppose the ship had taken fire, that would of itself be a particular average loss according to English law, but not so according to Dutch law, unless the cargo were burnt too. The average stater would then, if the argument on the other side is followed out to its conclusion, have a great and unreasonable responsibility; he would have, that is, the power of altering the words of a policy. The functions of the Dutch average stater here never arose. [Lord COLERIDGE, C. J.—Before a claim can be paid it must be made. In what manner are the losses under the policies to be estimated, unless it be known what they amount to according to Dutch law? Have you not agreed to be bound by Dutch principles? DENMAN, J.—What is the difficulty of holding that stranding means a Dutch stranding? The difficulty is that this is an English, not a Dutch policy. [Lord COLERIDGE, C. J.—The losses whereupon are to be paid on Dutch terms. DENMAN, J.—The more differences you make out between English and Dutch law in the matter, the more it seems to be against you.] The insertion of "Dutch terms" cannot alter the meaning of

"stranded, sunk, or burnt." [DENMAN, J.—According to your argument, "Dutch terms" might be struck out altogether.]

Cohen, Q.C., in reply, argued, first, that the expression, "Dutch terms," must have some meaning; that if it did not mean Dutch law, the expression, "Dutch average statement" would have been sufficient, so that "Dutch terms" must have some meaning not included in "Dutch average statement," which meaning could only be that the claims were to be made according to Dutch law, and paid according to Dutch average statement; and, secondly, that the parties had expressly agreed to be bound by the statement of the Dutch average adjuster, wherefore *Harris v. Scaramanga* (*ubi sup.*) was precisely in point.

Lord COLERIDGE, C. J.—I am of opinion that the plaintiff is entitled to recover in this case.

The question is, whether the defendants are bound to pay upon a policy in which the following words occur: "To cover only the risks excepted by the clause warranted free from particular average, unless the vessel be stranded, sunk, or burnt?" Now, I agree in the argument that this policy is to be construed for all purposes of construction as if it stood absolutely alone. Whether the words which I have read refer to another policy or not is quite immaterial to the question how they are to be construed. The words, then, are such as I have read. Now if the clause went no further than the words, "stranded, sunk, or burnt," the argument used by Mr. Williams with great force would prevail. The policy would be taken to cover such risks as are well known to be covered in an English policy, and the only claim sustainable under it would be a claim sustainable in a case where, according to English law, the vessel was stranded, sunk, or burnt. But the words of the clause do not end here, but are followed by words which have no meaning unless they are incorporated with and govern the previous words, with which they form one sentence. These words are, "to pay all claims and losses on Dutch terms, and according to statement made up by official *dépêcheur* in Holland, being warranted free from particular average, unless amounting to 10 per cent. on each series." I am of opinion that the whole sentence must be taken together, and cannot be split. The claims and losses are claims and losses according to British law, and are claims and losses which are to be considered as accruing and to be paid for according to the Dutch law applicable to the foregoing words in the sentence. The meaning is, that the claims are to be under Dutch law, and the statement of them made by a Dutch average stater, who is to make that statement on considerations drawn from the law with which he is himself acquainted—that is, the law of Holland. That being the fair construction of the contract, we have the facts that the average stater made up his statement correctly according to Dutch law, and that the claim arose and the losses were suffered and stated according to Dutch law. I think, therefore, on principle, the plaintiff is entitled to recover.

My judgment would have been to the same effect had the case stood by itself. But it also happens that this is not the first case of the kind. I am of opinion that, quite independently of principle, the question in this case is absolutely concluded by the two cases of *Harris v. Scaramanga* (*ubi sup.*), and *Stewart v. The West and Pacific*

Steamship Company (ubi sup.). Now in *Harrie v. Searamanga*, the agreement stood thus: "To pay general average, as per foreign statement, if so made up, warranted free from particular average, unless the ship be stranded, sunk, or burnt." It does not become me to say that all the ingenuity expended in arguing that case was thrown away, but the words there were not clearer than the words here. It was contended in that case, then, that the object of the disputed memorandum was, not to extend the risk which the insurers agreed to take upon themselves under the policy, but a mere provision that if there should be a general average loss according to English law arising from a peril insured against, the underwriters would pay it according to the foreign average statement, if made. But the court held the contrary, saying that the words were clear to bind the defendants to pay according to the statement of the average adjuster made according to the law of his own country, and that the defendants were bound by that statement. *Harrie v. Searamanga (ubi sup.)* was afterwards reviewed in *Stewart v. The West India and Pacific Steamship Company (ubi sup.)*. There the words were, "average, if any, to be adjusted by British custom," and the contention was that the defendants were not bound to pay, because they would not be bound to pay by English law. Then the Court of Queen's Bench entered into a discussion as to whether the loss was, according to the general law, properly the subject of a general average contribution, and pronounced an opinion that it was, but further held that the parties had agreed to make "British custom" a part of the contract, so as to be bound thereby, for which reason the judgment of the court, which would otherwise have been for the plaintiff, was given for the defendants. Afterwards the Exchequer Chamber distinctly affirmed the judgment of the Queen's Bench upon that very point.

I think that these two cases, though I will not say they are on all four with, are conclusive in principle of the present case, so that on authority, as well as upon principle, our judgment ought to be for the plaintiff.

BRETT, J.—In this case the contention for the plaintiff was, that there were two policies, one including the risks excluded from the other; and, further, that although the only risks excepted were the risks excepted by an ordinary English policy, yet that those risks were enlarged by the use of the expressions, "to pay all losses and claims on Dutch terms." It was argued for the defendant that the policy was to be construed as if no other policy existed. It was said that the risks were contained only in the words, "sunk, stranded, or burnt," and that the insertion of the subsequent phrase as to Dutch terms does not alter the construction of the contract.

Now, on the first point, I am of opinion that this policy, as it does not either refer to or incorporate the Dutch policy, is to be construed as if no other policy were in existence. On the second point, the risks excepted are those excepted *eo nomine*, the losses where the vessel had not been sunk, stranded, or burnt. If the clause in the policy had ended with its first phrase, according to all recognised rules of construction, the policy would be treated as a pure English policy, and as there was stranding, there would be no loss. The only claim that could have been maintained would

be such as the facts would make out to be a loss according to English law. But the clause does not end with its first phrase. That first phrase is followed by other words which must have some meaning. They are:—"To pay all claims and losses on Dutch terms, and according to statement made up by official *dépêcheur* in Holland, being warranted free from particular average, unless amounting to 10 per cent. on each series." These words do not apply to any claim or any loss, but to a claim for particular average, where the ship has been stranded, sunk, or burnt. But these words can have no meaning unless sunk, stranded, or burnt, according to Dutch law, is intended. It must be remembered that a Dutch average *stater*, would have to inquire, or an English court, if without the assistance of the Dutch average *stater* would have to inquire, what is the meaning of stranded by Dutch law? If no more than the first words were to be found in the policy, there would be no necessity for a Dutch average *stater*. But what we have here is an application of English law to the first part of the policy, subject to the condition that the only claim should be made before a Dutch average *stater* in Holland. And the intention was, that the Dutch average *stater* should be governed in his statement by Dutch law, with which he was presumed to be perfectly acquainted.

Therefore, on the true construction of this policy, I am of opinion that the plaintiff is entitled to recover. But the case is not the first of its kind. I concur with the Lord Chief Justice in thinking that it falls within the principle of *Harrie v. Searamanga (ubi sup.)* and *Stewart v. The West India and Pacific Steamship Company (ubi sup.)*. It is quite true, I suppose, that if a foreign average *stater* made a statement founded on no claim at all, his statement would not bind. But that is by no means the present case. It is admitted that the Dutch average *stater* here was right both in his law and his facts.

DENMAN, J.—I am of the same opinion. Entirely agree that this policy is to be construed without any reference to the Dutch policy, and I do not think that I need say any more on this head. On the second point, the question is, what does this policy mean? [After reading the clause in dispute, the learned judge proceeded:] After the careful discussion which this clause has undergone, I can entertain no doubt that it means that the policy is to be interpreted by Dutch law. But the defendant says that this is extending the terms of the contract beyond their fair meaning. Now if we were bound to go by the first part of the clause, that would be a very tenable argument. But we cannot take the first part by itself; and, going on to the second part, we come to the expression, "stranded," and if we ask what stranded is, the answer is, stranded according to Dutch law. But there remains one point in favour of the defendants. There is an official *dépêcheur*, and what he says is conclusive. Then, argues Mr. Williams with much force, that the official *dépêcheur* cannot make law, and that if he had made a wrong statement, that statement would not be binding. But this last point fails, when we consider that in this case the statement was made up on correct facts, and was correct according to Dutch law. I do not say that if the statement were wrong it would bind the parties; the probabilities are that it would be inoperative. But in the present case it is quite

C. P.]

GUNN v. ROBERTS.

[C. P.]

correct, so that there is nothing to prevent the plaintiff from recovering.

Judgment for plaintiff.

Cohen, Q.C. stated that the arbitrator had left it to the court to say whether the plaintiff should have interest or not, and asked for interest accordingly, stating that the defendants had had the use of the money for three years.

The COURT allowed interest for two years only, deducting one year's interest for the period during which the special case had been pending.

Attorneys for the plaintiff, Pritchard and Sons.
Attorneys for the defendants, Waltons, Bubb, and Walton.

Tuesday, May 5, 1874.

GUNN v. ROBERTS.

Power of captain to bind owners by a contract for necessities—Foreign port—Agent duly authorised—Existence of agent not known to person supplying the necessities—What are necessities for a ship?

The master of a ship has authority to pledge his owner's credit for money borrowed or for goods supplied by him (the master's) orders in a foreign port only where (1) it is necessary to borrow money for the prosecution of the enterprise, or the goods are reasonably necessary for the use of the ship; (2), where neither the owner or his duly authorised agent is at the port, nor within such distance that he can be reasonably expected to interfere.

Want of knowledge of the presence of the owner or an agent on the part of the person supplying goods or money to a master will not entitle him to recover against the owner.(a)

Where the captain of a ship in a foreign port obtained from the plaintiff advances of money and supplies for the ship, both of which were necessary, in the sense that the ship could not have made her voyage without obtaining them from some one in the port, and it was proved that the owners had instructed R. and Co. to be agents for the ship in the port, and had provided them with funds for the purpose, of which the captain was fully aware, and that R. and Co. had undertaken the duties of agents, and had paid money, and were willing to have paid any more that the ship might require :

(a) The decisions of the United States courts fully support this view, and even go further, for it has been held in more than one case, that the person who supplies goods or money cannot recover against the ship, and consequently not against the owners, if it appears that the master had no necessity to pledge the ship's credit by reason of his having funds in hand to supply the ship's wants; there is a duty on the material man to make inquiries as to the master's authority, before making advances; (*Thomas v. Osborn*, 19 Wallace U. S. Sup. Ct. Rep. 22; *Pratt v. Reed*, 1b, 330) *The Eledona*, 2 Benedict U. S. Dist. Ct., 2nd Dist. Rep. 31). The general rule of law to be deduced from the various American cases seems to be that, even in a foreign port a master cannot pledge his owner's credit, if the owner himself or his agent be present; (*See Parsons on Shipping*, vol. 2 pp. 8, 9, 10, 17, and the cases there cited.) The general rule never seems to have been really disputed. Several cases have been decided which have been distinguished on the ground that the owner has ratified the master's authority; (*See Provost v. Patchin*, 9 N. Y. Rep. 235, and the cases there cited.) The English rule as here laid down will be found expressly adopted in a later case (*Gager v. Babcock*, 48 N. Y. Rep. 154).—Ed.

Held, on the authority of Arthur v. Barton (6 M. & W. 138), that the plaintiff could not recover against the owners for the goods and money supplied to the captain, because they had appointed R. & Co. as their agents in the port; and that notwithstanding that the plaintiff was ignorant of there being any agents, and had contracted with the captain on the faith of the latter's representation that he was his own master, and that there were no agents for the ship in the port.

THE declaration in this action was for money advanced and lent, and for goods sold by the plaintiff to the defendant; and the plea was never indebted, except as to £98 paid into court. The case came on for trial before the late Lord Chief Justice Bovill, at the Guildhall, in July, 1873, and the plaintiff obtained a verdict for £113 beyond the sum paid into court. Leave was reserved to the defendants to move, and in *Michaelmas Term* a rule nisi was obtained to set aside the verdict and enter it for the defendant, on the ground that "upon the facts proved and found by the jury and admitted, the defendant was not liable in point of law for any part of the plaintiff's claim, or beyond the sum paid into court."

The facts were that the plaintiff was a ship's chandler at Quebec, and that the defendant's ship *Aracena* arrived there in ballast on the 13th Oct. to find a cargo. She was consigned to Ross and Co., who had a credit of 500*l.* from the defendant for the purposes of the ship. It was admitted that they would have advanced more than the 500*l.* if they had been applied to by the captain. The captain had been instructed that Ross and Co. were agents, and that he was not to pay bills himself, but was to send them to Ross and Co.; and Ross and Co. had been told not to allow the captain to have more than small sums at a time. These were all private instructions, and were not known to the plaintiff. It was plain that the stevedore, and probably the captain, committed a fraud on the owner in reference to the loading of the ship with timber. However, the captain applied to the plaintiff and obtained from him 427*l.*, of which 300*l.* was in cash, and the supplies and money were such as the ship was in actual need of, being for the most part necessary for the loading of the ship.

The Lord Chief Justice left the following among other questions to the jury:—

1. Did the plaintiff before or at the time of making the supplies know that Ross and Co. had authority to supply the ship with all things necessary?—Answer: No.

2. Did the plaintiff know that Ross and Co. were agents for the ship?—Answer: No.

3. Ought the plaintiff to have inquired in the ordinary course of business?—Answer: Yes.

4. The jury also found that the goods supplied were necessities, and it was admitted that the plaintiff might have ascertained that Ross and Co. were agents if he had inquired.

Benjamin, Q.C. and Wormald showed cause.—The point made on the part of the defendant is that the captain was not the agent of the defendant so as to bind him; but we contend that any limitation of authority not known to the plaintiff cannot bind the latter, and the captain is *prima facie* clothed with a general authority to bind the owners for necessities. A ship comes once, not like a trader on a regular line, to a port seeking a

C. P.]

GUNN v. ROBERTS.

[C. P.]

cargo. The captain says he is his own master, and the things which are supplied to him are just such as would be wanted for the ship. No one else supplies them and yet it is suggested that the owners who have had the things are not liable. All that is shown here is that Ross and Co. were ready to supply money for those things, but they did not do so.

It is an important fact that the captain having borrowed 1500 dollars from the plaintiff, gave an account to the owners at Liverpool, and showed a balance in hand of 252 dollars which the defendant took from him. This sum has never been returned, the 98l. paid into court was stated by the defendant to be for fresh meat, &c., supplied in Quebec, but we contend that the owners cannot ratify the act of the master in part only, but must do so altogether if they accept any benefit. Here the defendant actually took some of the money: (See *Bristow v. Whitmore* in the House of Lords, 1 Mar. Law Cas. O. S. 95; 4 L. T. Rep. N. S. 622.) What the defendant is trying to say is this, "The captain is not my agent, but I will keep what he has got for me from you." This is a ratification of what the master has done.

But independently of that the master can bind the owners for necessities, and the jury have found that these were necessities. [BRETT, J.—In the sense in which you use necessities it would be the same if the owner were in the port.] No secret instructions can affect the position of the plaintiff, nor take away the general authority possessed by the master as agent of the owners. In *Grant v. Norway* (10 C. B. 686), a passage from Smith's Mercantile Law, p. 59, is quoted by Jervis, C. J., as being a correct exposition of the law. "The master is a general agent to perform all things, relating to the usual employment of his ship, and the authority of such an agent to perform all things usual in the line of business in which he is employed cannot be limited by any private order or direction not known to the party dealing with him." [BRETT, J.—Does that go farther than that the captain may bind within his general authority, notwithstanding secret orders, but that if things are not necessary he cannot bind the owners?] What then is the meaning of the term? It must mean necessities for the ship, not that they could not be got from some one else. [BRETT, J.—I take it that if the owner is in the port with money or credit, nothing is a necessary in the proper sense.] Yes that is so, if the owner or the agent be known; but there is no case deciding that the plaintiff is bound to make inquiries if there has been an agent secretly appointed. In *Williamson v. Page* (1 Car. & Kir. 581), it was held that the only question for the jury was whether under the circumstances the captain's position was such as to constitute him the authorised agent of the owner, in order to procure advances, and that the state of accounts between the captain and the owner had nothing to do with the case. *Arthur v. Barton* (6 M. & W. 138), which will be urged most strongly against the plaintiff, is not a decision against the view we are contending for. In the first place, what was assumed to be there decided, was not in reality decided. It occurs merely in the reasoning of the judge, it is an *obiter dictum*, and entitled no doubt to the respect due to a great judge, but still it was not a decision on the point of the known existence of an agent in the

port. In the second place, accepting it as far as it goes, it may well be that the attention of the court not being directed to that particular matter, the proposition is stated without the qualification which we think is understood though not expressed throughout, viz., that agent means "known agent," not secret agent. And that this is implied may be argued from the use by Lord Abinger, of "general" agent. He says, "Therefore, if the owner or his general agent be at the port, or so near it as to be reasonably expected to interfere personally, the master cannot unless specially authorised, or unless there be some custom of trade warranting it, pledge the owner's credit at all, but must leave it to him or to his agent to do what is necessary." [BRETT, J.—That is the proposition you have to negative; the fact of the presence of the agent in the port deprives the master of any implied authority.] The law is not now so rigid as at the date of *Arthur v. Barton* (*ubi sup.*). *Edwards v. Havill* (14 C. B. 107) shows that when there was a reasonable necessity the captain might act so as to pledge the owner's credit, though the owner was within one day's post. So in *McIntosh v. Mitchell* (4 Ex. 175), where it was held that the owner is on the plaintiff to show that the money and goods supplied were necessities. That once we accepted here, and proved at the trial. In *The Riga* (*ante*, vol. 1, p. 246; 26 L. T. Rep. N. S. 202; L. Rep. 3 Ad. 516) there is a review of the authorities on the meaning of "necessaries," and the Court of Admiralty adopted Lord Tenterden's definition, given in *Webster v. Seekamp* (4 B. & Ald. 352): "Whatever the owner of the vessel as a prudent man would have ordered if present at the time, comes within the meaning of the word 'necessary' as applied to those repairs done or things provided for the ship by order of the master, for which the owners are liable." In a recent American case *McCready v. Thorn* (6 Sickels, 51 N. Y. R.) the law is reviewed, and thence it appears that the necessity of borrowing money and the application of it must be proved by the lender to entitle him to recover, but that is all; nothing is said about the discovery of a secret agent. There is the analogy of necessities for infants and married women in favour of my contention. [BRETT, J.—Is not the analogy of hypothecation a better one? It is the fact always of there being an agent which it is important in reference to bottomry bonds to discover. The captain cannot hypothecate if there is an agent.] Hypothecation is so extreme and exceptional an act, that an agent must be known if you advertise. Consider, also, how dangerous it would be to hold that the mere fact of there being a secret agent, necessarily prevents a plaintiff from recovering for goods actually needed and actually supplied and enjoyed. It would open a wide door to fraud by collusion between owners and mere colourable agents. And then with regard to bottomry bonds, the principle is not so precise as is suggested by the court, for the judgment of Dr. Lushington in the case of *The Faithful* (31 L. J. 81, Adm.) shows, that the question of knowledge is not unimportant. He says, there is this qualification of the general principle, "If the merchant who furnishes these supplies, and at the same time takes a bottomry bond, is in a state of invincible ignorance as to the existence of an agent in the same town—the bond

C. P.]

GUNN v. ROBERTS.

[C. P.]

will be good; but we must recollect that invincible ignorance means that ignorance which it is not in the power of the merchant to overcome by taking requisite means to obtain information on that subject." If invincible ignorance will support a bottomry bond, surely such *bona fide* ignorance as existed here will support a contract for necessities actually supplied, nothing having occurred to excite even a suspicion that the statement of the captain that there was no agent was untrue. [BRETT, J. also referred to *The Alexander* (1 W. Rob. 346; *Johns v. Simons*, 2 Q. B. 424.)]

C. Russell, Q.C. (Cohen, Q.C. with him) in support of the rule.—First, I say, that the payment into court is not an admission of liability, nor that the captain was authorised to pledge the owners' credit. Then as to the supposed ratification. The captain had borrowed money from the plaintiff and from Ross and Co., and though on returning home he had 250 dollars in hand, there was nothing to show whose money that was, so that the defendant in receiving it did not thereby ratify the captain's dealing with the plaintiff; and there is no finding of the jury to support the theory of ratification. I contend the onus is on the plaintiff to establish that there was authority in the captain to bind the owners.

Secondly, the onus is not discharged by merely showing that the things were necessary to the ship, in the sense of being needed in the prosecution of the voyage, and that some one must have supplied them, but that regard must be had to the fact of whether or no the owner has provided the captain with funds or means of otherwise providing himself with such necessities. [BRETT, J.—Will you go so far as to say that it must be a direction to the jury, if it be proved that there was an agent, that they cannot find that goods supplied *alimunde* are necessities?] Yes, we must go that length, and it was so taken at the trial. The hypothecation cases are in *Williams and Bruce's Admiralty Practice*, p. 42. But the cases cited as modifying or questioning *Arthur v. Barton*, do not upon examination really do so at all; and unless *Arthur v. Barton* (*ubi sup.*) is overruled, there can, I submit, be no doubt about this case. It is admitted that the captain has only a limited authority, even without relying upon Lord Abinger's judgment: he cannot pledge the owner's credit except for necessities for the ship, that is, except in case of necessity. It comes round, therefore, to the question, What is a case of necessity? and I contend that the true consideration is not merely whether the thing itself is necessary, but whether it was necessary to pledge the owner's credit to get it. [DEMAN, J.—The captain might buy goods a dozen times over, and they would be equally necessities each time.] Yes, that shows it by a *reductio ad absurdum*; if the captain made away with or misappropriated the things supplied, the owners might be held liable for necessities *ad infinitum* were the construction contended for on the other side to prevail. [He was then stopped by the court.]

BRETT, J.—In this case the facts are that the plaintiff has supplied the captain of the defendants' ship with certain goods and money while she was seeking a cargo in a foreign port, and such goods and money may be taken to have been necessities for the ship in the sense that the ship could not have sailed without

their having been supplied by some one. But it was proved that the owners, the defendants, had previously instructed Ross and Co. to be their agents in that port for the ship on this voyage, and had supplied them with certain funds on purpose, and had authorised them to advance more if necessary for the voyage, and had appointed them to be their agents for the management of the ship at the port. Ross and Co. had accepted the office, and it was proved were ready, able, and willing to do anything that was necessary, and had in fact already made some advances and provided some supplies. The captain, though he knew all this as to the appointment of Ross and Co. as agents (although I may say that it seems to me immaterial whether he knew or not) yet fraudulently gave orders to the plaintiff for goods for the ship. It was admitted that the plaintiff was not cognisant of the fraud, and knew nothing of Ross and Co.; but it was found by the jury that he might by inquiry have discovered that there was an agent, and then by inquiry of Ross and Co. have known of the real position of the ship and of the captain. Under these circumstances the plaintiff having supplied goods on the defendant's credit brought an action for money lent and for goods delivered under an alleged contract between the plaintiff and the defendants, the latter acting through their agent, the captain of the ship.

One point which is urged on behalf of the plaintiff is this, that although the captain was not authorised to pledge the defendant's credit, yet as he did actually borrow money, and the defendants have, by receiving part of that money, ratified the act of the captain, they are liable to repay the money so borrowed. Now that they might have ratified is undoubted, but then it was necessary to show that they had received part of the money as coming from the plaintiff, and that they knew of the proceedings and arrangement. But here there was no knowledge; and I am clearly of opinion that here there has been no ratification. The case, therefore, is an ordinary one of money and goods supplied on a captain's order.

The action is on a contract and the onus is on the plaintiff to show the contract. There is certainly no express contract, for what was made was between the plaintiff and the captain, and the defendants are not bound unless the captain had authority. It is said that the captain had a general authority. That is a vague statement, but it is so far true, because a captain has a general implied authority to pledge the owner's credit under certain circumstances, but only then. To raise the presumption of the existence of that authority, it is recognised law that two main things must exist. First it must be necessary to borrow money for the prosecution of the enterprise, and as to goods, such must be shown to be reasonably necessary for the use of the ship—I don't say absolutely necessary, but they must certainly be reasonably necessary, for if the goods are not necessary then even if the captain could not get money from the owner or his agent, still he would not be entitled to pledge the owners' credit for such goods. Secondly, even if the things are necessities, that alone does not give the captain authority. It must also be shown that it was reasonably necessary to order them on the credit of the owners, or of the ship, and that the master could not get the supplies through an authorised agent. If the captain is at a port of his own

C. P.]

GUNN v. ROBERTS.

[C. P.]

country, or at a foreign port, and if neither the owner nor an agent be there, or near there, and the captain be not in funds, then there is a reasonable necessity to order goods or borrow money on the owner's credit, as in the case of *Edwards v. Havill* (*ubi sup.*). But if the owner be present, with means to pay for the goods, or credit to procure them, then there is no necessity for the captain to pledge his owner's credit. Where the owner is present and in a position to pay, if this be proved in fact, it is the law of England that the judge trying the case ought to direct the jury that the captain has no right to pledge the owner's credit, and that he has therefore no authority, express or implied to do so; and that therefore there can be no evidence of a contract between the owner and the person who may have supplied goods or lent money to the captain under such circumstances.

This is equally the fact if the owner has an agent who stands in his place, who has been instructed to act as agent and accepted the appointment, and who is ready and able to fulfil the duties. Here, also, there is no necessity for the captain to act on behalf of the owner, for the agent can act; the captain is servant of the owner, and so is servant of the agent, who is in the owner's place for the time being; if it were otherwise, and if he do act, he in effect takes away the owner's discretion.

This view of the law is supported by every authority. The leading case on the subject, which has always been so treated on account of the exposition of the law in it by Lord Abinger, is *Arthur v. Barton*, and it has ever since been quoted with approbation, has never been questioned, and has been copied into all the books. This exposition of the law is well and accurately summed up in *Maclean's Law of Shipping*, 1st edit., p. 131, where the law on many subjects is very well stated, though I do not invariably agree with the author when he theorises as to what the law ought to be. The passage is this, "There are well defined limits to the exercise of the authority of the master to pledge the owner's credit. First, in cases where the owner or his agent is at the port of the ship's anchorage, or so near to it as to be reasonably expected to interfere, the master cannot, without special authority for the purpose, pledge the owner's credit for the ship's necessities." Now the general law that is contended for by Mr. Benjamin, and rightly, is that the master is agent for the ship, and so for the owner for all that is necessary for the working and navigation of the ship, and the prosecution of the voyage. Quite so, but there is this limitation as shown in *Arthur v. Barton* (*ubi sup.*), that if the owner or his agent be at the port the authority of the master ceases. Then there is also a second limitation, given by *Maclean*, p. 132, viz., that the authority of the master, when it exists, extends only to such things as the owner, if there, would deem to be necessary; to such things only "as a prudent man would deem reasonably necessary and proper to be done or supplied for the purposes of the voyage on which the vessel is engaged."

The plaintiff, therefore, must show, taking these limitations in inverse order, first, that the things which have been supplied to the captain are such things as the owner would if present have thought necessary; and, secondly, that neither the owner nor any agent of his was there with money or credit to supply the things, whether the port be a

home or a foreign port. If the plaintiff fails in these, he fails in the primary part of his proof; he fails, that is to say, in proving the authority of the captain, and, if so, there is no contract.

This is in harmony with the law in respect to hypothecation as held universally in the Admiralty Court. In case of hypothecation the lender must, to justify such a proceeding, and enforce his bond, show that neither the owner nor his agent were at the port, and that there was no means of communication with them, and that by no reasonable efforts could the master have obtained money upon less security. Although the money may be absolutely necessary for the ship, yet that fact does not give the master authority to hypothecate, without showing what have been just stated to be the other requisites, notwithstanding the indisputable possession by the captain of a general authority. It has been argued that the plaintiff might, if he knew of no agent, deal with the master, but it has been held to the contrary. The knowledge of the plaintiff who lends the money is immaterial, and has always been held to be so, and that being so, can it be maintained that necessity alone, in the case of the ship being in need of the goods or money, apart from any consideration whether or not the owner or agent is ready to supply them, is to justify any one in dealing with the captain and fixing the owners with liability.

But it is said that the course of authorities has been broken in upon by the case of *The Faithful* (*ubi sup.*). I would always speak of any judgment of Dr. Lushington with the greatest respect, as I believe him to have been one of the ablest judges who ever sat on the bench, and his decisions are those of one who had the widest knowledge of law, especially in relation to nautical matters; but I am bound to say that the propositions put before us from *The Faithful* (*ubi sup.*) seem to me to be novel, and I doubt if they could be sustained in the form in which they have been cited. But even if they can be sustained they would not help the plaintiff here, for the finding of the jury taken this case out of those limitations, as the plaintiff might have by inquiry discovered the agent. That also was a case of bottomry, and not strictly or necessarily applicable to a case of goods supplied to a captain. The American case (*McCready v. Thorne, ubi sup.*), which has been mentioned does not derogate from the long list of authorities which have affirmed the state of the English law.

I am of opinion therefore that upon proof or admission that Ross and Co. were agents appointed by the owners to manage the ship in the port (I do not rely upon their being consignees) and to see the ship supplied, and that they had accepted the appointment and were ready to act—on that proof or admission, I think the Lord Chief Justice would have been justified in directing, and would, if he had acted strictly, have directed the jury that there was no case on behalf of the plaintiff for them to consider. For these reasons I am of opinion that this rule to enter the verdict for the defendant must be made absolute.

DENMAN, J.—I am of the same opinion. The only difficulty which presented itself to my mind during the argument was owing to the fact that the case most relied upon for the defendant and

[EX. CH.]

FISHER v. LIVERPOOL MARINE INSURANCE COMPANY (LIMITED).

[EX. CH.]

which has been taken to govern this, does not contain on the point for which it is cited an absolute ruling, but only a dictum. But I think that as that judgment was delivered in a case where the whole law on the subject was before the court, and was discussed and considered, and as it has been adopted everywhere since that time, and has been inserted in the text books and recognised in later cases, the dictum may be acknowledged to be a correct statement of the law. I find in Maude and Pollock (Law of Merchant Shipping, 2nd edit., p. 102), it is laid down in this way. "The master under the general authority which he possesses may do all things necessary for the due and proper prosecution of the voyage in which the ship is engaged. This implied authority, however, does not usually exist in cases in which the owner can himself personally interfere; as for instance when the ship is in a port where the owner resides, or at which he has beforehand appointed an agent." It seems that the law is always stated as being settled in favour of non-liability of the owner where there is an agent in the port, and every case goes to corroborate the view that such is the law, though no case is founded on exactly the same circumstances as the present one. All, however, recognise the principle that the agent, if there be one, is the proper person to furnish all supplies, and the liability of the owners does not arise if the master takes upon himself to do what he should not, and no implied authority to bind the owners is created. On the other points it is unnecessary for me to enlarge; but as to the evidence of ratification I agree with my brother Brett, and I also think that we need not resort to the fourth finding of the jury unless the doctrine alleged to be laid down by Dr. Lushington in the case of *The Faithful* (*ubi sup.*) is to be applied, which I am of opinion it is not.

Rule absolute.

Attorneys: for plaintiff, Stevens, Wilkinson, and Harries; for defendant, Field and Roose, for Bateson.

EXCHEQUER CHAMBER.

Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

Saturday, May 9, 1874.

FISHER v. LIVERPOOL MARINE INSURANCE COMPANY (LIMITED).

Marine insurance—Slip—Contract to prepare or execute policy—30 & 31 Vict. c. 23, ss. 7, 9.

An underwriter's slip is a contract of marine insurance within the meaning of the Stamp Act 1870, and such a contract cannot be enforced unless expressed in a stamped policy, and the agreement on behalf of underwriters signing a slip is not an agreement divisible into two parts, the one to make a contract of marine insurance, and the other to prepare a policy in accordance with that contract, but is a whole agreement to insure, which can only be enforced against underwriters after being expressed in a stamped policy.

Defendants' agent in London initialled a slip for the insurance of some steel rails of plaintiffs on board a ship. Defendants' agent, in the ordinary course of his business, sent a copy of this slip the same day to the defendants. The plaintiffs' brokers paid defendants' agent in London for the premium due upon the policy, and also for the stamp of the policy, but although some correspondence

passed concerning it, no policy was executed. The steel rails were totally lost by perils insured against, and the defendants refused to pay the amount named for insurance on the slip.

Held by the Exchequer Chamber (affirming the majority of the Queen's Bench), that the whole transaction between the parties constituted one indivisible contract; and that sects. 7 and 9 of the Stamp Act 1870, prevented the plaintiffs from recovering the insurance from the defendants in any form of action.

THIS was an appeal by the plaintiffs under the provisions of the Common Law Procedure Act 1854, against the decision of the Court of Queen's Bench in making absolute a rule of that court, obtained by the defendants pursuant to leave reserved, calling upon the plaintiffs to show cause why the verdict found for the plaintiffs should not be set aside, and instead thereof why a nonsuit should not be entered or a verdict for the defendants, on the grounds hereinafter set out.

The pleadings, the arguments upon the rule, and the judgments of the court below are reported ante p. 44.

The following were the facts as stated in the appeal case:

The plaintiffs carry on business as merchants and shipowners at Barrow-in-Furness, and were at the time of the orders to insure hereinafter referred to, the owners of the ship *Lizzie* and continued to be such owners up to and at the time of the loss of the ship as hereinafter mentioned. The defendants are a marine insurance company, carrying on business at Liverpool under the name and style of the Liverpool Marine Insurance Company (Limited) and in Dec. 1871 they entered into a voluntary liquidation.

The defendants appointed and employed before such liquidation the firm of Eames and Co. to act as their agents in London to accept risks and receive premiums on their behalf; and a circular was issued by the defendants informing the public of the said appointment.

Eames was called as a witness by the plaintiffs, and proved the course of business to be as follows:—His firm accepted risks for the defendants by himself initialling the slips. Copies were then sent to him by the brokers, and he invariably forwarded copies of the same to the defendants at Liverpool on the same day.

The plaintiffs employed their brokers in London, Messrs. John Patton, jun., and Co., to insure for them a cargo of steel rails per the said ship *Lizzie*.

The said cargo was the property of the Barrow Hematite Company, as agents for whom the plaintiffs were shipping the said cargo; and the *Lizzie* being the plaintiffs' own vessel, they were carrying the cargo upon a charter-party, and took upon themselves the risk of the cargo, and to pay the Hematite Company any loss thereupon. After the loss the plaintiffs paid the Hematite Company the amount thereof.

On the 16th Nov. 1871, the said brokers submitted a slip, of which the following is a copy, to Eames, who initialled the same:—

£4923 & 5s.	Cash.	16th Nov. 1871.
	John Patton, jun., and Co.	
	<i>Lizzie</i> .	
Barrow.		New York.
Steel Rails.		fpa.
1. g. s.	880	{ 60. %
10. & s.	£2000	
	£1000 T. R. E.	16/11

[EX. CH.]

FISHER v. LIVERPOOL MARINE INSURANCE COMPANY (LIMITED).

[EX. CH.]

The initials T. R. E. appearing opposite the sum of 1000*l.* on the slip are the initials of Eames, and the said slip was put in and proved at the trial, and was not objected to.

A copy of the said slip or request note was made by the brokers and sent to Eames, and he the same day forwarded to the defendants a document of which the following is a copy:—

Liverpool Marine Insurance Company (Limited), London Agency, London, 16 1/2.

Policy in the name of	On	Voyage including all risk of craft, fire of cargo and seizures and the consequences of any attempt thereof.	Sum insured.	Premium per cent.	£ s. d.	No.
John Patton, Jun., and Co.	Steel Raille sp. for. to & a.	At and from Barrow to New York.	£1000	6s.		
To the debit of Do.	Ship Lixie Date of Sailing			Brokerage, Discount, Duty.....	£	

On the 1st or 2nd Feb. a debit note was forwarded from Eames to Patton and Co., of which the following is a copy:—

The Liverpool Marine Insurance Company (Limited). London Agency.
Eames and Co., St. Michael's House, Cornhill, E.C.
To premiums for the month of Jan. 1872, less 0
brokerage and 10 per cent. discount for cash) £25 15 0
Policy Duty 2 6
Messrs. J. Patton, Jun. and Co. £25 15 9

NOTE.—The discount will be forfeited in default of prompt payment on the 8th Feb.
Please bring this account when payment is made.

On the 29th Jan. 1872, the defendants' liquidators in Liverpool wrote a letter to Eames and Co., of which the following is a copy:—

T. R. Eames, Esq., London.

29th Jan. 1872.

Dear Sir,—We have open slips as at foot, and shall be glad to receive instructions regarding them.—Yours faithfully, for Self and Co., Liquidators.

J. S. Mc GHEE.

Nov. 16th.—*Lixie*. Barrow to New York.—1000*l.* on steel rails. J. Patton, Jun., and Co.

To this letter Eames and Co. sent no reply, but upon receipt of it communicated with Patton and Co., and received their instructions to put the slip forward. The slip was put forward, but on what date did not appear, except by the correspondence hereinafter set out.

On the 13th March 1872, Patton and Co. paid to Eames and Co. by cheque to the defendants' order the sum of 25*l.* 15*s.* 6*d.*, being 25*l.* 13*s.* for premium and 2*s.* 6*d.* for stamp duty on the policy; and Eames and Co., acting on their authority, endorsed the said cheque for the defendants and paid it into their own banking account, and it was duly paid.

The brokers on that occasion, and on several occasions afterwards, applied to Eames for the policy, and were told it had not been sent up from Liverpool, and that he would write a sharp letter about it.

The *Lixie* and cargo were on the 21st March

1872 posted as, and were in fact, totally lost, and the defendants refused to execute any stamped policy or to pay the insurance.

The following correspondence took place between Eames and the defendant:—

London, 13th March 1872.

Gentlemen,—Messrs. Patton and Co. have applied to us for policy per *Lixie*, the ship of which was sent to you some time since. Please send us the policy at your earliest convenience.—Yours faithfully, EAMES & CO.
To Liverpool Marine Insurance Company. Per E. O.

Liverpool, 16th March 1872.

Messrs. Eames and Co., London.

Dear Sirs,—Please send me a copy of your reply to mine of the 29th Jan., it appears to have been mislaid.—Yours faithfully, J. S. Mc GHEE.

For Self and Co., Liquidators.

Eames and Co., London. To J. S. Mc GHEE.

London, 18th March 1872.

In reply to yours of the 16th we cannot find any favour from you dated the 29th Jan. Please hand me a copy of same.

Eames and Co., London. 29th March, 1872. To Liquidators of Liverpool Marine Insurance Company.

Copy of yours of 29th duly to hand. We have never received the original. The *Lixie* was sent down to you to put forward some ten days ago and we have since written asking for policy. Messrs. Leech and Harrison will let us know to-morrow about ship or ship's policy.

Defendants to Eames and Co.

21st March 1872.

As so long a time has elapsed since the insurance per the *Lixie* was opened, we cannot now issue a policy.—Yours faithfully, J. S. Mc GHEE.

For Self and Co., Liquidators.

Eames and Co. to Defendants.

London, 25th March 1872.

Referring to your note in reference to the "*Lixie* we are surprised at your refusing to issue a policy. This slip was sent to you some time since, and we have written more than once for the policy, and moreover, Messrs. Patton and Co. have paid the premium.

Defendants to Eames and Co.

Liverpool, 26th March 1872.

Lixie.

Dear Sirs,—Will you please say when you received the premium per this vessel, as we have no account of it? The earliest request we had for a policy was contained in your letter of the 13th March.—Yours faithfully,

J. S. Mc GHEE.

For Self and Co., Liquidators.

Eames and Co. to Defendants.

27th March 1872.

In reply to yours of yesterday, respecting the *Lixie*, the copy of the slip was sent to you some time since; we have no record of the date, because it was sent down without any letter being written (as customary). The cheque was paid 13th March. Messrs. Patton and Co. inform us that they wish to know by wire to-morrow, without fail, if you intend to issue a policy or not?

Defendants to Eames and Co.

28th March 1872.

I have yours of yesterday, and repeat a policy cannot now be issued. The liquidators do not recognise the payment to you by Messrs. Patton, as you had no authority to receive it on behalf of this company. Permit me to ask you why advice of the payment was not made to the liquidators before?—Yours faithfully,

J. S. Mc GHEE.

For Self and Co., Liquidators.

Eames and Co. to Defendants.

28th March 1872.

Yours of the 28th duly to hand. Never having had our authority to receive money on behalf of the Liverpool Marins cancelled, we of course considered we were justified in applying for and receiving premiums overdue; and referring to your other question, it has not been our custom, as you well know, to make daily advice of payments made to us on behalf of the company. Messrs. Patton and Co. inform us that they consider you are bound to issue a policy.

EX. CH.]

FISHER v. LIVERPOOL MARINE INSURANCE COMPANY (LIMITED).

[EX. CH.]

The company did not at any time return the said slip, nor did they in any way intimate that they would not grant a policy until the 21st March 1872.

The learned judge put the following questions to the jury:—First, Did the defendants authorise Eames to initial slips, to accept risks and to receive premiums on their behalf? Secondly, Did the defendants by approving the circular issued, stating that Eames had authority to accept risks, give the plaintiffs reasonable ground to believe, and did the plaintiffs believe, that if they (the plaintiffs) paid the premium and stamp duty on a slip initiated by Eames, the defendants would issue a policy in accordance with the slip? Thirdly, Were the plaintiffs prevented by the conduct of the defendants from insuring elsewhere? And the jury having answered all these questions in the affirmative, a verdict was thereupon entered for the plaintiffs with damages 1000*l.*, the declaration to be taken as amended to meet the facts and findings, his Lordship ruling that there was no evidence on the record as it stood, and reserving leave to the defendants to move to enter a verdict for them or a nonsuit, on the grounds that there was no evidence to go to the jury of liability on the part of the defendants, and that his Lordship ought not to have allowed the declaration to be amended.

The defendants obtained a rule nisi in pursuance of the leave reserved, which was made absolute on the 5th July 1873 by a majority of the Court of Queen's Bench, consisting of Quain and Archibald, JJ.; Blackburn, J. dissenting.

The grounds of the rule were: First, that there was no evidence to go to the jury; secondly, that no action will lie on the slip alone without the policy; thirdly, that no interest was shown in the plaintiff; fourthly, that the learned judge should not have allowed the declaration to be amended.

Benjamin, Q.C. (with him *Aspland*) argued for plaintiffs, the appellants.

B. G. Williams, Q.C. (with him *Aspland, Q.C.*), for defendants.

For the arguments, see report of the case in the court below, *ante*, p. 46.

COLERIDGE, C. J.—I am of opinion that the judgment of the majority of the Queen's Bench should be affirmed; and I base my opinion upon the short and simple ground that all the transactions between the parties from the initialling of the slip constituted one and an indivisible contract. If that be so, it is admitted that the contract cannot be enforced. It has been laid down again and again that a slip is a contract of marine insurance; and by sect. 7 of 30 & 31 Vict. c. 23, "No contract or agreement for Sea Insurance," with exceptions not relating to this case, "shall be valid unless the same is expressed in a policy." Although this contract, which was expressed only on the slip, cannot be enforced at law, it is not the less a contract, and the parties are bound in honour to carry it out. The learned judges in the court below have differed in opinion, and I think it was natural enough under the circumstances of this case that any one should endeavour as far as possible to maintain and enforce a contract which was repudiated as this was by the defendants. It can, however, be supported at law only by separating that part of the contract of which the slip might be evidence from the other part, which can only be inferred, that the defen-

dants should tender to themselves a policy which they themselves should sign. Now, certainly it would require an extreme refinement of words and some violence to common understanding to support such a contention; everyone knows that the ordinary contract in a case of this kind is that which the slip contains, and on this ground I think the judgment of the majority of the court below was correct. Something has been suggested as to a subsequent contract contained in the correspondence, but there is no reference therein to any but the one whole and indivisible contract which alone existed between the parties. This being so the judgment of the Queen's Bench should be affirmed, I think, on the grounds stated in the opinion of the majority of that Court.

BRAMWELL, B.—I am entirely of the same opinion. It has been said that there are here two contracts between the parties; a very ingenious suggestion, and emanating, probably, from a natural feeling of indignation at the conduct of the defendants. When the practice in these matters is borne in mind, it is impossible to hold that this transaction constituted two contracts. When Eames initiated the slip, the company in the ordinary course was bound to issue and pay for the policy; it was all arranged at one time, and no further bargain was required. Nothing further needed to be done by the plaintiffs. If there had been a lawful contract, or I should rather say a contract enforceable at law, no one would have suggested there were two contracts. Take, by illustration, the sale of land, which can be enforced at law without difficulty; no action would ever be brought merely for not preparing the conveyance; or in a sale of goods, no action would be brought for not making a memorandum in writing. It is admitted here that this is not a contract to execute a policy, which, if it were, would not improve the plaintiffs' position; but it is said there was a breach of a contract to prepare a policy. The result of this contention would be that although no action would lie for not executing a policy, there might be an action for not preparing one. It is very curious if such an obligation exists. I should like to see the form of the count into which Mr. Benjamin wants to amend the declaration. Another argument was that the plaintiffs were misled by the defendants' statements, and that the latter were estopped from denying the existence of a policy. That argument comes to this: That the defendants were bound to execute and forward a policy; but as they had not forwarded it, the plaintiffs had a right to assume that they had done the other part of their duty and had executed it. I am of opinion that the judgment of the majority of the court below should be affirmed.

BRETT, J.—If I had not tried this case at Nisi Prius, I should not have added anything to the judgments which have been delivered. I sought at the trial every possible means to upset the defendants, and now I would do anything I can to accomplish that result which is in accordance with my view of the law. Eames had bound the defendants as far as he could, but this slip as it appeared to me was the only evidence of a contract between plaintiffs and defendants. If there be evidence of any other contract between them I do not see it in the case. It has been urged in the argument that by reason of the course of business

ADM.]

THE CAIRO.

[ADM]

there was another and independent contract that the defendants would execute and stamp a policy; if so it was only because the slip was signed. Then it was said there was an independent contract by the defendants to procure an executed policy from themselves; this, however, could be only a roundabout way of evading the Stamp Act. It has been urged also that there was a contract in February to get the policy prepared. But there was no agency in Eames for that purpose, and the point was not raised at the trial, nor left by me to the jury. As this rule is upon leave reserved, I do not think that it is open to the plaintiffs to argue this point now. Nay, more, I doubt whether even my brother Blackburn's judgment was founded upon that point at all. There is nothing to distinguish this action from one upon a Lloyd's slip against an ordinary underwriter; if this contract could be upheld, so could any of which a slip is the only evidence. Although with great reluctance, I cannot concur in the opinion of my brother Blackburn.

CLEARY, B., DENMAN, J., POLLOCK and AMPHLETT, BB., concurred.

Judgment affirmed.

Attorney for plaintiffs, J. McDiarmid.

Attorneys for defendants, F. Fenn and Son, for Anderson, Collins, and Robinson, Liverpool.

COUPE OF ADMIRALTY.

Reported by J. P. ASHALL, Esq., Barrister-at-Law.

Monday, April 27, 1874.

THE CAIRO.

Salvage of life—Ship damaged by collision—Crew leaving her without orders—Liability of ship and shipowners—Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), sect. 458—Admiralty Court Act, 1861 (24 Vict. c. 10), sect. 9.

Where some of a ship's crew leave their ship shortly after a collision at sea in consequence of her dangerous condition, not against their master's orders, but without orders and without his consent, and are picked up and rescued from a dangerous position by another vessel, the owners master and crew of the latter, as salvors of life within the meaning of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), sect. 458, and the Admiralty Court Act, 1861 (24 Vict. c. 10), sect. 9, may recover reward against the ship.

Semble, that if a crew deserted their ship without reason and contrary to orders, and afterwards found themselves in a position of danger from which they were rescued, the ship would not be liable for salvage reward.

This was a cause of salvage instituted on behalf of the owner, master and crew of the smack *Emerald*, against the foreign steamship *Cairo* and her freight, and her owners intervening.

The *Emerald* was a fishing smack of fifty-one tons register, belonging to the port of London, and was manned by a crew of eleven hands all told. On the 15th Dec. 1873, she left Harwich for the fishing ground off Cromer. Between 7 and 8 p.m., on that day, she was three quarters of a mile from the Newarp Lightship, and her crew saw the *Cairo* in collision with another steamer. When the steamers separated the crew of the *Emerald* heard cries from the direction of the *Cairo*, and headed their smack in that direction.

After about twenty minutes a boat was made out with several men in her, and pulling only two oars. The weather was then fine, but with a fresh breeze blowing, and an attempt was made to get the boat alongside, but the men in the boat not speaking English, were unable to understand the directions of the master of the smack, and there was great danger of their being run over by the smack. The smack was then laid to, and the boat succeeded in getting alongside. The men in the boat were very frightened, and at once jumped on board the smack letting go the boat, and had not the mate of the smack jumped into the boat and fastened it astern of the smack it would have gone adrift. The men turned out to be some of the crew of the *Cairo*. One of them was much injured about the head and neck. When they got on board the smack they all went into the cabin, and the smack bore up for the *Cairo*. The master of the smack in getting within hailing distance of the *Cairo*, asked that vessel if any assistance was required, and getting no answer lowered a boat, but at this moment the *Cairo* steamed away towards Winterton where she was beached to prevent her sinking. The smack then bore away for the Wold, where she lay to till daylight. Between 1 and 2 a.m., on Dec. 16, it came on to blow hard from the N.N.E., with a heavy sea, and the boat of the *Cairo*, which was astern of the smack was struck and carried away. At 7 a.m., the weather having moderated, the smack sailed for Yarmouth, where she arrived at about 11 a.m., and landed the *Cairo's* crew. The services rendered entailed upon the *Emerald* the loss of two days fishing, equal to about 40*l*. The allegations in the plaintiffs' petition relating to their services were as follows:

9. When the boat's crew from the *Cairo* were picked up they were in a very dangerous position; from the darkness of the night it was impossible to see the boat until very near, and the men ran great risk of being run down by passing vessels; those on board the *Emerald* did not have reached them if they had not heard their cries, and it was only by the exercise of great care on the part of those in charge of the *Emerald* that they managed to get near the boat in the darkness without running it down. The boat's crew had no compass with them and only three oars, one of which they were obliged to use for steering, so that they had little or no power over the boat and were at mercy of the wind and tide, and with the wind at W.S.W. and the flood tide they could never have gained the lightship (the *Newarp*), which they were attempting to reach, for they were already to the south of the lightship, and they must have driven towards the cross sand and into broken water before the wind changed to the N.N.E. If the boat's crew had not got on board the *Emerald* before 1 a.m. on the morning of the 16th they most in all probability have been lost.

10. In rendering the aforesaid services the master and crew of the *Emerald* incurred some risk and underwent great exertion and fatigue.

The facts alleged by the plaintiffs were admitted by the defendants, except in so far as they alleged that the character of the services were exaggerated, and the defendants further pleaded:

5. When the boat's crew left the *Cairo* she was in no danger, and there was no reason for leaving her, and the said boat's crew left without the master's orders, and against his consent and most improperly.

6. They submit that in the circumstances no salvage services were rendered for which the defendants are liable, or which they ought to be ordered to remunerate.

From the evidence produced at the hearing it appeared that the *Cairo* was an iron ship, built in compartments, and that by the collision only one compartment was damaged. The master of the

[ADM.]

THE CAIRO.

[ADM.]

Cairo had immediately after the collision ordered the boats to be lowered by way of precaution, but had given no orders for the passengers and crew to get into them; according to his account there was no such danger as justified the boat's crew in deserting the *Cairo*, and they left without his consent, although not against his positive orders. He heard the hailing from the *Emerald*, but did not answer it because he had enough hands on board to enable him to get to a place of safety, and did not require assistance. When the men returned to the ship a few days afterwards he allowed them to return to their duty without remembrance.

The *Admiralty Advocate* (Dr. Deane, Q.C.), and G. Bruce for the plaintiffs.—The plaintiffs are entitled to life salvage under the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104) sect. 458, and the Admiralty Court Act 1861 (24 Vict. c. 10) sect. 9.(a) The boats crew at the time the services were rendered still belonged to the *Cairo*, and the plaintiffs may recover in rem against that ship. The object of the statute was to give encouragement to salvage of life. If it should become necessary for sailors to inquire as to the right of persons in danger to leave their ship before instituting a suit, this inquiry will be made before rendering the service, and the result will be that fishermen and others will refuse to take people on board their vessels unless they are satisfied that they can recover salvage reward. There was here a substantial life salvage. In *The Willen III.* (ante, vol. 1, p. 129, L. Rep. 3 Adm. & Ecc. 487; 25 L. T. Rep. N. S. 386), a claim for life salvage rendered to persons in boats who had left their ship was entertained.

Butt, Q.C. and Phillimore for the defendants.—In *The Willen III.* (supra) the ship was on fire before she was abandoned. Owners ought not to be made responsible for services rendered to sailors who abandon their ship without necessity. To decree salvage reward will be to give a direct premium for cowardly desertion of ships in distress. There was no such danger as justified the desertion. The services afterwards rendered were of a most trifling character.

The *Admiralty Advocate* in reply.

Sir ROBERT PHILLIMORE.—In this case, the *Emerald*, a fishing smack of 55 tons register,

(a) The Merchant Shipping Act, 1854, s. 458. "In the following cases (that is to say): Whenever any ship or boat is stranded or otherwise in distress on the shore of any sea or tidal water situated within the limits of the United Kingdom and services are rendered by any person.

1. In assisting such ship or boat.

2. In saving the lives of the persons belonging to such a ship or boat.

3. In saving the cargo or apparel of such ship or boat or any portion thereof.

And whenever any wreck is saved by any person other than a receiver within the United Kingdom there shall be payable by the owners of such ship or boat, cargo, apparel, or wreck, to the person by whom such services or any of them are rendered or by whom such wreck is saved, a reasonable amount of salvage, together with the expenses properly incurred by him in the performance of such services or the saving of such wreck, the amount &c., . . . to be determined, &c."

By the Admiralty Court Act 1861 (24 Vict. c. 10) s. 9, the provision is "extended to the salvage of life from any British ship or boat, whereforever the services may have been rendered, and from any foreign ship or boat where the services have been rendered wholly or in part in British waters."

belonging to the port of London, and navigated by eleven hands, having put into Harwich with a cargo of fish, sailed from that port on the morning of the 5th Dec. last year. On the night of that day she was in the fishing-ground off Cromer, and those on board her saw two steam-vessels in collision, and heard cries, and shortly afterwards, after sailing about for twenty minutes, they made out a boat with several men in her, pulling only two oars and calling out for assistance. The men in the boat were foreigners, and unable to understand the directions given by the master of the *Emerald*. The men in the boat, ten in number, were taken on board the *Emerald*, and the court is now asked by the owners, master, and crew of that vessel, to award salvage remuneration to them on the ground that, under the 458th section of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), a salvage service has been rendered by them in saving the lives of the crew of the boat from imminent danger. The action has been brought against the steamship *Cairo*, to which the men belonged, and which proved to have been one of the two vessels seen from the *Emerald* to have been in collision as before mentioned.

The defence raised by the owners of the *Cairo* is two-fold. It is first alleged that the lives of the men picked up by the *Emerald* were in no danger; secondly, that if their lives were, in the circumstances, in any danger, the men had improperly left their ship, and therefore the ship ought not to be made responsible in respect of the services rendered to them.

The facts of the case lie in a very small compass. I must remember what were the circumstances, the time of the year, the time of night, the fact that the men taken on board were foreigners, ignorant of the locality, ignorant also of the English language. I must also remember the state of the weather. At the time the men left the *Cairo* the weather was fine, but it changed, and the sea became rough not long after the men had been received on board the *Emerald*, so that in all probability, if they had remained at sea in the boat, they would have been lost. At the same time it must certainly not be forgotten that, although when the men were taken on board it was moonlight, there was some haze on the water, and the boat, when discovered, was in the track of vessels and in danger of being run down. In all the circumstances, I am of opinion that these men were saved from danger of loss of life by the assistance rendered by the *Emerald*, and that if no other objection can be shown to exist, the plaintiffs are entitled to recover salvage.

The question of law raised by the defendants is of a grave kind, and I should be sorry by any words of mine to countenance the idea that the section of the Merchant Shipping Act, 1854, to which I have referred, could be so strained as to compel the court to hold a ship liable for salvage because some of her crew had deserted her without reason and contrary to orders, and afterwards found themselves in a condition of danger, from which they had been rescued. It might be that the persons rescuing them from peril might be salvors of life, and yet not be able to charge the ship with their reward. Whether a ship is or is not liable for life salvage is a question which can only be answered by considering the circumstances of each case. In this case, no doubt, the *Cairo* herself had suffered serious damage, and was in

[ADM.]

THE MIRIAM—THE SCHWANN.

[ADM.]

great danger, and the boat's crew left the ship to avoid that danger, and shortly afterwards her master accepted the services of another set of salvors, who assisted to beach her. It must be remembered that before the men left their vessel the boats had been ordered out. There is, moreover, the fact that the captain of the *Cairo*, who has given his evidence, does not state that the men left the vessel contrary to his orders; but he does state that two days afterwards they went back on board their vessel, and that he allowed them to return to their duty without making any remonstrance to them. Certainly it would not be to the interests of navigation or commerce if the court were to put a narrow construction on a statute passed for the encouragement of efforts to save human life and to look too strictly at the acts of men leaving their ship in time of peril, and so to deprive salvors who have relieved them from a position of danger from all reward.

On the whole, taking into consideration the special circumstances of the case, I am of opinion that the ship must be held liable to be condemned in salvage on the ground that the lives of the men belonging to her were saved from danger by the services rendered by the plaintiffs in this case. At the same time, the sum I have to award as salvage remuneration, bearing in mind the facts, must be moderate. Considering that it has been proved that the *Emerald* lost two days' fishing, which involved a loss of 40*l.*, I think that I shall not be wrong in awarding the sum of 140*l.* to the salvors with costs.

Solicitors for the plaintiffs, Keen and Rogers.

Solicitors for the defendants, Stokes, Saunders, and Stokes.

Wednesday, April 29, 1874.

THE MIRIAM.

County Court appeal—Arrest of ship—Practice.

Where plaintiffs appeal from a County Court in a cause in rem in which there has been a decree for the defendants and the ship has in consequence been released, the High Court of Admiralty will on the ex parte application of the plaintiffs order a warrant to issue for the detention of the ship till bail given or the appeal decided.

Seemle that notice should be given before arrest to the defendants, so that they may come in and apply for the suspension of the warrant if they see fit.

THIS was an appeal from a decree of the judge of the County Court of Carnarvon, holden at Bangor, in a claim of tort in respect of goods carried in a ship made under the provisions of the County Courts Admiralty Jurisdiction Act Amendment Act 1869 (32 & 33 Vict. c. 51) sect. 2. The claim was in rem against the ship for the wrongful conversion of a quantity of coals shipped by the plaintiffs on board the *Miriam*; the master had sold the coals, and the plaintiffs claimed 80*l.* The ship was arrested and no bail given. The County Court judge found that the master was justified in selling the coals, and gave a decree for the defendants with costs. From this decree the plaintiffs appealed.

Clarkson, for the appellants, now moved for a warrant to issue to arrest the ship so that she might be detained till bail should be given or the

appeal decided.—The suit having been dismissed in the court below, the vessel has been released. There is no means of continuing an arrest on appeal to the court. On judgment for the defendants the County Court necessarily releases, and the only way of obtaining security for judgment on appeal is to re-arrest the ship. There is no settled practice on this point, and hence it is necessary to apply to the court. [Sir R. PHILLIMORE: Has notice of this motion been given to the other side?] No. If notice was given the ship would go at once.

Sir R. PHILLIMORE.—I shall order the warrant to issue, but at the same time I direct that notice be given to the shipowner before the arrest takes place, so that he may, if he thinks fit, come in and apply to the court for the suspension of the warrant on good cause shown.

Solicitors for the plaintiffs, Ingledew, Ince, and Greening.

Tuesday, May 5, 1874.

THE SCHWANN.

Collision—Costs—Compulsory pilotage—Practice of Admiralty Court.

In a collision case, where a defendant raises, together with other defences, that of compulsory pilotage, and his ship is found to be liable, but is dismissed on the ground that the negligent act of the compulsory pilot was the sole cause of the collision, each party pays his own costs, according to the practice of the High Court of Admiralty. It has never been the custom in that Court to apportion the costs in such cases according to the findings on the various issues.

THERE were cross causes of collision instituted, the one by the owners of the barque *Robert Morrison* against the steamship *Schwann* and the North-German Lloyd, her owners, intervening, and the other by the owners of the *Schwann* against the *Robert Morrison* and her owners intervening. The two causes were heard at the same time, and upon the same evidence, under the 34th section of the Admiralty Court Act 1861 (24 Vict. c. 10), but pleadings were printed in both causes.

The facts are shortly as follows:

The *Robert Morrison* was coming up the river Thames in tow of a steam tug, and in charge of a licensed pilot; she had her lights duly exhibited, and whilst proceeding along the south shore of Limehouse Reach, at the rate of about two knots an hour, her pilot sighted the lights of a vessel, which turned out to be the *Schwann*, coming down the river. The *Schwann* came on and struck the *Robert Morrison* in the starboard bow, and drove her on to the south shore. The petition on behalf of the *Robert Morrison* alleged that her lookout first sighted the green light of the *Schwann*, bearing about two points on the *Robert Morrison*'s starboard bow, and that the *Schwann* improperly ported into the starboard bow of the *Robert Morrison*. The answer on behalf of the *Schwann* alleged that her lookout first sighted the red light of the tug of the *Robert Morrison*, a little on the *Schwann*'s port bow; that the helm of the *Schwann* was ported; that shortly afterwards the tug showed her green light; that the engines of the *Schwann* were set full speed astern, but that the collision nevertheless happened; the answer then continued as follows:—

[ADM.]

THE SCHWANN.

[ADM.]

5. Save as herein appears, the defendants deny the truth of the several allegations contained in the petition filed in this cause.

6. The *Robert Morrison* and her said tug improperly neglected to port their beams.

7. The *Robert Morrison* and her said tug improperly starboarded their beams.

8. The *Robert Morrison* and her tug improperly neglected to keep to the north or Middlesex side of the river, and improperly neglected to take proper measures for passing the *Schwann* on her port side.

9. The *Robert Bruce* did not duly comply with the provisions of the 29th of the Rules and Bye-laws for the Regulation of the river Thames.

10. The said collision was occasioned by all or some or one of the matters set forth in Articles 6, 7, 8, and 9, of this Answer, or otherwise by the neglect or default of those on board the *Robert Morrison* or her tug.

11. The said collision was not occasioned by any neglect on the part of those on board the *Schwann*.

12. Before and at the time of the said collision the *Schwann* was navigating within a district, and under circumstances in which it was compulsory upon her and her master and owners that she should have on board, and be in charge of a duly-licensed pilot for each district, and before and at the time of the said collision the *Schwann* was in charge of and being navigated by and under the direction of a pilot duly licensed for each district, and all the orders of such pilot were duly obeyed by the master and crew of the *Schwann*, and if the said collision was in any way occasioned by any improper navigation of the *Schwann* it was solely occasioned by some neglect or default on the part of the said pilot, and not in any way by the master or crew of the *Schwann*.

The main questions of fact between the parties were, which of the two vessels was nearest to the south shore when they first sighted each other, and consequently whether they showed each other their respective green or red lights.

The cause was heard before Sir R. Phillimore, assisted by Trinity Masters on May 1st and 2nd 1874, and he then pronounced that the collision was entirely owing to the negligence on board the *Schwann*, but that the owners of the *Schwann* had succeeded in establishing their plea of compulsory pilotage; and consequently the cause against the *Robert Morrison* was dismissed with costs, but the owners of the *Robert Morrison* claiming the costs of issue of which ship was to blame, in which they succeeded, that question was reserved.

May 5, 1874.—The question of costs now came for argument.

Milward, Q.C. and Gainsford Bruce for the owners of the *Robert Morrison*.—We submit that the practice in these cases has never been definitely settled, and that on principle the owners of the *Robert Morrison* are entitled to costs of the issue in which they have been successful. It has no doubt been usual where a defendant raised a double defence, but succeeds on the plea of compulsory pilotage only, to give no costs, but it has never been so definitely decided. In *The Admiral Boxer* (Swab. 193, 197) Dr. Lushington only expresses his belief that the practice has been to give no costs to the defendants. In *The Batavier* (4 Notes of Cases, 356; 10 Jur. 20) it was intimated that if the defendants had admitted the facts and relied upon the plea of compulsory pilotage alone they would have got their costs. In the *Muriel* (a)

(a) This was a cause of collision instituted by the owners of *La Escoffier* against the *Muriel*. The defendants pleaded after setting out the facts as follows:

10. In respect of the alleged cause or causes of the said collision, the defendants deny the truth of the statements relating thereto, in the several articles of the peti-

tion were refused although the only defence raised was that of compulsory pilotage. In the *Royal Charter* (L. Rep. 2 Adm. & Ecc. 362; 20 L. T. Rep. N. S. 109; 3 Mar. Law Cas. O. S. 262) costs were allowed the defendants as they raised the defence of compulsory pilotage only and succeeded thereon. From these cases it is clear that there are instances where costs are given to a party to a damage suit where the defence is compulsory pilotage, and that it is not the mere nature of the defence which is the foundation of the supposed rule as to costs. The owners of the *Robert Morrison* ask only for costs of the issue on which they had been successful, namely, which ship was to blame. They do not claim the costs of the compulsory pilotage issue. On this point there is no decided case, but we ask it on principle. If the cross-cause had been the principal cause, the *Robert Morrison* having been dismissed with costs, her owners would have got all costs, whereas as it is they get nothing but nominal costs, unless the rule is altered. We suggest that the court should follow the course adopted in the courts of common law, and that the costs should be apportioned according as the issues have been determined. [Sir R. PHILLIMORE.—It was a very common thing in the Ecclesiastical Courts to apportion costs according to the results of the various issues, but there is no precedent in this court.] In the *Laurel* (Bro. & Lush. 191), plaintiffs in a bottomry suit were allowed to reply that by the law in force at the place where the bond was given, the lenders had a

tion made, save and except that the defendants, without thereby admitting the truth of any one or more such statement or statements, in particular do admit that the said collision was occasioned by the improper navigation of the *Muriel* so far and so far only as such admission is consistent with the 11th section next hereinafter following and subject always to the same.

11. The *Muriel* was before and at the time of the said collision in charge, as aforesaid, of a duly licensed pilot of the port of Liverpool, to wit the said J. H., whose employment was at the time and place of the said collision compulsory by law upon the *Muriel*, her masters and owners, and the *Muriel* was at such time under the sole charge of the said J. H., whose orders in reference to her navigation were promptly and implicitly obeyed, and the said collision, if it was occasioned by the *Muriel* or any one on board her was exclusively occasioned by the said J. H., and neither the *Muriel* nor her owners are liable in respect thereof.

At the trial a discussion arose as to the meaning of these allegations, and it was contended by Milward, Q.C., and Clarkson, on behalf of the plaintiffs, that they contained no absolute admission of the fact that the *Muriel* was to blame, and hence put the plaintiffs to the expense of being compelled to bring their witnesses to show the negligence of the *Muriel*. On the other hand Gully and Kennedy argued for the defendants that the allegations were an absolute admission of default on behalf of the *Muriel*, and they admitted then at the trial that the *Muriel* was to blame for the collision, but claimed exemption from liability on the ground that the *Muriel* was in charge of a pilot by compulsion of law, and that his acts alone were the cause of the collision.

Sir R. PHILLIMORE, after finding as a fact that the crew of the *Muriel* did not in any way contribute to the collision and that the pilot was solely to blame said: Looking at the peculiar facts of this case, without meaning in the least to trench upon the authority of *The Royal Charter* (Bro. & Lush. 191) and the other cases which have been cited—authorities to which I shall adhere on all occasions till properly instructed by the Superior Court—I shall dismiss the case without costs.

Solicitors for plaintiffs, Gregory and Co., Agents for Duncan, Hill and Dickinson, Liverpool.

Solicitors for defendants, Chester and Co., Agents for J. H. E. Gull, Liverpool.

ADM.]

THE SCHWANN.

[ADM.]

lien upon the ship for the advances made, which the bond secured, and could have arrested the ship and would have done so, but for the bond having been given; but Dr. Lushington said that if the allegation were put in issue, the party failing on such an issue would have to pay the costs whatever the ultimate result of that litigation. That is the principle for which we contend; if the defendants raise false issues they ought to take the consequences. At common law where there are several pleas, each raises a distinct issue, and the costs are apportioned.

Bull, Q.C. and Clarkson for the owners of the Schwann, contra.—This is an attempt to upset the long existing practice of the court. The chief argument is the analogy of common law cases. Now at common law, in an action for damage by collision, the declaration usually alleges that the defendants by themselves or their servants are guilty of negligence and, although it may be usual to plead compulsory pilotage specially, still there is no reason why a defendant should not, under the general issue of "not guilty," show that the ship was not under the management and control of himself or his servant, but under that of a compulsory pilot(a); and if this defence were established the defendant would be entitled to his costs. In this court, when the defence of compulsory pilotage is raised, whether after admitting negligence or in conjunction with allegations, that the plaintiff's ship was, and that the defendant's ship was not, to blame, the question of how far the crew are to blame or not must necessarily be tried; for, one of the questions in either case is whether the crew of the defendant's ship have or have not contributed to the collision; and in both cases the same evidence must be adduced. Hence it would be impossible for the registrar to apportion the costs between the issues. In *The Mariel* (see note ante p. 538) it was distinctly admitted by counsel at the hearing that the defendant's ship was to blame; and costs were not given, upon the ground that the admission in the pleadings was not sufficiently distinct to indicate to the plaintiffs that the defendants did not intend to raise any issue but that of compulsory pilotage. In *The Admiral Boxer* (ubi sup.) it is distinctly laid down that in those cases it is the practice not to give costs. The court is asked to overthrow a practice which has existed ever since, and, according to Dr. Lushington, long before the date of that case (1857). The question may now have been solemnly raised for the first time, but that happens because the practice was considered so settled that it was never raised; the practice ought not now to be disturbed except by a court of appeal. In *The Annapolis, The Johanna Stoll* (Lush. 236; 1 Mar. Law Cas. O. S. 69), where there were canoe and cross canoe as here, it was found that the *Annapolis* was alone to blame, but that the act of defendant was the sole act of the pilot, who was employed by compulsion of law, and the suit against the *Annapolis* was dismissed. As to costs, Dr. Lushington, after argument claiming apportionment, said "The owners of the *Johanna Stoll*, the plaintiff's in the cross action, have failed only because the collision was occasioned by the act of the pilot of the *Annapolis*, who was employed compulsorily. According to the usual practice, there-

fore, they are entitled to be dismissed without costs in their action, and I see no reason for departing from the established rule." This decision shows that there is not any practice in this court by which costs are apportioned in these cases. In the *City of Cambridge* (ante, pp. 193, 239), the suit was dismissed without costs. It is too late now to ask the court to depart from its established practice.

Milward, Q.C., in reply.

Sir ROBERT PHILLIMORE.—In this suit a double defence was raised by the defendants, who by their answer denied that there was any neglect on the part of those on board their vessel, and further pleaded that if the collision was in any way occasioned by the improper navigation of the *Schwann*, it was occasioned by the default of the pilot in charge, who was employed by compulsion of law. The plaintiffs have succeeded in proving that the collision was occasioned solely by the improper navigation of the defendants' vessel, and the defendants have succeeded in substantiating the defence that the collision was caused by the sole default of the pilot.

Now, the contention has been that the defendants ought to pay all the costs incurred in determining the question which vessel was to blame, inasmuch as they did not admit that they were to blame, and rest on the pilotage issue alone, but forced the plaintiffs to try the question on the merits, and on that part of the case failed. It was admitted and could not be denied that the whole practice of the court ran counter to this contention. Several cases have been cited in which this distinct proposition was laid down, viz., that when a defendant admits upon the pleadings that his vessel is to blame, but sets up the defence of compulsory pilotage alone, he becomes entitled to costs if he succeeds in establishing that defence; indeed it could hardly be otherwise, because the defendant having given notice to the plaintiffs that he raises that defence alone, and succeeding therein, the responsibility of further contesting the suit is thereby thrown upon the plaintiff. But no single case has been cited in which a defendant in a damage suit who has raised the double defence and has succeeded upon the defence of compulsory pilotage alone, has been ordered to pay any portion of the costs of the suit.

The analogy of common law cases has been brought to the notice of the court, as has frequently been done on previous occasions, and it has been said that the common law rule by which the costs of issues are apportioned lays down a principle which this court should adopt; but in my opinion this court ought not easily to depart from its own established practice as to costs. This court does not always follow the rules of practice laid down by the Common Law Courts. There are various instances in which it takes a different course from the Courts of Common Law; as for instance where defendants in causes of damage succeed in establishing the defence of inevitable accident, or where the court holds both ships to blame, the court acts upon well established rules of its own. Dr. Lushington, my learned predecessor, who had extraordinary experience reaching a long way back of the practice of this court, and was peculiarly cognisant of all the authorities on the subject, expressed an opinion that where a defendant in a collision cause succeeded in estab-

(a) See *Mitchell v. Greenvalley*, 13 C. B. 237; 22 L. J. 100, C. P.; *Joyce v. Capel*, 8 C. & P. 370.—En.

AMERICAN REPS.] THE GREAT WESTERN INSURANCE COMPANY v. FOGARTY. [AMERICAN REPS.]

liabing the defence of compulsory pilotage, be was never condemned in costs: (*The Admiral Bazer*, Swab. 193.) Now I am of opinion that it would require very clear and decisive proof that this practice was productive of evil, before it ought to be altered by the court; but I do not think it at all proved that such evils exist as to call for any change; on the contrary, to alter the practice as suggested might be to cast on the officers whose duty it is to tax the costs, a burden of extreme difficulty. There can be no doubt that evidence must be given under a plea of compulsory pilotage as to all the circumstances attending the collision, and hence as to the orders of the pilot being duly obeyed, as to immediate information being given him by the look-out, and as to his being duly assisted in the execution of his duty by the other persons on board the ship. This is the same evidence as would be given under the issue raising the question of which ship was to blame.

After carefully considering the matter, I am of opinion that there is no evidence to show that the present practice—admitted to be unmistakably of long and ancient standing—is so full of faults as to call upon and induce the court to exercise so strong an authority as to alter the rule. I must refuse the application to condemn the defendants in any portion of the costs, but as it is the first time the question has been solemnly argued, I shall make no order as to the costs of the application.

Solicitor for the plaintiffs, *Thomas Cooper*.

Solicitors for the defendants, *Clarkson, Son, and Greenwell*.

AMERICAN REPORTS.

Collected by JAMES F. ASHALL, Esq., Barrister-at-Law.

SUPREME COURT OF THE UNITED STATES.

October Term, 1873.

THE GREAT WESTERN INSURANCE COMPANY (apps.)
v. FOGARTY (resp.).

Marine insurance—Policy on machinery free of particular average—Destruction of species—Total loss.

Where the component parts of "machinery" insured "free of particular average" are by the perils insured against, some totally lost and the remainder so damaged that they are useless for the purpose for which they were intended when shipped, there is a total loss, which can be recovered from the underwriters, the species of the machinery being destroyed.

Under an open policy on machinery, at and from New York to Havana, free of particular average, the plaintiff (defendant in error) shipped the various parts necessary for a complete sugar-packing machine, including, as part of it, three sets of truck irons, and also other extra truck irons. The vessel on which this machinery was shipped was driven on the rocks in a violent gale just before reaching Havana, filled with water, became a total wreck, and was abandoned to the underwriters. A large number, but not all, of the pieces composing plaintiff's machinery were recovered and tendered to him, but he refused to accept them, as they were much broken and rusted, and the cost of repairing and polishing and putting the

pieces in order would cost more than a new machine.

Held, a total loss.

MILLER, J., delivered the opinion of the court.—This was an action on a policy of marine insurance, in which the plaintiff recovered a judgment for \$511.95 dols. and costs. The policy was an open one, and the indorsement procured by the plaintiff on it was of insurance for 2250 dols., on machinery on board the bark *Elle Adele*, at and from New York to Havana, free from particular average. The memorandum clause of the policy provides that machines and machinery of every description are warranted by the assured free from average unless general. The machinery insured consisted of the various parts necessary for a complete sugar-packing machine, including as part of it, three sets of truck irons, and also other extra truck irons. It is described in the bill of lading and invoice as eight pieces and eight boxes, composing one sugar-packer and three trucks. The vessel on which these articles were being transported from New York to Havana, just before reaching the latter city, was driven on the rocks in a violent gale, filled with water, and finally became a total wreck, and was abandoned to the underwriters. Their agent at Havana took possession, and was engaged about a month in raising the cargo. A large number of the pieces composing plaintiff's machinery was recovered and tendered to him at Havana, which he refused to receive, on the ground that the insurance company was liable to him as for a total loss. They denied that under the circumstances of the case there was a total loss within the meaning of the policy; and the soundness of the instruction to the jury on that point, given and refused by the circuit court on the trial, is the only question now before us. There is very little conflict of testimony as to what was recovered and what was its condition when tendered to the plaintiff. It was all of iron. About half of it in weight was saved, and the remainder left at the bottom of the sea. That which was saved was entirely useless as machinery, and was of no value except as old iron, for which purpose it would sell for about 50 dols. The machinery, in working order, was worth 2250 dols. That which was saved was much broken and rusted, so that it would cost more to repair it, polish it, and put it in order for use than to buy a new machine.

Upon the testimony offered by plaintiff the counsel for defendant moved the court to instruct the jury that the action could not be sustained, because it showed that there was not a total loss. The court declined to do this, and the request was renewed at the conclusion of the defendant's evidence and again declined. Several prayers for instruction were then presented by the defendant, based upon the leading proposition, that if any of the pieces of the machinery insured were recovered and tendered in specie to the assured, there was no total loss. These were refused and exceptions taken to all these refusals, on which error is assigned here. An exception was also taken as to the charge of the court laying down the law by which the jury were to decide the question of total loss submitted to them. That charge was in the following words: "The meaning of the term 'free from particular average,' used in the policy, was that the defendants should be liable only for a total loss of the subject insured; that the

subject insured was not machines, but machinery, by which is generally understood the several parts or portions of machines, adapted and fitted to be put together so as to constitute a machine (in this case a sugar-packing machine), and applying the rule of law as to what constitutes a total loss to this particular subject insured, the jury will find whether any piece or portion of the machinery insured arrived at its destination in a perfect condition, so that it could have been used with its corresponding or connecting pieces had they also arrived in good condition; in that case the plaintiff could not recover, as the loss would not be total; but that if every piece of the machinery was so damaged by the perils insured against as to be entirely unfit for use on being supplied with its corresponding or connecting pieces, then there was a total loss of the subject insured as machinery, although the material itself might still exist; and if they so found, they would find a verdict for the plaintiff for the sum named in the policy, with interest from the 10th Sept. 1868."

The question here presented for consideration has been often in the courts, and the discriminations between what is a total loss and what is not, are frequently very nice and delicate. The authorities are by no means uniform or consistent with each other, when, as in the present case, the line of distinction is very narrow. Several cases bearing upon the one before us have been decided in this court and perhaps a short review of them may aid us here better than a more extended examination of the numerous other authorities on the subject. In the case of *Biays v. Chesapeake Insurance Company* (7 Cranch, 415), plaintiff was insured upon hides, the whole number of which was 14,565. Of these, 789 were totally lost by the sinking of a lighter, and 2491 of those sunk were fished up in a damaged condition and sold. The hides were memorandum articles, and this court held that, inasmuch as less than 800 hides insured as part of a much larger number of the same kind were lost, it could not be a total loss, and overruled the argument that it was a total loss as to the 789 hides. In the case of *Marcardier v. Chesapeake Insurance Company* (8 Cranch, 39) it is said that "it seems to be the settled doctrine that nothing short of a total extinction, either physical or in value of memorandum articles at an intermediate port, would entitle the insured to term the case a total loss, where the voyage is capable of being performed. And perhaps even as to an extinction in value, where the commodity specifically remains, it may yet be deemed not quite settled whether, under like circumstances, it would authorize an abandonment for a total loss." In the case of *Moreau v. The United States Ins. Co.* (1 Wheat. 219), more than half a cargo of corn was thrown overboard and lost. The remainder was saved in a damaged condition and sold at about one-fourth the market value of sound corn. This was held not to be a total loss, because part of the corn was saved, and though damaged was of some value. It was, therefore, only a partial loss. The next case is that of *Hugg v. Augusta Ins. Co.* (7 How. 585). The question there arose on an insurance of jerked beef of four hundred tons, part of which was thrown into the sea and part of the remainder so seriously damaged that the authorities of the city of Nassau refused to allow more than one hundred

and fifty of it to be landed. This was wet and heated, and not in a condition for re-shipment. In answer to a question on this subject, certified to this court by the judges of the Circuit Court, it was replied: "That if the jury found that the jerked beef was a perishable article within the meaning of the policy, the defendant is not liable as for a total loss of the freight, unless it appears that there was a destruction in specie of the entire cargo, so that it had lost its original character at Nassau, or that a total destruction would have been inevitable from the damage received if it had been re-shipped before it could have arrived at Matanzas, the port of destination." And though there are some very strong expressions of the judge who delivered the opinion as to the necessity of the total destruction of the thing insured to establish a total loss of memorandum articles, no doubt the language here certified is the true expression of the court's opinion. And it will be observed that in this case, as in the case in 8 Cranch, the destruction spoken of is destruction as to species, and not mere physical extinction. Indeed, philosophically speaking, there can be no such thing as absolute extinction. That of which the thing insured was composed must remain in its parts, though destroyed as to its specific identity. In the case of the jerked beef, for instance, it might remain as a viscid mass of putrid flesh, but it would no longer be either beef or jerked beef. And when the case went back for trial in the Circuit Court, the charge of C. J. Taney to the jury places this point in a very clear light. He says there was not a total loss at Nassau, because a part of the jerked beef remained in specie, and had not been destroyed by the disaster. And if there was reasonable ground for believing that a portion of this beef could, by repairing the vessel, have been transported to Matanzas, although it might arrive there in a damaged condition, but yet retaining the character of jerked beef, there was no total loss. Taney's Decisions, 168. The jury found there was a total loss. The case of *Judah v. Randall* (2 Caines' Cases, N.Y. 324), where a carriage was insured and all was lost but the wheels, is another illustration of the principle. A part of the carriage, namely the wheels, a very important part, was saved; but the court held that the thing insured, to wit, the carriage, was lost—that it was a total loss. Its specific character as a carriage was gone. In the case of *Wallerstein v. The Columbian Insurance Company* (44 N.Y. 205) the whole doctrine is ably reviewed with a very full reference to previous decisions, and it is there shown that there is far from unanimity in the language in which the rule is expressed; and the extreme doctrine of an absolute extinction or destruction of the thing insured is not the true doctrine, or, at least, is not applicable in all cases as a criterion of total loss.

The Circuit Court was right in holding that what was insured was machinery—pieces or parts of a machine; pieces made and shaped to unite at points with other pieces, so as to make a sugar-packing machine. If parts of them were absolutely lost, and every piece recovered had lost its adaptability to be used as part of the machine; had lost it so entirely that it would cost as much to buy a new piece just like it, as to repair or adapt that one to the purpose, then there was a total loss of the

PRIV. CO.]

THE NOR.

[PRIV. CO.]

machinery. If no piece recovered was of any use, or could be applied to any use connected with the machine of which it was a part, without more expense on it than its original cost, then there was no part of the machinery saved, however much of rusty iron may have been taken from the wreck. The court went quite as far in behalf of defendant as the law justified when it told the jury that plaintiff could not recover if any piece or portion of the machinery insured arrived at its destination in a condition so perfect that it could have been used with its corresponding or connecting pieces had they also arrived in good condition.

We are of opinion that the charge of the court put the case very fairly to the jury, as we understand the law, and the judgment is therefore affirmed.

Judgment affirmed.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

ON APPEAL FROM THE VICE-ADMIRALTY COURT OF
GIBRALTAR.

Reported by J. P. ABERNETHY, Esq., Barrister-at-Law.

Friday, March 20, 1874.

(Present Sir JAMES W. COLVILLE, the JUDGE of the
HIGH COURT of ADMIRALTY (Sir R. Phillimore),
Sir BARNES PEACOCK, Sir MONTAGUE E. SMITH
and Sir ROBERT P. COLLIER.)

THE NOR.

Collision—Regulations for preventing collisions at sea, art. 14—Construction of—Immediate danger of collision—Responsibility for act done under.

Art. 14 of the regulations for preventing collisions at sea which provides that "if two vessels under steam are crossing so as to involve risk of collision, the ship which has the other on her own starboard side shall keep out of the way of the other" is not to be construed so that "keeping out of the way" means in all cases porting; a vessel may within the meaning of that article keep out of the way by stopping, or by going ahead, or by starboarding, or by porting, or by going astern, as the circumstances of the case may require.

A vessel which, having performed her own duty, is thrown into immediate danger of collision by the wrongful act of another is not to be held liable if at that moment she adopts a wrong manoeuvre.

THIS was an appeal from a decree of Honourable Sir James Cockburn, the learned Judge of the Vice-Admiralty Court of Gibraltar, in cross causes of damage promoted respectively in that court by the appellants, the owners of the steamship *Asturias*, against the steamship *Nor*, of which the respondents are the master and owners, and by the master and owners of the *Nor* against the *Asturias*, for the recovery of damages arising out of a collision between the said two vessels.

The *Asturias* is an iron screw steamship of 272 tons register and 110 horse-power, manned by a crew of twenty-two hands all told, and belonging to the port of Gijón, in Spain.

The *Nor* is an iron screw steamship of 700 tons register and 130 horse-power, belonging to the port of Bergen, in Norway.

The collision took place about two a.m. of the 31st March 1873, off Marbella, on the coast of Spain, and twenty-eight miles from Gibraltar.

The wind at the time was about W.N.W., the weather cloudy, but otherwise fine.

The case set up in the court below on behalf of the appellants, as stated in the petition, was that the *Asturias* was bound on a voyage from Bilbao to Barcelona, touching at the intermediate ports of Gijón, Villa García, Cadix, Malaga, Carthagena, Alicante, Valencia, and Tarragona, and that, after leaving Cadix for Malaga on the 30th March, when nearly abreast of Marbella, she was steering a course N.E. true, proceeding at the rate of from eight to nine knots an hour under steam only. Her regulation lights were said to be duly placed and burning brightly at the time.

About ten minutes past two a.m. a red light, which afterwards proved to be that of the *Nor*, was observed about three points on the starboard bow, and distant about one and a-half miles. The *Asturias* kept her course, until shortly afterwards the white light of the *Nor*, which was alleged to be obscure, came in view. Thereupon the helm of the *Asturias* was starboarded, in order to get out of the way of the approaching vessel, and her head veered to port—that is, towards the north. Shortly afterwards the hull of the *Nor* came in view, when the *Asturias* helm was put hard astarboard in order to carry the vessel all round. Whilst in the act of going round the collision took place, the *Nor* with her stem and port bow striking the *Asturias* amidships on the starboard side, thereby doing her considerable damage and disabling her.

The case on the part of the respondents was that, on the occasion in question, the *Nor* bound from Alexandria for Dunkirk, was steering for the port of Gibraltar for the purpose of obtaining a supply of coals. Her course at the time was W. by compass, and she had her proper regulation lights burning brightly, and a good look out was being kept.

Under these circumstances, about two a.m. on the 31st March, the masthead and green lights of the *Asturias* were observed distant between three or four miles, bearing about two points on the port bow. Those on board the *Nor* kept their course and continued to watch the lights of the *Asturias*, but when the *Asturias* approached at great speed, and rendered a collision inevitable, the helm of the *Nor* was put hard astern and her engines immediately stopped and reversed, in order to lessen the shock. The port bow and stem of the *Nor* came into collision with the starboard side of the *Asturias* about amidships. At the time of the collision the *Asturias* was still going full speed, but the way of the *Nor* was almost stopped. By her porting the *Nor* had gone off ten points at the time of collision. After the collision the *Nor* stayed by the *Asturias* and rendered her assistance, and ultimately towed her to the Bay of Gibraltar.

The appellants alleged that the collision was caused by those on board the *Nor* neglecting to keep their course, and also by reason that the regulation lights of the *Nor* were not brightly burning.

The respondents attributed blame to those on board the *Asturias* for not taking due and proper measures to keep out of the way of the *Nor*, and also for improperly neglecting to stop and reverse their engines.

The evidence was taken orally in open court before the learned judge of the court below. The learned judge found the *Asturias* alone to blame for the collision, on the ground that as it was the duty of the *Asturias* to keep out of the way of the *Nor*, and for that purpose it was "unquestionably

[PRIV. CO.]

THE NOR.

[PRIV. CO.]

the duty of the *Asturias* to port her helm and show her red light to the *Nor*," whereas in fact she "starboarded her helm, and pursued her course with undiminished speed," and obtaining sight of the hull of the *Nor* put her helm hard starboard. The *Nor* be held not to blame on the ground that she held on her course, as she was bound to do, until there was immediate danger of collision and then put her helm hard astern which was "the only course that offered any reasonable prospect of lessening the effect of the collision, if not of avoiding it altogether."

From this decree the owners of the *Asturias* appealed on the following amongst other grounds.

1. Because the vessels were crossing steamers under steam, and it was the duty of the *Asturias*, having the *Nor* on her starboard bow, to keep out of the way of the *Nor*, and it was the duty of the *Nor* to keep her course.

2. Because the *Asturias* was at liberty to get out of the way of the *Nor* either by porting or starboarding, as she thought fit, and the learned judge of the court below erroneously held that she was bound to port her helm.

3. Because the *Asturias* starboarded her helm sufficiently to have avoided the collision if the *Nor* had performed her duty by keeping her course, and the collision was occasioned by the improper porting of the helm of the *Nor*.

4. Because the judgment and decree of the court below were in favour of the respondents, whereas upon the pleadings and evidence they ought to have been in favour of the appellants.

Butt, Q.C. and Clarkson for the appellants.

Milne, Q.C. and Webster for the respondents.

The judgment of the court was delivered by THE JUDGE OF THE HIGH COURT OF ADMIRALTY (Sir R. Phillimore):—This is an appeal from the Vice-Admiralty Court of Gibraltar. It was a case of collision between two screw steam-ships, a Spanish screw steam-ship, the *Asturias* of 272 tons, with engines of 110 horse power and a crew of 22 hands, and a Norwegian screw steam-ship of 760 tons and 130 horse power. The collision took place on the 31st March, shortly after two o'clock in the morning, abreast of Marbella, on the coast of Spain, fourteen miles distant. The course of the *Asturias*, that is, the true course, at this time was north-east, and the course of the *Nor* was west by south half south. The speed that they were going at was about eight knots each. The nature of the damage which was inflicted was that the *Nor* struck with her stem and port bow the *Asturias* amidships on the starboard side, what would appear to be somewhat of a slanting blow. The distance is variously stated, but the *Asturias* says that she saw the red light of the *Nor* at a mile and a half distance, and the *Nor* says that she saw the white and the green light of the *Asturias* at between three and four miles distance. The state of the weather appears to have been cloudy, but on the whole fine. The judge of the court below found that the *Asturias* was alone to blame.

Now, these vessels were crossing vessels, and the rules applicable to them are: the 14th, "If two vessels under steam are crossing so as to involve risk of collision, the ship which has the other on her own starboard side shall keep out of the way of the other;" the 16th,—"Every steamship when approaching another ship so as to involve risk of collision shall slacken her speed, or

if necessary, stop and reverse;" and the 19th, which is always applied in these cases, which says, that "regard is to be had to special circumstances which may render it necessary not to obey the rule." Now, there is no doubt at all, nor has it been disputed for a moment, that it was the duty of the *Asturias* in these circumstances to keep out of the way of the *Nor*, and it was the duty of the *Nor* to keep her course.

It has been much argued before their Lordships that the judge miscarried in his sentence in the court below, mistaking the application of the rule which I have read, enjoining the vessel which has the other on her starboard hand to keep out of the way, by putting upon it a limited and rigid construction, that keeping out of the way must mean in all cases porting. But their Lordships are by no means inclined to put that construction on the learned judge's language. There is no doubt that he thought that in this particular case, and in these particular circumstances, porting was the right course, and he probably knew perfectly well that keeping out of the way might be by stopping, or by going ahead, or by starboarding, or by porting, or by going astern, as the circumstances of the case might require. The conclusion at which he did arrive was, that the circumstances of this case did require, and that skilful seamanship did require, that the getting out of the way should be effected by the porting and not by the starboarding of the helm.

Now, what happened was this, the *Asturias* says that she observed a red light three points on her starboard bow at about half a mile distance, and that she did nothing for a short time; that then she saw the white light, which she says was a very obscure light, when she was distant from her about three quarters of a mile; that then she starboarded, and that then in about a minute and a half from that time she had starboarded, and that the collision took place in the way in which I have mentioned.

The version of the story which was given by the *Nor* is to this effect, that she saw the masthead light and the green light of the *Asturias* approaching her about two points on her port bow and at a distance of from three or four miles; that she kept her course unaltered expecting that the steamer, the *Asturias*, would port her helm and show her red light, and that it was not until she saw the hull of the *Asturias* that she varied her course by porting, and that she went off under the influence of her port helm ten points. The *Asturias* says that she went off under the influence of her starboard helm four points.

Now, two questions have to be decided by their Lordships, as indeed they had to be decided by the court below—one is, did the *Asturias* adopt the right manoeuvre for getting out of the way by starboarding as she did in this case? and the other is, did the *Nor* cause or did she contribute to the collision by porting? In the court below a great discussion took place upon the question whether the *Nor* did or did not carry proper lights; and after that question had been sifted and examined closely by the court below, it came to the conclusion that the *Nor* did carry proper lights, and that those lights ought to have been visible at the usual distance. Their Lordships see no reason whatever to differ from the conclusion at which the learned judge arrived on this point; and the consequences of it in the

PRIV. CO.]

IONIDES v. PENDEK.

[Q. B.]

application of the law to this case are not unimportant, because their Lordships are of opinion that the *Asturias* ought to have seen the white light when she saw the *Nor's* red light, and, indeed, before she saw the *Nor's* red light. It is an admitted fact in the case that she did not see the white light at all until she was within three quarters of a mile. In the first instance she did not see it at all, and the inevitable consequence appears to their Lordships to be that the *Asturias* could not have had a good look-out.

The next question which their Lordships have to consider is, when the *Asturias* saw the red light what is the course which she ought to have pursued? Their Lordships, after conference with the nautical gentlemen who have given their assistance to the court on this occasion, are of opinion that her duty was then to have slackened her speed and to have waited and ascertained the character of the vessel which was then approaching and the course which she was pursuing.

Another question upon which their Lordships have had the benefit of the advice of the nautical assessors is this—when the *Asturias* admits that she saw the white light of the *Nor*, that is, when she was three quarters of a mile and four minutes distance from her, did she or did she not execute a right manœuvre in starboarding and afterwards hard starboarding, or was it her duty to have ported? The nautical gentlemen by whom the court are assisted are most clearly of opinion that it was her duty at that time to have ported, and that she did not exercise a proper discretion in starboarding her helm, and by that manœuvre causing to get out of the way of the *Nor*. Here I may mention that their Lordships are of opinion, under the same advice, that the *Asturias'* account of her starboarding cannot be correct; that if she has starboarded at the time she mentioned she would have gone off more than four points, probably eight points, and, therefore, that her version of the time when she executed the manœuvre of starboarding cannot be relied upon.

The next question which arises is this—was the *Nor* to blame, and did she contribute, in the legal sense of contributing, to the collision by doing what unquestionably she did do, namely, hard sport her helm so as to go off ten points? Now it is to be observed that the conduct of the *Asturias* had put the *Nor* into a great dilemma, and it would be in their Lordships' opinion a very harsh construction of the law to say that even if at this moment, of what may be called the agony of the collision, just before the collision, she had erred in porting, she would be liable for that mistake; and it is also to be observed that at the time when she ported, the *Nor* stopped and reversed simultaneously; but in fact their Lordships are of opinion that the *Nor* was well founded in thinking that she had a right to expect that even at that time the *Asturias* would port her helm, because in the opinion of their Lordships, assisted by that of the nautical gentlemen who attend upon this occasion, that would have been the proper manœuvre in the case. Their Lordships have further to observe that the *Asturias* ought not to have kept on at full speed after the time when she admits she saw the white light, but ought to have stopped and reversed.

For these reasons, without going into any detail of the evidence, which would be quite unnecessary at the present time, their Lord-

ships are of opinion that the decision of the court below ought not to be disturbed but ought to be affirmed, namely, that the damage in this case was caused by the wrong navigation of the *Asturias*, and that what was done by the *Nor* in no way caused or contributed to this collision.

Their Lordships will therefore humbly advise Her Majesty to affirm the sentence of the court below with the usual costs.

Decree affirmed and appeal dismissed.

Solicitors for the appellants, *Lowless and Co.*
Solicitor for the respondents, *Thomas Cooper.*

COURT OF QUEEN'S BENCH.

Reported by J. SPOXT and M. W. MCKELLAR, Esqrs.,
Barristers-at-Law.

May 9, 11, and 27, 1874.

IONIDES v. PENDEK.

Marine insurance—Excessive valuation—Concealment of material fact.

Though an assured is not bound to disclose everything which might influence the mind of an underwriter, he is bound to disclose all those facts which a rational insurer, governing himself by the principles and calculations commonly applied to policies and risks, would regard as bearing on those risks.

An excessive valuation of the subject matter of insurance is a fact which, as bearing on the risks insured against, ought to be disclosed to an underwriter by an assured, and the concealment of such a fact will vitiate a policy if its disclosure would have materially affected the mind of the underwriter in assuming the risk.

On the trial of an action against an underwriter, on policies of insurance on goods, valued to the extent of about double their real value, the jury found that the valuations were excessive, that it was material to the underwriter to know that they were excessive, that that fact had been concealed from the underwriter, but that there was not sufficient evidence to show that the excessive valuations were made with a fraudulent intent.

Held, that on these findings, the underwriter was entitled to the verdict entered for him on a plea alleging the concealment of a material fact.

DECLARATION on a policy of insurance dated the 1st May 1871, subscribed by the defendant at and from Hamburg to Wladivostock, Victoria Bay, upon and in respect to goods carried in the *Da Capo*, beginning the said adventure from the loading of the said goods aboard the said ship, and continuing during her abode there until the said ship should be arrived at Wladivostock, and until the said goods should be there discharged and safely landed, against perils of the seas, barratry of the master and mariners, and of all other perils, losses and misfortunes, &c.; the subject matter of the insurance being valued at "£900L on commissions, goods valued £4,071L, said commissions valued at £500L," &c., &c., and the said ship, with the said goods on board thereof, sailed on the said voyage, and afterwards, whilst the said ship with the said goods on board thereof was proceeding on the said voyage, and during the continuance of the said risk, the said goods were, by the perils so insured against as aforesaid, wholly lost, and it became thereby wholly impossible to

Q. B.]

LOSIDEN v. PENDER.

[Q. B.]

receive or earn commissions in respect thereof, and all conditions were fulfilled, &c.

Second count on a policy of insurance of same date, subscribed by the defendant at and from Hamburgh aforesaid, to Windwardstock, Victoria Bay aforesaid, upon and in respect of goods carried in the said ship, the *Da Capo*, the subject matter of the insurance being "valued at 230*l.* as profits on charter valued thereat," and continuing the adventure, as in the first count mentioned, until the goods should be discharged and landed as in the first count mentioned, against like perils, losses and misfortunes as in the first count mentioned, &c.

Third count on a policy of insurance of same date, subscribed by the defendant, at and from Hamburgh aforesaid, to Windwardstock, Victoria Bay aforesaid, upon and in respect of goods carried in the said ship, the *Da Capo*, the subject matter of insurance being "valued at 1800*l.* on sundry goods as per annexed specification, valued at 3173*l.*," &c., &c.

Fourth count, that after the making of the said policy in the last count mentioned, it was declared and agreed by and between the plaintiffs as agents for the persons interested, and the defendant by indorsement on the said policy that the interests insured by the said policy should be 1800*l.* on certain goods specified in the said indorsement, carried in the said ship on the said voyage, that is to say, 222 casks of spirits valued at 2800*l.*, instead of 1800*l.*, on goods as by the said annexed specification in the policy, and the last count mentioned, valued at 3173*l.* on the said ship on the said voyage, but that in all other respects the said policy should be, and remain as in the last count mentioned, &c.

Pleas, first, to all the counts of the declaration that the defendant did not become an insurer to the plaintiffs as alleged; secondly, that the said goods were not loaded on board the said ship, to be carried on the said voyage as alleged; thirdly, that the said ship did not set sail on the said insured voyage as alleged; fourthly, that the said goods were not lost by the perils insured against as alleged; fifthly, that the said policy was not made for the use and benefit, or on account of the person or persons interested as alleged; sixthly, that the said persons for whose benefit the said policy was made were not, nor were any, nor was either of them interested as alleged; seventhly, that the defendant was induced to become an insurer, and to subscribe the said policy by the fraud of those for whom and on whose account, and by whose directions the plaintiffs acted as agents in effecting the said policies as in the declaration mentioned; eighthly, that the said vessel when she set sail on the said insured voyage was not seaworthy for the same; ninthly, that the defendant was induced to effect the said insurance, and to subscribe the said policy by the wrongful and improper concealment by the plaintiffs and their agents from the defendant of certain material facts and information then known to the plaintiffs and their agents, and unknown to the defendant, and which ought to have been communicated to the defendant; tenthly, to the last count of the declaration, that it was not agreed and declared as therein alleged.

Replication joining issue on the several pleas.

The following were the particulars of fraud and concealment delivered by the defendant under the

seventh and ninth pleas: First, that the subject matter of insurance was grossly and fraudulently overvalued by the assured; secondly, that at the time of making the insurance it was known to the assured that the *Da Capo* set sail without any intention of ever reaching her destination; thirdly, that at the said time the assured knew that the shipowner intended that the *Da Capo* should be scuttled and cast away on the voyage; fourthly, that at the time of making the said insurance it was known to the assured that other policies had been effected, and that others were about to be effected by themselves or other persons, upon interests alleged to be at risk upon the said ship and voyage, to amounts and upon valuations greatly in excess of the true value of the said alleged interests.

Under the eighth plea the following particulars were delivered—that the master of the *Da Capo*, when she set sail, intended to scuttle and cast away the said ship upon the insured voyage, and to prevent the vessel ever reaching her destination.

The case came on for trial before Haumen, J. and a special jury, on the 1st July 1872, at the sittings in London after Trinity Term of that year. The material facts as proved in evidence, the questions put by the learned judge to the jury, and the findings of the jury thereon, are set forth in the judgment of the court *infra* (see *ante*, vol. 1, p. 432). On the findings the learned judge directed the verdict to be entered for the defendant. Subsequently a rule *nisi* was obtained on behalf of the plaintiff for a new trial, on the ground of misdirection, and that the verdict was against the weight of evidence.

Sir Henry James, Q.C., Watkin Williams, Q.C., and Langton showed cause against the rule, and went at considerable length through the facts as proved in evidence, as to excessive valuation, and the materiality of such a fact as bearing on the risks insured against. Then, as to whether the findings of the jury, stopping short of fraud on the part of the plaintiff in not communicating the fact of over valuation, would support the verdict entered for the defendant, it was contended that the findings were sufficient for that purpose. In *Carter v. Boehm* (3 Burr. 1910) Lord Mansfield, C.J., said: "Good faith forbids either party by concealing what he privately knows to draw the other into a bargain from his ignorance of that fact and his believing the contrary. But either party may be innocently silent as to grounds open to both to exercise their judgment upon, *aliquid est celare, aliquid tacere*, &c. This definition of concealment, restrained to the efficient motives and precise subject of any contract, will generally hold to make it void in favour of the party misled by his ignorance of the thing concealed." Aronold on Marine Insurance (vol. 1, 4th ed.), p. 511, thus states the rule on the subject: "It is the duty of the assured to communicate to the underwriter all the intelligence he has that may affect the mind of the underwriter as to either of the two following points: First, whether he will take the risk at all; secondly, at what premium he will take it." And Phillips (Law of Insurance, s. 531) says: "Concealment in insurance is where, in reference to a negotiation therefor, one party suppresses, or neglects to communicate to the other, a material fact which, if communicated, would tend directly to prevent the other from entering into the

[Q. B.]

IONIDES v. PENDER.

[Q. B.]

contract, or to induce him to demand terms more favourable to himself, and which is known or presumed to be so to the party not disclosing it, and is not known or presumed to be so to the other." And again (sect. 537), "It is sufficient to state here that generally, if either party, whether purposely or through negligence, mistake, inadvertence, or oversight, misrepresents a fact which he is bound to represent truly, or omits to communicate a fact which he is bound to communicate, the other is wholly or partially exonerated from the contract. The effect of a misrepresentation or concealment in discharging the underwriters does not seem to be merely on the ground of fraud, as has been usually laid down by writers on insurance, but also on the ground of a condition implied by the fact of entering into the contract, that there is no misrepresentation or concealment;" and, after referring to Duer's criticism of the phraseology of the books on this subject, and Mr. Arnould's adhesion to this application of the term, he goes on: "But I cannot think that this anomalous use of the term is justifiable on this ground, since ambiguous phraseology is not to be tolerated in any science, and least of all in that of law, where it can possibly be avoided, as it may easily be in this case, by stating the practical doctrine in direct terms, namely, that it is an implied condition of the contract of insurance, that it is free from misrepresentation or concealment, whether fraudulent or through mistake. This implied condition involves no more difficulty than that of seaworthiness or any other implied warranty. And if insurance is thereby distinguished from other contracts, which I apprehend it is not entirely, this peculiarity is not, that I can perceive, of great weight, certainly not enough to excuse an anomalous application of the technical term 'fraud' and 'fraudulent' to many of the misrepresentations and concealments whereby a policy of insurance has been held to be defeated." Kent (3 Com. 282) lays down the rule now contended for in equally clear language: "A positive misrepresentation to the underwriter, or concealment of a fact material in relation to the risk, or material in the mind and judgment of the insurer, will avoid the policy. It will avoid it though the loss arose from a cause unconnected with the misrepresentation, or even though the misrepresentation or concealment happened through mistake, neglect or accident, without any fraudulent intention. . . . The special facts upon which the contingent chance is to be computed usually lie in the knowledge of the insured only, and the underwriter trusts to his representation and proceeds upon the confidence that he does not withhold any facts material to the estimate of the risk. The suppression of any such facts, whether by design or mistake or negligence equally renders the policy void, for the risk run becomes different from the one assumed in the policy." And again: "If the misrepresentation was by fraudulent design, it avoids the policy without staying to inquire into its materiality; or if it was caused by mistake or oversight, it does not effect the policy, unless it was material, and not true in substance; and in that case it will vitiate the policy without assuming the ground of fraud, for it is not the contract the party undertook to make. If the representation of the policy insured greatly overstate the value, it will avoid the policy, whether

the representation be through ignorance or design." A similar definition of concealment is given by Tindal, C.J., in *Elton v. Larkins* (5 C. & P. 392): "A material concealment is a concealment of facts, which, if communicated to the party who underwrites, would induce him either to refuse the insurance altogether, and not to effect it except at a larger premium than the ordinary premium." Parsons (on Insurance, vol. 1, p. 494) states the law relating to the present question thus: "While all material intelligence and even rumours and reports must be communicated, the line must be drawn somewhere between these and mere conjectures, suspicions, or possibilities. Outside of such facts as any reasonable insurer would take into consideration, lies a large class of those which some might deem material, and others not. There may be those which would very generally be disregarded, but which a timid or fainful insurer would think worth notice. In some cases this line of distinction is drawn. In such cases the test of materiality, which is the question whether the insurer under that policy would have regarded those facts in making the policy? should perhaps in justice to both parties have been modified into this form—would a rational insurer, governing himself by the principles and calculations commonly applied to policies and risks have regarded these facts as bearing on these risks?" Duer (on Marine Insurance, vol. 2, p. 386), says: "The parties do not deal upon equal terms unless they have an equal knowledge of the facts and circumstances from which the risks arise, or by which they may be affected; and to produce this equality, the obligation of a full disclosure must of necessity be imposed. Without such a disclosure the parties have not the same knowledge of the subject of the contract." This might be expressed even more strongly—that in such a case there is not an identity in the subject matter of the contract.

An over-valuation, coupled with over-insurance, is most material to the risk which the underwriter takes on himself. It will be contended for the plaintiff that an over-valuation, however excessive, if honest, and done without any fraudulent intent, does not affect the policy, and is not material to the risk, even though the excessive over-valuation is coupled with a corresponding over-insurance. But it is most material to the risk which the underwriter takes upon himself, as diminishing the inducement to save the goods in case of danger, and indeed offering a temptation to the insured to neglect using their best endeavours for that purpose. Again it is material on this ground: it is an implied condition in every policy, where nothing is expressed to the contrary, that it is a contract of indemnity—of indemnity against loss of a real interest. If then the assured knowingly makes an extraordinary excessive valuation of the goods insured, is he not obtaining what is in reality a wager policy? (BLACKBURN, J.—He is making evidence of fraud against himself; but the jury here have negatived the instance of fraud.) At any rate, the underwriter is entitled to assume that the valuation is within reasonable limits. *Barker v. Janson* (17 L. T. Rep. N. S. 473; L. Rep. 3 C. P. 363) was referred to. In that case the over-valuation was in all respects made *bona fide*. In *Murphy v. Crawford* (3 Dall. 485), Shippen, J., said, "If in the opinion

Q. B.]

IONIDES v. PENDER.

[Q. B.]

of the jury a knowledge of the circumstances that were suppressed, would have induced the insurer to demand a higher premium, or to refuse altogether to underwrite, it will be sufficient, on commercial principles, to invalidate the policy." [BLACKBURN, J.—That proposition must be qualified in the manner in which Mr. Parsons puts it. The objection must not be a fanciful one on the part of the underwriter; but the facts concealed must have been such as "a rational insurer, governing himself by the principles and calculations commonly applied to policies and risks, would have regarded as bearing on those risks."] The jury in the present case have found that the facts concealed were material to the risk. In *New York Bowery Fire Insurance Company v. New York Fire Insurance Company* (17 Wend. 359), the judge charged the jury that they should give a verdict for the defendants if they were of opinion that information was wilfully withheld of the fact that the plaintiff had been insured and twice burnt out, and that he was in bad repute at the offices. The jury having returned a verdict for the plaintiffs, a *venire de novo* was ordered, the court saying, "This question was not properly submitted to the jury. They were instructed in effect, that although they should think the information material, they must still find for the plaintiffs unless they should think it was intentionally withheld. There was no ground for submitting such a question to the jury. It was not raised by the evidence. And, besides, if the facts communicated by Thorpe were material, it is enough that they were withheld by Merchant on applying for re-insurance. Whether the omission was the result of mistake or design was not an important inquiry. The assured acts at his peril in withholding information." In *Richards v. Murrell* (10 B. & C. 527), one of the circumstances in the case, the suppression of which was deemed by the Court of King's Bench to be material, was that the owner of the goods insured had directed his agents in London not to make the insurance until thirty days after the arrival in London of the letter containing the order to insure, the court being of opinion that the concealment was fatal, because the fact of so long a delay after the arrival of the letter before the insurance was effected would surely "have influenced the mind of the underwriter in deciding upon what terms he would accept the risks." Lord Tenterden, C.J. said: "At the trial several witnesses were examined, who stated that they thought the letter material; but it has been contended that no such evidence ought to have been received. I know not how the materiality of any matter is to be ascertained but by the evidence of persons conversant with the subject-matter of the inquiry. If such evidence is rejected the court and jury must decide the point according to their own judgment unassisted by that of others. If they are to decide, all the court agree in thinking that the letter was material, and ought to have been communicated, and that a jury would have been bound to come to that conclusion." They have come to that conclusion as to the concealment of the over-valuation in the present case, though they have stopped short of finding the existence of actual fraud.

The next question will be whether the jury, under the circumstances of the case, ought not to have found that fraud actually existed. [BLACKBURN, J.—We think it would be better, before

entering on this question, to hear the arguments of the other side on the former question, and to determine that first.]

Butt, Q.C., and F. M. White (with them Sir J. B. Karslake, Q.C.) in support of the rule, commented at length upon the evidence and contended that there was ample evidence to show that the plaintiff might reasonably have expected, under the circumstances, to make profits sufficient to justify his insuring the goods at the valuation actually made, so that there was, in reality, no excessive valuation at all. The valuation cannot be said to be excessive unless it is shown that the anticipated profits could not possibly be received. "There is no reason why a man should not insure to the amount of the profits which he might reasonably expect to make. Unless the matter concealed goes to one of the risks covered by the policy, the concealment does not vitiate the policy. It has been frequently held that mere over-valuation of the goods insured does not invalidate the policy; the over valuation must be extravagantly great which could have such an effect. In fact it would be impossible to draw the line between over-valuation which would, and over-valuation which would not avoid a policy. It may be said that it is a mere question of materiality and that materiality is a question for the jury; but there are some things which it is not for the jury to determine, and this, it is submitted, is one of them.

The argument on the law of the matter which we would urge on behalf of the plaintiff is summed up in 2 Duer, 518, *et seq.* (Note iii): "If the definition of a concealment that alone has the effect of avoiding the policy, which was given by Lord Mansfield in *Carter v. Boehm* (*ubi sup.*) is admitted to be just, it is a necessary consequence that the obligation of the assured is limited to the communication of those facts which are connected with the real nature of the risks. His Lordship said that the concealment 'must be fraudulent, if designed, or, if not designed, must vary materially the object of the policy, and change the risk understood to be run.' It is the risk itself that the concealment must charge, not the mere opinion of the underwriter, as to the prudence of assuming it. In *Haywood v. Rodgers* (4 East, 590) Lord Ellenborough adopted this construction of the language of Lord Mansfield, and it was partly upon this construction that the judgment of the court in that case was founded. The assured had received a letter from the captain, stating that the ship insured, on account of her bad character, had undergone a survey in the West Indies; but that the result of the survey had proved that she was in a good condition to perform the voyage. It appeared, on the trial, that the vessel was in fact seaworthy; but it was insisted that as the letter from the captain was not disclosed to the underwriter, the concealment was fatal, on the ground that a knowledge of the contents of the letter would certainly have enhanced the premium. The judge on the trial adopted and expressed this opinion; but the jury, in opposition to his charge, found a verdict for the plaintiff, and this verdict the Court of King's Bench refused to set aside." That it is not the duty of the assured to communicate everything which might vary the opinion of the underwriters, was clearly stated by Lord Ellenborough in this case. He said: "Is it then to be said

[Q. B.]

LOSINES v. PENNER.

[Q. B.]

down as a principle that every fact known to the assured, with respect to the condition, quality, and circumstances of the ship, prior to the period of effecting the insurance, which may possibly guide the judgment of the underwriter in undertaking or refusing to undertake the insurance, is to be communicated to him? It certainly would have some weight in guiding the judgment of the underwriter on such a subject to know how old the ship was, where she was built, whether originally British or foreign, what was the form of her construction, &c. But the question is, is it the duty of the assured in the first instance, and as a condition precedent on his part, to inform the underwriter of all these circumstances to the extent of his, the assured's own actual knowledge on the subject? If it be, and it never yet has been, either in theory or in practice assumed to be the case, the assured must, before he effects the insurance, collect from all his documents all the materials for the history of his ship from the moment of her being launched down to that of subscribing the policy." Duer says (p. 521) that the observations of Lord Ellenborough were intended "to lay down the general rule that facts not varying the risks, are not requisite to be disclosed, however they might vary the opinion of the underwriter; and I conceive that the very doctrine of Lord Mansfield implies, or more properly is founded on, the same rule, differently expressed, viz., that only those circumstances are necessary to be disclosed that bear a relation to the risks that are, in fact, assumed." In *Beckwith v. Siblethorn* (1 Camp. 116), Lord Ellenborough decided that the owner of the ship insured was not bound to communicate to the underwriter a letter which he had received from the captain, stating that the vessel would probably be detained in her port of departure a considerable time for the purpose of necessary repairs. The only case which Duer says (p. 522) that he has discovered in the English reports in which the omission to disclose facts apparently not bearing on the actual risks, has been held to be a material concealment, upon the ground that the disclosure would probably have varied the decision of the underwriter, is that of *Rickards v. Murdock* (*ubi sup.*). On this case he remarks: "It is, however, to be observed that the expressed part of the letter was not merely important as showing the fears of the writer. Had the time of the arrival of the letter been known (as it would have been had the whole letter been communicated), it would also have been known that it had arrived by a ship which, having sailed about the same time as the ship insured, had been nearly forty days in port; circumstances plainly material to the risk, and which I am persuaded furnish the true explanation of the decision. Certainly the Court of King's Bench, and Lord Tenterden as their organ, never meant to decide that where the assured communicates all the facts that have a bearing on the risks, he is bound also to disclose his own speculations and fears concerning the event, because the disclosure may influence the decision of the underwriter."

The state of the existing law is thus summed up by Duer: "In the United States, as in England, the judges in many cases have expressed themselves in general terms that, taken literally, imply that the only test of the materiality of a concealment is the probable influence of the facts, if disclosed, upon the mind of the

underwriter; but in every decided case that I have examined, in which the concealment has been held to discharge the underwriter, the facts concealed were material to the risks, in the strict and proper sense of the terms. The question, therefore, whether facts extrinsic to the risks, which it is yet highly probable would influence the mind of the underwriter, are for that reason to be deemed material, and therefore necessary to be disclosed, has never become a subject of distinct consideration. . . . As an additional proof that no such rule exists, it may be added that the law is well settled that, where the assured discloses all the facts that are known to him and all the information that he has received, he is not bound to communicate the conclusions of his own mind from the facts disclosed—the fears or the hopes they may suggest. Yet were it known to the underwriter that the opinion entertained of the risk by the assured was more unfavourable than his own, he would be certain to demand a higher premium; he would demand as high a premium as the fears of the interested party would, probably, induce him to pay." (*LUSH, J.*—It is certainly a very startling proposition that if you have reason to believe that a ship is going to be scuttled, you may put your goods on board of it and get them insured, keeping back from the underwriter the reasons for your belief.) *Clason v. Smith* (3 Wash. C. C. R. 156), and *Ruggles v. Gen. Ins. Co.* (4 Mason, 74), were referred to. It is submitted, in conclusion, that the assured was not bound to communicate to the underwriter the fact and the extent of over valuation. *Cur. adv. vult.*

May 27.—The judgment of the court (Blackburn, Lush, and Archibald, JJ.) was now delivered, as follows by

BLACKBURN, J.—This was an action on three policies of insurance by the ship *Da Capo*, on a voyage to Wladivostock, all dated on 1st May 1871. The first was on commissions on goods valued at 14,700*l.*, the commissions being valued at 1500*l.* The second was on profits on charter, valued at 2300*l.* The third had originally been on goods, but by an indorsement on the policy it had become on 222 casks of spirits, valued at 2800*l.* The material pleas were that the ship was not lost by the perils insured against, and that there had been a concealment of a material fact. Particulars were given of this last plea. The one on which the question before us turns was that the insured knew and concealed from the defendant that insurances were made by him, and others in concert with him, on interests alleged to be at risk in the vessel on values greatly exceeding the actual value of those interests.

The case came on to be tried before my brother Hannen.^(a) It appeared in evidence that Wladivostock is a harbour south of what, in 1870, was the customs' line of Russia. It was intended by the Russian Government to bring their customs' line lower down, so as to include Wladivostock within it; and this was, in fact, done in Feb. 1871. Richard Dieckman was the person interested in these policies. He gave, in substance, this account of the transaction: Having learned that this change was in contemplation, and believing it would make shipments to Wladivostock very profitable, he entered into a speculation with one Weneke, by which Weneke was to purchase

^(a) A report of the facts proved, and the summing up of Hannen, J., will be found *ante*, vol. 1, p. 432.—Ed.

[Q. B.]

IONIDES v. PENDER.

[Q. B.]

a ship and charter her to Dieckman, who was to procure the goods he considered suitable to the market, put them on board, and travel overland to Wladivostock, where he would meet them and sell them. The *Da Capo* was accordingly bought by Wencke, through the instrumentality of Dieckman. Dieckman found some persons willing to send out some goods on this adventure. Those persons insured their goods for 1080*l*. The freight on those goods was fixed by bill of lading at a higher rate than the charter freight. This formed the subject of the policy on profits on charter. No evidence was given as to the value of the goods thus insured for 1080*l*., which, therefore, it may be taken, were fairly valued. Dieckman not being able for want of funds to fill up the whole vessel, Wencke purchased goods similar to those purchased by Dieckman, and filled up the vessel with them. These were to be sold by Dieckman. Under these circumstances Dieckman and Wencke employed brokers at Hamburgh to procure insurance, and those Hamburgh brokers employed the plaintiffs on the record, Ionides and Chapenronge, brokers in London, to procure insurance there. A slip was made out by Ionides and Chapenronge on the 29th March 1871 for insurance of 8000*l*. on commission, and goods per *Da Capo* to Wladivostock. After making inquiries about the port, which was quite unknown, various underwriters, including the representative of the defendant, initialed this slip at 34 per cent. Nothing appeared on the face of this slip as to any future declaration or valuation of the subject matter of the insurance; but, from the conduct of all parties, it must have been understood that the interest was to be subsequently declared and valued. The Hamburgh broker, towards the end of April, forwarded to Ionides and Chapenronge a paper in German declaring the interest to be on spirits with anticipated profit, however high or low, and on other goods, with anticipated profit, at 25 per cent. This valuation was certainly seen by the manager of the North China Company, whose name was on the slip before that of the defendant's representative, for he had initialed it. He stated, however, that he did not understand German, and was not aware what was in it. Whether it was ever seen by the defendant's representative or not was left in doubt; but in summing up the learned judge treated the case as if it had been seen by him also. The policies were then made out and signed. The vessel sailed on the 1st May, and on the 18th May sank at sea under circumstances making it very difficult to understand how she came to sink unless she was purposely scuttled. It appeared that Wencke had insured the ship and freight at a fair value, but that he and Dieckman had here and abroad insured the goods which they had put on board at values very considerably above their cost price. The price, including cost, charges, and insurance, amounted in the whole to something less than 8000*l*.; the various insurances on the goods, including profits, amounted to about 14,000*l*., and in addition to these there was the insurance on commissions of 1500*l*., and a further insurance of 1000*l*. on safe arrival, so that the assured stood to receive a very large profit if their venture was lost. This was used as an argument to induce the jury to draw the inference that the vessel was purposely scuttled by the captain in complicity with the assured; but, besides this, the defendant contended

that these high valuations ought to have been disclosed by the assured. The highest valuation was that of the spirits. It appeared in the evidence that the costs, charges, and insurance of the 222 casks of spirits amounted to 273*l*., and for insurance they were valued at 2800*l*. Dieckman, in his evidence, justified this high valuation by saying that spirits were a very profitable article, and also that he hoped and expected that his spirits would arrive when they could be imported duty free, and that a very heavy Russian duty was about to be imposed immediately afterwards, which would have the effect of raising the value of his spirits to the level of duty paid spirits. The defendant called underwriters, who gave evidence, without any objection being made, that it was material to underwriters to know the extent of the over valuation when it was to such an extent as appeared in this case. They also stated in effect that where the valuation was excessive, the risk was considered a speculative risk, which one class of underwriters would not take at all, and another class would take, but only if a sufficient premium was offered; that 25 per cent. added was not unusual, and that in one case 30 per cent. had been taken by the first class; that beyond this it would be a speculative risk.

On this evidence my brother Henneu proposed to ask the jury seven questions: First, whether the goods were really put on board? Secondly, were the valuations for insurance excessive? Thirdly, if excessive were they so made with a fraudulent intent? Fourthly, whether fraudulent or not was it material to the underwriter to know that the valuation was excessive? Fifthly, was it concealed from the underwriter? Sixthly, was the vessel lost by perils insured against? Lastly, did the assured know or intend that the vessel should be cast away? The counsel for the defendant admitted that the first question must be answered in favour of the plaintiffs. The other six questions were asked of the jury who answered, that the valuations were excessive; that there was not sufficient evidence to show whether they were made with fraudulent intent; but that whether fraudulent or not it was material to the underwriter to know that they were excessive, and that that was concealed; that the vessel was not lost by the perils insured against, but that they had not sufficient evidence to show whether the assured knew or intended that the vessel should be cast away. Some attempts were made to get the jury to express a further opinion on the mode in which the vessel was lost, without success. The verdict was then entered for the defendant on these findings.

In the ensuing term Mr. Butt obtained a rule nisi for a new trial, on the grounds of misdirection, as to the concealment, and as against evidence. Delays and difficulties came in the way of hearing the argument, but in the three days next after last Term it came on before my brothers Lush, Archibald, and myself. We desired the counsel for the present to confine themselves to the question whether there was any ground for disturbing the verdict on the plea of concealment, supposing the plea had stood alone, or the jury had been discharged on the other issue, leaving it for further discussion, whether that would finally dispose of the rule.

We have come to the conclusion that there is no ground for disturbing the verdict on this

Q. B.]

IONIDES v. PENDER.

[Q. B.]

issue. My brother Hannen, in summing up, pointed out to the jury that a valuation of goods for the purpose of insurance might fairly and properly be made, taking into account not only the original costs of the goods, but adding an estimate of the anticipated profits of the goods arrived at their destination; and that opinions might vary as to the profit to be made on a particular venture. He advised them not to find the valuation excessive unless they thought the goods were valued with an addition of profit greater than could be expected to be realised under any circumstances which could be reasonably contemplated. This may, perhaps, be too favorable to the assured, as it makes the question whether there is an excessive valuation or not depend on whether the valuation was so high as to amount, in part at least, to a wager; but no objection on that ground can be taken by the plaintiffs. And we think that the evidence here was such as to justify the jury in finding that the valuation of the spirits, at least, was excessive according to this definition; and this finding cannot be considered as against the weight of evidence. The finding that the excessive valuation was concealed from the underwriters was impugned on the ground that the statement in the German valuation, that the spirits were valued with anticipated or imaginary profits, be the same high or low, amounted to a disclosure that the valuation was excessive. As to this, my brother Hannen told the jury, and we think quite rightly, that, in the absence of some active deception, the assured had a right to suppose that an underwriter read and understood the documents laid before him, and that if he did not understand the language in which they were written he would ask for a translation; and he assumed, in his summing up, that the defendant's representative had independent notice that the valuation contained the words, "profits however high." This we have not found in the notes of the evidence, but it probably was so. But then he asked the jury to consider whether that was a disclosure that there was an excessive valuation in the sense which he had previously explained to them, of an estimate of profits formed with knowledge that it had no foundation. The jury must be taken to have found that it was no disclosure, and we cannot say that they were wrong. The finding of the jury that the concealment was material was impeached, both on the ground that it was against evidence, and that of misdirection, as it was contended that the judge ought to have told the jury that the fact of an excessive valuation was not one which the assured was bound to disclose.

It is perfectly well established that the law as to a contract of insurance differs from that as to other contracts, and that a concealment of a material fact, though made without any fraudulent intention, vitiates the policy. In *Duer on Insurance*, vol. 2, p. 388, it is said: "The terms in which the general rule is usually stated are, that it is the duty of the assured to communicate all facts that are material to the risks, and which are not known or presumed to be known to the underwriter; but these terms are ambiguous, and the first and necessary inquiry is by what criterion the materiality of the facts alleged to have been concealed is proper to be determined. Is the obligation of a disclosure limited to the facts that are material to the risks, considered in their own nature? or does it extend to all that may be

deemed material by the insurer, and would probably influence his ultimate decision?" He admits that a knowingly false representation of a matter which, though extraneous to the risks, may affect the judgment of the underwriter, will vitiate, and that the case of *Sibbald v. Hill* (2 Dow. 283), is an express decision of the House of Lords to that effect. But he lays it down as being the most reasonable opinion that those facts only are necessary to be disclosed which are material to the risks in their own nature, and a prudent and experienced underwriter would deem it proper to consider. The cases and proofs in support of his position are collected at *Duer*, p. 518, *et seq.*

It was argued before us that the nature of the risk—i.e., the strength and seaworthy qualities of the *Da Capo*, and the probability of encountering storms on the voyage, and so forth, were not in the least affected by the amount at which the goods were valued, which is no doubt true. The underwriter is not answerable for any loss occasioned by fraud of the assured, and it was argued that, therefore, the objection which an underwriter might have to take a risk on account of the temptation which the assured might have to make away with the venture, ought not to be taken into account. Whether *Duer* would have gone so far as this is not clear; but if he would, the courts in America have refused to follow him: (*New York Brewery Fire Insurance Company v. New York Fire Insurance Company*, 17 Wend. 359). In that case the plaintiffs had insured certain property against fire, and the president of the company heard that the person insuring with them, or at least some one of the same name, had been so unlucky as to have had several fires, in each of which he was heavily insured. The plaintiffs reinsured with the defendants, but did not inform them of this. A fire did take place; the insured came upon the plaintiffs, who came upon the defendants. The judge directed the jury that if this information given to the president of the plaintiffs was intentionally kept back, it would vitiate the policy of reinsurance. The jury found for the plaintiffs, but the court on appeal directed a new trial, on the ground that the concealment was of a material fact, and, whether intentional or not, it vitiated the insurance. It is to be observed that the excessive valuation not only may lead to suspicion of foul play, but that it has a direct tendency to make the assured less careful in selecting the ship and captain, and so diminish the efforts which in case of disaster he ought to make to diminish the loss as far as possible, and cannot, therefore, properly be called altogether extraneous to the risks; nor we would scarcely base our judgment on so special a ground. We agree that it would be too much to put on the assured the duty of disclosing everything which might influence the mind of an underwriter. Business could hardly be carried on if this was required. But the rule laid down in *Parsons on Insurance* (vol. 1, p. 495), that all should be disclosed which would affect the judgment of a rational underwriter governing himself by the principles and considerations on which underwriters do in practice act, seems to us a sound one. We do not think any of the cases cited by *Duer* are in contravention of it; and, applying it to the present case, there was distinct and uncontradicted evidence that underwriters do in practice act on the principle

Q. B.]

DE WOLF v. ARCHANGEL MARITIME BANK AND INSURANCE COMPANY.

[Q. B.]

that it is material to take into consideration whether the overvaluation is so great as to make the risk speculative. It appears to us a rational practice.

We think, therefore, that the judge could not do otherwise than leave this question to the jury, and that their verdict was not against the weight of evidence, and should not be disturbed. It will be for the counsel on both sides to consider what course they will take as to the rest of the rule.

Rule discharged.

Attorneys for plaintiff, *Stibbard and Croushay.*

Attorneys for defendant, *Hollams, Son, and Coward.*

April 28 and June 8, 1874.

DE WOLF v. ARCHANGEL MARITIME BANK AND INSURANCE COMPANY.

Marine insurance.—Policy on a ship "at and from" a port—Alteration of risk by delay in the commencement of the voyage.

Where a policy of marine insurance is entered into insuring a ship or goods thereon "at and from a port," there is, in the absence of a direct representation, an implied understanding that the vessel shall be at that port within such a time, that the risk shall not be materially varied; otherwise the risk does not attach.

An insurance was effected on the 13th July on a ship for a voyage, "at and from Montreal to Montevideo." No information was given by the assured, and no question was asked by the underwriters, as to where the ship was at the date of the policy. She did not actually arrive at Montreal until the 30th Aug. The jury found that the delay materially increased the risk:

Held, that it was immaterial whether or not that delay was caused by badness of weather or other causes beyond the control of the assured; that, in the absence of a representation on a policy at and from a port, it is an implied understanding that the vessel shall be there within such a time that the risk shall not be materially varied; and that otherwise the risk does not attach.

This was an action upon a policy of insurance against the defendants, an insurance company, to recover 24l. 13s. 2d. for general average and loss of freight. The insurance was an insurance (lost or not lost) at and from Montreal to Montevideo and Buenos Ayres, and was upon chartered freight in the ship called the *Florence Chipman*. The premium was at the rate of 2l. per cent. The fourth plea stated that at the time of the making of the policy the said ship was not, nor did the said ship within a reasonable time thereafter, arrive at Montreal, and great and unreasonable delay occurred before the said ship arrived at Montreal, being a delay which was material to the risk of the said policy, and by reason thereof the said policy, at the commencement of the said risk, had not attached. The cause was tried in the Lord Mayor's Court, before the Common Serjeant. It appeared that nothing had been said at the time when the policy was made as to where the ship then was. The ship did not actually arrive at Montreal until the 30th Aug., seven weeks after the date of the policy. Evidence was given on behalf of the plaintiffs that the delay had arisen from bad weather and other reasonable

causes. The Common Serjeant directed the jury that "It is immaterial whether the delay was excused. I hold the question is—Were the defendants ever liable on this policy? The question is whether the seven weeks' delay affected the risk, and the evidence of the underwriters is that the premium would be increased. The question is not affected by the consideration whether the delay was avoidable. It does not matter whether the delay was anyone's fault." The jury found that the delay did vary the risk, and a verdict was entered for the defendants. Leave was obtained on behalf of the plaintiffs to move for a new trial, if the court should disagree with the direction to the jury, that "if from any cause, avoidable or unavoidable, a delay occurred in the arrival of the vessel at the port of departure, which increased the risk, the policy never attached." A rule was obtained in pursuance of the leave reserved.

C. Bowen for the defendants, now showed cause.

—This case is governed by *Hull v. Cooper* (14 East. 479), where Lord Ellenborough said, "When a broker proposes a policy to an underwriter on a ship, at and from a certain place, it imports either that the ship is there at the time, or shortly will be there; for if she is only to be there at a distant period, that might materially increase the risk." The cases that may be cited on the other side are to be distinguished upon the ground that in all of them the delay took place after the policy attached. Here the policy never attached at all. *Hull v. Cooper* has been doubted as to the question whether the jury were right that the delay varied the risk, but not as to the correctness of Lord Ellenborough's dictum. It has been accepted in the case of *Mount v. Larkins* (8 Bing. 108), though it was there incorrectly stated that *Hull v. Cooper* turned upon the point of concealment; see also the judgment of Parke, B. in *Small v. Gibson* (16 Q. B. 141), and see Maude and Pollock, 3rd edit., p. 355, and Duer., vol. 2, 489. [BLACKBURN, J. also referred to Phillips on Insurance, sects. 618 and 690.] The reason of the thing is on my side. The underwriter takes the chance of what happens within the scope of the policy, but is in no way liable for what occurs before the policy attaches; he undertakes a risk of a particular kind: if the risk is of a different kind he does not undertake it at all. Here the defendants accepted a premium as for a summer voyage, the voyage did not in fact commence until the summer was over, and the jury found that the risk was materially increased, consequently the policy never attached.

Benjamin, Q.C. and *Aspland* for the plaintiffs.—If the contention of the defendants is right, no shipowner can insure a vessel on a homeward voyage without giving a warranty that the vessel shall complete her outward voyage within a certain time. But such a warranty cannot be implied in the words "at and from," which is merely a description of the voyage, and not a statement that the vessel is already at the port. Such a warranty must be expressed, and cannot be implied. The underwriters may, and in fact often do, exact such a warranty; it is their duty to ask for any information they may require: (see cases cited in *Arnould*, 554, et seq., and also *Beckwith v. Sydebotham* (1 Camp. 116)). The defendants were aware that the vessel was under charter for her outward voyage, and if they had chosen to look at the charter-party they would have seen when she was likely to arrive at Montreal. *Hull v. Cooper* is not

Q. B.]

DE WOLF v. ARCHANGEL MARITIME BANK AND INSURANCE COMPANY.

[Q. B.]

an authority in this case; it turned entirely upon the question of concealment, the vessel being actually at the date of the policy in the Thames, whereas from the terms the underwriters might have presumed that she was already at Heligoland. The language of the court in *Mout v. Larkins* is also in our favour, though the actual point was not decided: see *Vallance v. Decar*, 1 Camp. 503, and *Ongier v. Jennings*, reported in a note to that case; also *Grant v. King*, 4 Esp. 175; *Phillips v. Irving*, 7 M. & G. 325, where Tindal, C.J. said: "It may be collected from numerous cases, that delay before or after the commencement of a voyage insured is not equivalent to a deviation, unless it be unreasonable." Also

Driscoll v. Passmore, 1 B. & P. 200;

Jones v. Neptune Insurance Company, ante, vol. 1, p. 416; L. Rep. 7 Q. B. 702;

Brine v. Featherstone, 4 Taunt. 869.

In *Marshall* (p. 366) *Hull v. Cooper* is regarded as being decided wholly on the ground of deception.

Our. adv. vult.

June 8.—The judgment of the court (Cockburn, C. J., Blackburn and Lush, J.J.) was delivered by BLACKBURN, J. This was an action tried in the Mayor's Court, before the Common Sergeant. The action was on a voyage policy, on ship "at and from Montreal to Monte Video." The fourth plea, on which alone the question before us arises, was that the ship was not at Montreal within a reasonable time, being a delay materially varying the risk.

The facts as to this case were that the policy was effected on the 13th July, at a premium of 2 per cent. No question was asked by the underwriters as to where the ship then was, and no information was offered by the assured; but, in fact, she was then at sea, on a voyage intended to end at Montreal. She did not arrive at Montreal till the 30th August. Evidence was given that the delay in the arrival at Montreal changed the voyage from a summer one to a winter one, which materially affected the risk and the rate of premium. Evidence was offered on the part of the plaintiffs that the delay in arriving at Montreal was not voluntary on their part, but was occasioned by perils of the seas on the voyage out to Montreal. The Common Sergeant rejected this evidence, giving leave to the plaintiff to move in this court for a new trial on this ground. The case was then left to the jury, who found that the delay was unreasonable, and that the risk was thereby materially changed. A rule nisi was obtained for a new trial, which was argued in last term before my Lord, my brother Lush, and myself, when the court took time to consider.

As the evidence was rejected, we must consider the case as if it had been received and had established what it was offered to prove, and as if the jury had found, not only as they have done, that there was unreasonable delay between the making of the policy and the commencement of the risk intended to be insured against, materially altering that risk, but also that the delay was occasioned by matters beyond the control of the assured. And then we have to determine whether that would be a defence or not. Nothing would seem easier than for the parties making a policy to insert a few words preventing all possibility of dispute on such a point. If the insurance had been in this case at 5 per cent. to return 3 per cent. if the ship was at

Montreal on or before some named day, there would have been no question but that the underwriters would in this case have been liable and the assured would not have had to pay the winter premium unless the underwriter ran the winter risk. If the underwriters had inserted "warranted to be at Montreal on or before" some named day, there can be no doubt that the risk would not have attached, and in either case by naming a fixed day the controversy as to when the risk became varied would be avoided. But we are informed that in practice there are great if not insuperable difficulties in the way of introducing unusual clauses into policies, and that brokers prefer the risk of causing litigation at the expense of their customers to the risk of frightening away custom by proposing something unusual. We must anticipate that policies will continue to be made as this has been, and the question before us is therefore one of considerable importance.

It is quite clear that the words "at and from a particular place," do not import either a warranty or a representation that the vessel at the time of making the policy is already at the place. In *Hull v. Cooper* (14 East, 479), decided in 1811, the case was one of an insurance on goods "at and from Heligoland to a port in the Baltic." At the time when the policy was effected, the 13th Aug., the ship was in the Thames, which fact was known to the assured and not communicated. She did not sail from the Thames till 27th Aug., a fortnight later, which latter fact could not have been known to the assured at the time of making the policy, as it had not then happened. The plaintiff having obtained a verdict, a motion for a new trial was refused. It appears from the report as if the counsel who moved treated the case entirely as one of concealment, and not as one of a change of risk, but Lord Ellenborough in his judgment separates the two questions. He says: "When a broker proposes a policy to an underwriter on a ship at and from a certain place, it imports either that the ship is there at the time or shortly will be there, for it is only to be there at a distant period, that might materially increase the risk. But it has never been understood that the terms of such a policy necessarily imported that the ship was at the place at the very time, so as to make the assured guilty of deception if she were not." So far he is dealing with the non-disclosure of the fact that the ship was in the Thames on the 13th Aug. He then proceeds: "It was a question for the jury whether the intervening period materially varied the risk in this instance, the interval being from the 13th to the 27th Aug., with the additional days which elapsed from the sailing till she reached Heligoland; and the jury were not persuaded that the risk was thereby varied and found for the plaintiff." And Bayley, J., says, "It was a question for the jury whether the delay in reaching Heligoland for so many days after the policy was effected materially varied the risk." The affirmative decision here is that a delay not varying the risk does not discharge the underwriter, but the opinion is expressed that a delay materially varying the risk does discharge the underwriter, though that was not the very point decided. In *Driscoll v. Passmore* (1 B. & P. 200) in 1798, where an analogous question arose and the plaintiff recovered, it was stated in the report "that

Q. B.] TAYLOR AND OTHERS v. THE LIVERPOOL AND GREAT WESTERN STEAM COMPANY. [Q. B.]

it was in evidence that the difference of season arising from this delay did not vary the risk." *Brine v. Featherstone* (4 Taunt. 899) came before the court on a rule to enter the verdict on a point reserved at the trial, and the court in banc had not to consider whether the delay was such as to discharge the underwriters. The facts, as stated in the report appear to be such as would have afforded evidence that the delay was such as to vary the risk, but if that defence was raised at *Nisi Prius*, which does not appear to have been the case, there may have been some other evidence not stated in the report which justified the finding of the jury. Neither of those cases can, as we think, be considered in conflict with *Hull v. Cooper*.

The case, however, that comes nearest to the present is that of *Mount v. Larkins* (8 Bing. 108). In that case the facts were found in a special verdict, a part of which only is set forth in the report. The policy was on the ship *Aquila*, at und from Singapore and Batavia, both or either, to the ship's port of discharge in Europe. In the report it is said that it was found that the policy was entered into on the 28th Feb. 1824, that the ship sailed from England in the beginning of September 1823, on a voyage to the Cape of Good Hope, Van Diemens Land, and Sydney, and thence to Singapore. It is not stated in the report that it was known to the underwriters that she was bound on this preliminary voyage, but it is scarcely possible that it should be otherwise, and in the judgment of the court it is assumed throughout that it was known to them. The jury found that there was "unreasonable and unjustifiable delay between the making of the said policy of assurance and the commencement of the risk intended to be insured against." On this the Court of Common Pleas decided in favour of the defendants, saying, "We must intend that the risk was in fact varied, and consequently the underwriters discharged." This would be precisely in point were it not that it was there expressly found that the delay was unjustifiable, and that in the present case the plaintiffs have not been allowed to give evidence to show that the delay was not from any fault of theirs. The ground on which the judgment delivered by Tindal, C.J., in *Mount v. Larkins*, is based, is that "the underwriter has as much right to calculate the outward voyage on which the ship is then engaged being performed in a reasonable time and without unnecessary delay, in order that the risk may attach, as he has that the voyage insured shall be commenced within a reasonable time after the risk has attached. In either case the effect is the same as to the underwriter, who has another risk substituted instead of that which he has insured against, and in both cases the alteration is occasioned by the wrongful act of the insured himself." This may be relied on as an expression of opinion that the delay, if necessary, would not discharge the underwriters. It may be so where the fact that the vessel is on a preliminary voyage is known, and communicated to the underwriter, so as to make that the basis of the contract, and it seems to have been understood by Tindal, C.J., that the principle on which the cases of *Vallances v. Dewar*, and *Ongier v. Jennings*, were decided, was on the ground of notice. He says, in both those cases, "it is admitted that a delay in the commencement of the risk by the interposition of an intermediate voyage not communicated to the underwriters

would discharge the policy, unless such intermediate voyage was one which was made usually and according to the course of the trade in which the ship was then engaged, which would be equivalent to notice to the underwriters."

We need not, in the present case, decide how that is, for there was no communication made to the underwriters as to where the ship was at the time when the policy was made. And we think it, under such circumstances, not material whether the delay which varies the risk was occasioned by the fault or the misfortune of the assured. In either case the risk is equally varied. Where the alteration in the course of the voyage after the risk has attached is justified by necessity, it does not vary the risk. The underwriter has undertaken to insure the vessel during the usual and proper course of the adventure. Now, though under ordinary circumstances the usual and proper course of a voyage is to proceed direct; or if chased by a hostile cruiser, or forced to run before a storm to go out of the direct course, the underwriter takes his chance of the vessel being forced to do so. But the underwriter does not take upon himself any part of the risk of the vessel being delayed so long as to vary the risk by perils of the sea or otherwise on its passage to the port where the risk is to attach. This seems involved in the decision of *Hull v. Cooper*, that the assured is not bound to communicate to the underwriter the place where the vessel is at the time of insurance. For if the time when the risk is to attach might be indefinitely delayed by perils affecting the passage from the place where the vessel was, it must be material to the underwriter to know what that place is. If, on the other hand, at whatever place the ship then is, the risk is not to attach unless the vessel in fact arrives at the port within a proper time, it is not material to the underwriter at what place the ship then is. The position is laid down in 1 Phillips on Insurance, p. 379, s. 690, "That it is an implied understanding that the risk is to commence within a reasonable time unless the policy contains some express provision on the subject." He elsewhere, vol. 1 332, s. 602, expresses a hesitating opinion that a representation, though not embodied in the policy, may have the effect of qualifying or rebutting an understanding that is only implied. As already said, we are not now called upon to decide how this may be, as in the present case there was neither representation nor express provision in the policy. We think, at all events, in the absence of a representation, that in a policy "at and from a port," it is an implied understanding that the vessel shall be there within such a time that the risk shall not be materially varied, otherwise the risk does not attach. The rule, therefore, must be discharged.

Rule discharged.

Attorneys for plaintiffs, Fles and Co.

Attorneys for defendants, G. Ashley and Tee, for Freshfield and Williams.

Friday, June 5, 1874.

TAYLOR AND OTHERS v. THE LIVERPOOL AND GREAT WESTERN STEAM COMPANY.

Bill of lading—Exception against loss by "thieves"—Goods stolen—Barratry—"Damage capable of being covered by insurance."

Q. B.] TAYLOR AND OTHERS v. THE LIVERPOOL AND GREAT WESTERN STEAM COMPANY. [Q. B.]

Plaintiffs shipped on board defendant's ship at Liverpool for New York, certain boxes of diamonds, under bills of lading excepting, amongst other things, "robbers, thieves, barratry of the masters and mariners," and containing a clause that "the shipowner is not to be liable for any damage to any goods which is capable of being covered by insurance." One of the boxes of diamonds was stolen when on board the ship, either on the voyage or after her arrival in port, before the time for delivery arrived, but there was no evidence to show whether they were stolen by one of the crew, or by a passenger, or, after her arrival, by some person from the shore.

Held (1) that "damage to any goods" in the insurance clause did not apply to the case of a total abstraction of the goods; (2) that the word "thieves" applied, as in policies of insurance, only to thieves external to the ship, and not to a passenger or one of the crew; (3) that the onus of showing that the loss came within one of the exceptions lay upon the shipowners, and not the shipper; and that, as the defendants had failed in showing that, the plaintiffs were entitled to recover.

THIS was an action brought to recover damages for the non-delivery and loss of a certain box of diamonds under the circumstances hereinafter stated, and by consent of the parties and by the order of Mellor, J. according to the Common Law Procedure Act 1852, the following case was stated for the opinion of the court.

1. The plaintiffs are merchants carrying on business in New York. The defendants are the owners of the ship *Nevada*, one of a line of passenger ships running between Liverpool and New York.

2. On or about the 25th July 1871 the plaintiffs caused to be shipped at Liverpool on board the defendants' said steam ship *Nevada* for New York, five boxes of diamonds, and the defendants accepted and received the same from the plaintiffs to be carried on board the said ship from Liverpool to New York, on the terms of five bills of lading respectively, which were all in the same form, and a *fac simile* copy of one of which is hereto annexed and is to form part of the special case. The memorandum in the margin "Insurance in London by A. S. P. & Co." was upon the bills of lading when they were delivered to the shippers.

3. Four of the said boxes of diamonds were duly delivered by the defendants to the plaintiffs at New York, but the remaining box was stolen during the said voyage, and has never been delivered to the plaintiffs. The diamonds were stolen when on board the ship either on the voyage or after her arrival in port before the time for delivery arrived, but there is no evidence to show whether they were stolen by one of the crew or by a passenger, or after her arrival, by some person from the shore.

4. At the time of the shipment the diamonds were insured for the voyage by two policies effected at Lloyd's, copies of which are annexed to and are to be taken as part of this case. A claim for the loss in question was made upon the underwriters upon the policies and was paid.

The question for the opinion of the court is whether the plaintiffs are entitled to recover from the defendants the value of the third box of diamonds. If the court should be of opinion in the affirmative, then judgment shall be entered up for the plaintiffs for 950*l.* with costs. If the court

shall be of opinion in the negative, then judgment shall be entered up for the defendants with costs.

The exceptions contained in the bill of lading were: "The Act of God, the Queen's enemies, pirates, robbers, thieves, vermin, barratry of masters, and mariners, restraints of princes and rulers or people, sweating, insufficiency of package in size, strength or otherwise, leakage, breakage, pilferage, wastage, rain, &c., and all damage, loss, or injury arising from the perils or things above mentioned, and whether such perils or things arise from the negligence, default, or error in judgment of the pilot, master, the mariners, engineers, stevedores, or other persons in the service of the shipowners, always excepted."

The bill of lading contained also the following clause:—"The shipowner is not to be liable for any damage to any goods which is capable of being covered by insurance, nor for any claim, notice of which is not given before the removal of the goods; nor for claims for damage or detention to goods under through bills of lading, where the damage is done or detention occurs whilst the goods are not in the possession of the shipowner; nor in any case for more than the invoice or declared value of the goods, whichever shall be the least."

Cohen, Q.C. (with him *Hollams*) for the plaintiff contended that the loss of the diamonds under the circumstances mentioned in the case did not come within any of the exceptions mentioned in the bill of lading and that the defendant, was, therefore, liable for the loss. The exception as to loss by "thieves" does not embrace this case for, borrowed as it clearly is from the similar clauses found in policies of insurance, the word "thieves" must be understood in the same sense as it has in those instruments, and be held applicable only to persons outside the ship, not to members of the crew or to passengers. The theft intended must be held to be as in policies of insurance, not simple theft—*furtum*—but *latrocinium*. Aronold (Marine Insurance, vol. 2, p. 704, 4th edit.) says: "The theft that is insured against by name in the policy means that which is accompanied by violence (*latrocinium*) and not simple theft (*furtum*); it being an old and elementary rule that *furtum non est casus fortuitus*, is not one of the fortuitous events against which the owner may seek indemnity by insurance, but one which the law presumes might have been prevented by the exercise of due diligence." To entitle the shipowner to exemption from liability under this clause, he must show that the diamonds were lost not by *furtum*, but by *latrocinium*; the onus lies upon him to show this. Now the case distinctly finds that there was "no evidence to show whether they were stolen by one of the crew or by a passenger, or after her arrival, by some person from the shore." The defendants therefore have failed to bring the case within this exception. And the case clearly does not come within the insurance clause against damage which is capable of being covered by insurance; for "damage" cannot mean a total loss of the goods by a bodily abstraction of them, as here. It means an injury to the goods, not a total abstraction of them.

Hereckell, Q.C. (with him *B. V. Williams*) for the defendants.—As a matter of fact, as stated in the fourth paragraph of the special case, the plaintiff has recovered upon his policies of insurance in

Q. B.] TAYLOR AND OTHERS v. THE LIVERPOOL AND GREAT WESTERN STEAM COMPANY. [Q. B.]

respect of the loss of these diamonds. The word "damage" must include loss of the goods, otherwise a total loss could not be insured against; and a theft by a passenger or by one of the crew is a loss which could be insured against. However, whether the defendants come within the exemption of the insurance clause or not, it is submitted the case comes clearly within the exemption against loss by "thieves," a word of unrestricted meaning, and applicable to all cases of theft, no matter by whom committed. There is no reason for limiting the general word thieves to the narrower meaning given to it in policies of insurance; the words of this clause are different from those found in policies of insurance, and the word "pilferage" points unmistakably to acts done by passengers or members of the crew. If "thieves" mean persons who act with violence, there would be no need of the word "robbers" which, as decided by *De Rothschild v. The Royal Mail Steam Packet Company* (7 Ex. 734) means, not thieves, but robbers by violence. Again, the loss of the diamonds under the circumstances of the present case may well come within the exemption as to "barratry of the masters and mariners" as barratry is described in Phillips on Insurance, sect. 1071, where it is said: "Theft, embezzlement and wilful destruction of the property insured are in their nature barratrous acts." Nor is the definition of barratry given in Arnould on Marine Insurance (vol. 2 p. 706) inconsistent with this. Finally it is submitted that the onus is upon the plaintiff to show that the loss was caused by a species of theft which takes the case out of the exemption: (See *Phillips v. Clark*, 2 C. B., N. S., 156; *Czech v. The General Steam Navigation Company*, 17 L. T. Rep. N. S. 246.)

LUSH, J.—This case is one which presents considerable difficulty, and during the argument I have felt great doubt as to the construction of this bill of lading, but I have arrived at a conclusion satisfactory to my mind, that the loss of these diamonds does not come within any of the exceptions in the bill of lading, and that the plaintiff is therefore entitled to our judgment. The facts as stated in the case are that the diamonds were stolen when on board the ship either on the voyage or after her arrival in port, but there was no evidence to show whether they were stolen by one of the crew or by a passenger, or, after her arrival, by some person from the shore. We must take that finding in the case as equivalent to an averment that there were passengers on board, and the matter is left in doubt whether the diamonds were stolen by one of them, or by one of the crew, or by some one from the shore after the ship's arrival.

The question then is does such a loss come within any of the exceptions in the bill of lading? The exceptions are "the act of God, the Queen's enemies, pirates, robbers, thieves, vermin, barratry of masters, or mariners, &c." The important question as to this is whether the word "thieves" comprehends all thieves, including any amongst the persons on board, or, as hitherto understood in policies of insurance, whether it is not applicable only to persons outside the ship and not belonging to it. It is a word of ambiguous meaning, and in the case of such a word I think we ought to put such a construction upon it as will be most in favour of the shipper, and not that which is most in favour of the shipowner. The exception is one framed for the benefit of the shipowner and if it were intended to give him the

protection contended for he ought to have made that clear. I think therefore that the word "thieves" should receive the ordinary construction which has hitherto been put upon the word in policies of insurance. It is not reasonable to suppose that where nothing is added to qualify this meaning the shipowner was not meant to be liable for theft by one of the crew or one of the passengers. I think we should understand the word "thieves" used in this exception in the ordinary sense which it has hitherto borne, and as not including any of the persons on board. I say nothing as to whether the word "barratry" might not include such a loss as this. For supposing that a theft by one of the crew would be barratry, this theft was not necessarily committed by one of the crew; as there were passengers on board it is enough to say that the theft might have been committed by one of them, and not by one of the crew.

The next question is, whether the loss comes within the insurance clause in the bill of lading. That clause says: "The shipowner is not to be liable for any damage to any goods which is capable of being covered by insurance." I do not agree with Mr. Cohen that the word "damage" is to be limited to damage or injury as opposed to the destruction or total loss of the thing. If goods were damaged to the extent of their utter destruction, that would still be damage within the meaning of this clause. But I do not think that the clause includes the present case, which is not one of damage, but of entire abstraction of the thing itself. I think it must be confined to cases where the goods receive damage from one or other of the perils insured against, and that it does not apply to cases where no damage has been done to the goods but there has been an entire bodily abstraction of them.

The next question is, Does the onus of proof in the matter lie on the plaintiff or on the defendant? I am of opinion that it is for the defendant to bring himself within the exception in the bill of lading. It lies upon him to show that the theft was committed by some person outside the ship; the onus does not lie on the plaintiff of showing the contrary. The case of *Czech v. The General Steam Navigation Company* (ubi sup.) which has been cited, does not seem to me to have any bearing on the present case. There the shipowner stipulated that he would not be liable for "breakage, leakage, or damage" which, according to the decisions, means breakage, leakage, or damage not caused by or owing to his own negligence; and the court held that it was not sufficient to show that the damage was such as *prima facie* was caused by one of the perils insured against, but that the plaintiff must go further and show that it was caused by the negligence of the shipowner or one of his servants. I do not think that case at all touches the present. The shipowner here is responsible for the non-delivery of the box of diamonds, unless he can bring himself within one of the protecting clauses. He says, according to the construction we have put on the word thieves, that he will not be responsible if the thing is stolen by some person not belonging to the ship; he fails to show that the box was stolen by some person not belonging to the ship, and therefore he does not bring himself within the exception. The plaintiff therefore is entitled to our judgment.

ARCHIBALD, J.—I am of the same opinion. The first question is what is the proper construction of

C. P.]

HUDSON AND ANOTHER V. HILL AND ANOTHER.

[C. P.]

the bill of lading. The goods were shipped on board the defendant's ship under a bill of lading, and the defendants are responsible for their safe delivery, unless they can bring themselves within any of the exceptions in that bill of lading. I own that during the argument I felt considerable doubt as to the meaning of the document, but I have arrived at the same conclusion as my brother Lush, that the defendants have not brought themselves within any of the exceptions exempting them from liability.

The clause as to insurance says that the shipowner is not to be liable for any damage to any goods which is capable of being covered by insurance. It has been contended that this clause is so extensive as to exempt from liability for every possible risk that could be insured against, and that the word damage extends not only to a loss by destruction, but also to a loss by theft. If the word damage could be so extended, the clause would exempt the shipowner from liability as to these goods under all circumstances whatever, as the theft might be insured against. But when we come to look at the clause itself we must see, I think, that the word damage is not used in that sense. The present case was one of abstraction of the goods, and I do not think the words of the clause apply to such a case as that. The whole of the insurance clause seems to me to point to some injury done to the goods, the goods themselves remaining in specie. The defendants cannot therefore rely on this exception.

The next question is, have the defendants brought themselves within the exception against loss by thieves? This depends on the construction to be put on the word thieves. No doubt the words of this clause were copied originally from policies of insurance, and in policies of insurance the word thieves refers to theft by violence, to *latrocinium* as opposed to *furtum*. As the word is ambiguous I think it is for the shipowner to make out clearly that it was the intention that the word should have the other meaning, and should not bear the ordinary meaning which it had acquired in policies of insurance. As the defendants have failed to do that, I think they have not brought themselves within this exception either; for it is found in the case that the diamonds may have been stolen by one of the crew, or by a passenger, or by some person from the shore after the ship's arrival. The question of barratry, therefore, does not arise.

For these reasons I agree with my brother Lush that there should be judgment for the plaintiff.

Judgment for the plaintiff.

Attorneys for the plaintiff, *Hollams, Son, and Coward.*

Attorneys for the defendants, *Gregory, Rowcliffe, and Co.*

COURT OF COMMON PLEAS.

Reported by EYMERSON SMITH and J. M. LEST, Esqrs.,
Barristers-at-Law.

May 26 and 27, 1874.

HUDSON AND ANOTHER V. HILL AND ANOTHER.

On inter-party—Outward cargo taken for shipowner's benefit—Ship to proceed "forthwith" to Barbadoes for sugar—Delay of outward voyage by excepted perils—Arrival of ship too late for sugar season at Barbadoes—Refusal of charterer's agent to

load—Refusal of captain to take cargo from other island.

On the 28th Dec. 1870, the plaintiffs and the defendants agreed, by charter-party, that the plaintiffs' ship should forthwith proceed to Barbadoes, and there load a sugar cargo of the defendants, taking an outward coal cargo for the benefit of the plaintiffs, "lay-days not to commence before the 1st April 1871."

The ship sailed on the 8th Feb., and having been delayed more than a month by the excepted perils, did not reach Barbadoes till the 28th July, when the defendants' agents, who had expected the ship to arrive at the beginning of the sugar season in April, refused to load, on account of the sugar season having passed, alleging that time was the essence of the contract, but offered to provide another cargo of sugar and molasses from Barbadoes and St. Vincent. The captain refused to take such other cargo, and the ship having sailed away on another enterprise, the plaintiffs sued the defendants for not loading according to charter-party.

Lord Coleridge, C.J., told the jury that the exception of perils of the seas applied to the outward voyage, and that the captain was not bound to take the substituted cargo so offered, and the jury having found that the ship had, in fact, sailed forthwith to Barbadoes, and that the date of the ship's arrival at Barbadoes was not such as to put an end to the commercial speculation of the parties, directed a verdict for the plaintiffs:

Held, no misdirection, and a rule for a new trial, on the ground of misdirection, discharged.

Barker v. McAndrew (2 Mar. Law Cas. O.S. 205; 12 L. T. Rep. N. S. 459; 34 L. J. 191, C. P.), approved and followed.

DECLARATION.—That the plaintiffs and the defendants agreed by charter-party, dated the 28th Dec. 1870, that the plaintiff's ship *Winslow* should forthwith proceed to Carlisle Bay, Barbadoes, the said vessel being allowed to take a cargo of coals to a port outwards for the owner's benefit, or to the Brazils, and as ordered load about a full and complete cargo of sugar or other lawful merchandise, to be shipped according to the custom of the ports of loading, which the said charterers bound themselves to ship; and that the said ship, being so loaded, should therewith proceed to London and deliver the same, on payment of freight, 40s. per ton, and that the defendants should be allowed thirty running days, Sundays excepted, for loading the said ship, and ten days on demurrage at 8s. per day, and the said lay days not to commence before the 1st April 1871, and the penalty for non-performance of the agreement, was to be the estimated amount of freight. Averment of performance of conditions precedent. Breach, that defendants made default in loading the said ship, and refused and wholly neglected to do so, whereby, &c.

Plens: First, that the ship did not forthwith proceed to Carlisle Bay, within the meaning of the charter, and by reason thereof the object of the said charter, and of the voyage therein mentioned, was wholly frustrated, and the defendants were prevented from deriving any benefit therefrom; secondly, that the master was not ready and willing to accept and load the agreed cargo; thirdly, that the defendant had not reasonable notice of the ship having arrived at Carlisle Bay, within the meaning of the charter, or of her being ready to

C. P.]

HUDSON AND ANOTHER v. HILL AND ANOTHER.

[C. P.]

receive cargo there, wherefore the defendants could not load; fourthly, that the defendants, did not make default in loading; fifthly, exoneration and discharge before breach; sixthly, to money count, never indebted; seventhly, after setting out the charter-party(a), that time was an essential and material part of the said contract, as the plaintiffs and the defendants well knew; eighthly, that the said ship was not at the time of making the charter tight, staunch, or strong, or every way fitted for the said voyage, within the meaning of the said charter, but, on the contrary, was in a bad state of repair, of which the defendants had no knowledge; and by reason of her said condition, it would have been impossible for her, and the plaintiffs could not have reasonably expected her to be able to proceed to Carlisle

(a) The charter-party was as follows:
 London, 28th Dec. 1870.
 Jamaica. Charter-party.
 Ship or vessel..... Winslow.
 Class..... A 1.
 Where lying..... In Sunderland.

It is this day mutually agreed between G. W. Hudson, Esquire, owner of the above-named ship, and Messrs. Thomas Daniel and Co., of London, charterers, That the said ship, of which the above general description is warranted to be correct, being tight, staunch and strong, and every way fitted for the voyage classed as above, and guaranteed to be maintained so during present service, shall forthwith proceed to Carlisle Bay, Barbadoes, vessel being allowed to take in cargo of coals to a port onwards, for owners' benefit, or to the Brazil; and as ordered, load about a full and complete cargo of sugar or other lawful merchandise to be shipped according to the custom of the ports of loading (charterers to pay any lighters for any produce shipped from outside the harbour where the ship lay), which the said charterers bind themselves to ship, not exceeding what she can reasonably stow and carry over and above her tackle (apparel, provisions, and furniture); and being so loaded shall therewith proceed to London to discharge, or so near thereto as she may safely get, and deliver the same in the usual manner, in such dock as charterers may direct, on being paid freight as follows:

Forty shillings for sugar, 150 } Per ton of 20 cwt.,
 barrels, or equal thereon, } not delivered at the
 in barrels or tierces, for } Queen's beam.
 stowage.....

Other goods in fair and customary proportions to sugar. All in full of all port charges and pilotages, as customary (the act of God, the Queen's enemies, restraints of princes and rulers, fire, and all and every other dangers and accidents of the sea, rivers, and navigation of whatever nature and kind sever, hands striking, frost, floods, or other unavoidable accident which may prevent the loading or delivery of the cargoes during the said voyage always mutually excepted). Vessel to be consigned to charterer's agent in Barbadoes, paying 2½ per cent. at one port only for doing ship's business. Thirty running days (Sundays excepted) are to be allowed the said charterers for loading the said ship at Barbadoes, to begin when the vessel is clear and ready to receive cargo, the master giving charterer's agents written notice to that effect, and to discharge with all customary dispatch. The said charterers to have the option of keeping the said ship ten days in demurrage, over and above the said laying days, at 8s. per day; the master to sign bills of lading at any rate of freight required by charterer's agents, without prejudice to this agreement. Charterer's agents at ports of loading abroad to advance cash for vessel's ordinary disbursements, for the appropriation of which by the captain the charterers are not to be held responsible, free of interest and commission, subject to cost of insurance, the same to be also on account, and the balance on unloading and right delivery of the homeward cargo in cash, at two months, or, under discount at 5 per cent. per annum, at charterer's option. Lay-days not to commence before the 1st April 1871. Penalty for non-performance of the agreement, estimated amount of freight.

Bay forthwith, within the meaning of the said charter-party.

Issue thereon.

The cause was tried before Lord Coleridge, C.J., and a special jury at the London Sittings after Hilary Term 1873, when the following material facts were proved:

The plaintiffs were shipowners at Sunderland, and the defendants were West India merchants in the city of London, carrying on business as Daniels and Co., and the action was for not loading the ship *Winslow* according to charter-party.

The practice of the West India sugar trade is, that merchants in London make advances to planters, who consign the crop to them. The crop is then sold in London, and the proceeds, after deducting the expenses are paid over to the planters. The sugar season extends from April to July inclusive, after which period double insurance is paid on vessels leaving Barbadoes, by reason of the hurricane season commencing in August. This being so, and known to be so by the parties, the charter-party already set out in the note was signed when the *Winslow* was in dock, on the 28th Dec. 1870. (a) Detained by bad weather, she did not sail till the 8th Feb. 1871. Being further delayed by accident, she did not reach Barbadoes till the 28th July, when the consignees, having taken the advice of the Attorney-General of that island as to the construction of the charter-party, refused to load the agreed cargo at Barbadoes, but offered to load a similar cargo from the neighbouring island of St. Vincent.

The following correspondence contains such offer, and the refusal thereof.

Letter from the charterer's agents to the captain, dated Bridgetown, Barbadoes, 31st July:

We have perused the charter-party of the *Winslow*, dated 28th Dec. 1870, by which she was forthwith to proceed to Carlisle Bay, Barbadoes, being allowed, however, to take a cargo of coal to a port onwards for owner's benefit, or to the Brazil, thirty running days to be allowed the charterers for loading the vessel, which were not to commence before the 1st April 1871. The charter-party stipulates that the vessel shall proceed on her voyage forthwith, and had she done so it is probable that she would have been here by the 1st April or soon after, as was evidently contemplated by the parties to the contract. On that day, and for some time afterwards, we were provided with a full cargo of sugar for her. It appears, however, by your own account, that instead of leaving forthwith, the vessel did not quit the port of Sunderland, until the 9th March 1871, being ten weeks after the charter-party was executed. The crop of the island, in

(a) Table of material dates:

1870. Dec. 28. The charter-party signed and was signed.
 1871. Jan. 6. The coal charter for the outward voyage was completed.
 Jan. 27. The ship finished loading the coals.
 Feb. 8. The ship sailed, having been detained by bad weather.
 " Ban into, and obliged to put back for repairs to Portsmouth.
 March 8. Repairs completed.
 May 26. Arrived at Rio.
 June 23. Finished discharging at Rio.
 July 28. Arrival at Barbadoes reported to consignees.
 July 31. Notice to consignees to receive cargo. Letter to captain from consignees, refusing to load from Barbadoes, but offering to load from St. Vincent.
 Aug. 1. Notice by captain that lay-lays would commence.
 Sept. 4. Notice that lay-lays ended.
 Sept. 15. Demurrage days ended.
 Oct. 14. Ship sailed from Barbadoes.

C. P.]

HUDSON AND ANOTHER v. HILL AND ANOTHER.

[C. P.]

the mean time, has been brought to a close and shipped before the arrival of the vessel, and we are, therefore, unable to load her; however, to prevent loss accruing to the owners, from the non-performance of their contract, we are willing to provide you with a cargo of sugar and molasses from this and the Island of St. Vincent.

Answer of the captain thereto, dated Barbadoes, 1st Aug. 1871:

I am in receipt of your favour of yesterday's date, the 31st ult., the contents duly noted; and in reply I beg leave to state that there is a statement as follows: "It appears however, by your own account, that instead of leaving forthwith the vessel did not quit the port of Sunderland until the 9th March 1871, being ten weeks after the charter-party was executed." That statement I most respectfully beg leave to deny as having emanated from me. My words were in answer to a question put by you that Mr. Daniels evidently contemplated that the ship would arrive here by the 1st April. My reply was, that that was impossible, as I did not leave England until March. In reply to the other portion of your letter, you seem to ignore the fact that my charter-party binds me to load a full and complete cargo here in Barbadoes, and not at two or more ports. I therefore beg leave to confirm my written notice, handed to you yesterday, to the effect that the barque *Winslow* is at your service, and all ready to take in cargo, and that I count my lay-days (specified in charter) from to-day, the 1st Aug. 1871.

Further negotiations to the same purpose resulted in nothing, and in the end the vessel sailed away to take troops from Demerara to Sierra Leone, and this action was brought for not loading according to the terms of the charter-party.

The learned judge told the jury that the exception as to perils of the sea applied to the outward as well as the homeward voyage, and that the term "forthwith" in the charter-party did not mean at once, but must bear a reasonable construction, and was equivalent to as soon as possible under the circumstances.

With regard to the conduct of the captain, the jury were charged as follows:

The captain is merely the shipowner's agent, he is not a principal; he is there under the charter-party which you have heard read. His contention was, that under the charter-party, the shipowner had a right to have this ship loaded, and he so stated to the charterer's agents. They said, on the other hand, they would not load it, and begged him to go elsewhere and seek a cargo. If he had gone elsewhere to seek a cargo before there was a distinct breach, or that which he chose to accept as a distinct breach on the part of the charterers, he would have discharged the charterers from their engagement, and he would have placed his own employees, the shipowners, I will not say at a greater disadvantage, because it might have turned out, possibly, that he might have got as good a charter as the one he gave up, but he would have relinquished the shipowner's rights upon the charterers and left his masters to the chance of fortune, whether or not he could have got as good an engagement as the one he gave up. It is not for me to say whether he behaved well or ill, but I do not think there is much ground of complaint against him, so far as I may express an opinion. He thought his duty was to hold on to the contract. He knew what would happen if that were broken. He determined, at any rate, to hold to the contract that he had got, and unless the agents would come under an engagement with him which would save his masters in all events, he would hold on to the charter as long as he reasonably could. . . . But on the other hand the captain might fairly say, "Unless you put me in as good a position, with regard to yourself as my owners now stand in with regard to your principals, I cannot give up the hold which my principals have against your principals." They never would give him any encouragement of that kind at all. Their case, from the beginning, was—"You have no claim against us. We will, as a matter of courtesy and good nature, help you to get a freight, either at St. Vincent or St. Thomas; we will do anything we can to help you. You being here, and having no claim upon us, we will do our best for you; but you will distinctly understand

we decline, in any extent, to be bound." They may have not said this in terms, but the captain may have understood them to say, "If you treat us as agents of the charterers, and accept our offer in substitution of the contract, you will have discharged the parties to the original contract, and your remedy against our principals will be gone." The captain might no doubt have said, "I will consider this as a breach, and the matter as at an end, so far as this contract is concerned. Treating you as the principals, I consider the principals have broken their contract, and now I will set to work at once to do the best I can for all parties concerned." He might have done that, and if he had it is not likely that the principals in London would have repudiated the agent's conduct. It is in the highest degree unlikely.

The jury found, in answer to seven specific questions,—First, that the *Winslow* was so tight, &c., as to be able to proceed to Barbadoes and Brazil; secondly, that she did in fact forthwith proceed thither; thirdly, that there was no delay on the voyage but what was occasioned by the expected accidents; fourthly, that there was no want of reasonable notice by the shipowners to the charterers of the circumstances of the delay; fifthly, that such want of notice, if any, did not prevent loading at Barbadoes; sixthly, that the date of the arrival at Barbadoes was not such as to put an end, in a commercial sense, to the commercial speculations entered upon by the shipowners and the charterers; and, seventhly, that such date was not a date which could have been at the time of making the contract, in the reasonable contemplation of either the charterer or the shipowner.

Upon these findings the learned judge directed a verdict for the plaintiffs, reserving leave to move.

A rule was afterwards granted by Lord Coleridge, C.J., and Keating and Denman, J.J., to set aside the verdict, and for a new trial, on the ground that the judge misdirected the jury as to the effect of the exception of perils of the sea, as to what effect on the charterer's liability, the acceptance under protest by the captain of other employment would have had, and that the sixth and seventh answers were against evidence.

Benjamin, Q.C., Grantham with him, for the plaintiffs, now showed cause.—*Barker v. McAndrew* (12 L. T. Rep. N. S. 439; 18 C. B., N. S., 759; 34 L. J. 191, C. P.; 2 *Mir. Law Cas.* O. S. 205) is absolutely conclusive upon the first point. In that case it was held that the ordinary exception as to perils of the sea, applied to the preliminary transit from the place where a ship was, when the charter-party was made, to the loading-place, and there is nothing to distinguish that case from this. [*Brett, J.*—In *Potter v. Rankin* (18 L. T. Rep. N. S. 712; L. Rep. 3 C. P. 562; 37 L. J. 257, C. P.) the court was of opinion that the chartered voyage included the voyage out.] As to the second point, *Sickens v. Irving* (7 C. B., N. S., 165) will be found to bear a curious similarity to the present case. "There can be no doubt," said Williams, J., "that an agent appointed to load a cargo at a foreign port has authority to do all that is necessary for the performance of the contract, and also to vary the mode of performance if any exigency arises, provided the contract be substantially maintained. But there is no ground for contending that he has by law any implied authority to substitute a new contract—to substitute one sort of commodity for another, sugar for salt, for instance—or to appoint a different place of loading from that contemplated

C. P.]

HUDSON AND ANOTHER v. HILL AND ANOTHER.

[C. P.]

by the charter-party. It is quite new to me to hear it suggested that there is such an authority; and I cannot but think that it would be very mischievous if the agent's authority could be so extended as thus to vary the contract of his principal." [Lord Coleridge, C.J., referred to that portion of the summing up which will be found set out above.] They also referred to

Crow v. Palk, 9 Q. B. 467; 15 L. J. 183, Q. B.;

Valentine v. Gibbs, 6 C. B. N. S. 270; 28 L. J. 229, C. P.;

Brace v. Nicolopulo, 11 Ex. 129; 24 L. J. 321, Ex.

Matthews, Q.C. (Murphy, Q.C., with him), for the defendants, supported the rule.—By the terms of this charter-party the rule in *Barker v. McAndrew* (*ubi sup.*) is excluded. The plaintiff had the option of taking the coals on the outward journey, and so he takes upon himself, as it is only just that he should, the risk of that journey. At any rate he is not excused the performance of the condition precedent that he should proceed "forthwith." (*Crookwell v. Fletcher*, 1 H. & N. 893; 26 L. J. 153, Ex.) And forthwith has the same meaning as directly, which latter term has been held to mean speedily: (*Duncan v. Topham*, 7 C. B. 225.) [Lord Coleridge, C.J.—I explained "forthwith" to the jury to mean as soon as practicable, and they found that the ship sailed in fact "forthwith." *Grove, J.*—"Forthwith" is a comparative term; it means that the shipowner, at any rate, will cause no delay.] The damages ought to be merely nominal, as the captain was bound to set about taking other employment:

Bradford v. Williams, *ante*, vol. 1, p. 313; 26 L. T. Rep. N. S. 641; 1 L. Rep. 7 Ex. 259; 41 L. J. 161, Ex.;

Beckham v. Drake, 2 H. of L. Cas. 579; 8 M. & W. 845; 7 Jur. 704;

Emmens v. Elderton, 13 C. B. 405; 4 H. of L. Cas. 624; 18 Jur. 21.

The damages ought to have been diminished on the ground of the captain having acted unreasonably: (*Wilem v. Hicks* 16 L. J. 243, Ex.) They also referred to

Stanton v. Richardson, *ante*, vol. 1, p. 449; 27 L. T. Rep. N. S. 513; 1 L. Rep. 7 C. P. 421; 41 L. J. 189, C. P.;

Jackson v. Union Marine Insurance Company, 1 L. Rep. 8 C. P. 572;

McAndrew v. Chapple, 1 L. Rep. 1 C. P. 643; 2 Mar. Cas. O.S. 339;

in the last of which cases Brett, J., had asked the jury a question similar to the sixth question in this, but the jury had answered it in the affirmative.

BRETT, J.—I am clearly of opinion that the sixth and seventh answers were not against evidence; on the contrary, I think that they would have been against evidence if they had been given otherwise. It has been contended that the object of the voyage was frustrated, within the rule laid down by the majority of this court in *Jackson v. Union Marine Insurance Company* (*ubi sup.*). But such a contention can be grounded only upon a misapprehension of that decision, which means merely this—that where a delay has been so long as to frustrate, from a commercial point of view, the object of both parties, the contract is inapplicable, and cannot be enforced. Such a delay has not arisen here. In this case the charterers thought to ship a cargo of sugar during the sugar season, but the shipowners thought to employ their ship during the whole year. It was nothing to the shipowners whether the cargo could be shipped at a profit to the charterers or not. The failure to arrive at the particular time wished for

by the charterers, therefore, did not terminate the contract. But it is said it was impossible to load. Even if it had been, it would not have been within the rule, but I doubt whether it was impossible. At a profit, perhaps, it was impossible to load, but that is no concern of the shipowners. As to the first ground of misdirection, that the excepted perils included perils on the outward voyage, I am of opinion the clause as to excepted perils began to operate as soon as the outward voyage began. Mr. Matthews argues otherwise, on the ground that the charterers derived no profit from that voyage. But that voyage was, I think, the chartered voyage. At any rate, *Barker v. McAndrew* (*ubi sup.*) is a clear authority to that effect, and there is no authority to the contrary. The distinction between that case, and cases apparently conflicting, is shown in the judgments.

As to the second ground of misdirection, that the learned judge ought to have told the jury that the charterers were absolved because the vessel had not sailed "forthwith," I think such a construction of that term would be equivalent to striking out the clause as to excepted perils altogether. "Forthwith" merely means as quickly as possible, unless prevented by excepted perils.

As to the third ground of misdirection, what really occurred was this—it was left to the jury to say whether the captain, by unreasonable conduct, had prevented the lessening of the damage to the charterers, which was, perhaps, a direction too strong in favour of the charterers. It was thus left open to the jury to consider the captain's conduct, both in and after the lay-days. I cannot say whether the captain might not wait till after the lay-days, but even that consideration was not shut off, and the jury had left to them whether the captain's conduct was reasonable on the whole. They were to consider how the offer of a substituted cargo could present itself to the mind of the captain, and whether he took a reasonable view of the situation.

I think that there was no misdirection at all, and that the rule must be discharged on all points.

GROVE, J.—I am of the same opinion on both points.

As to the first ground of misdirection, I think the case is not only governed by *Barker v. McAndrew* (*ubi sup.*) but is *a fortiori* to it. In *Barker v. McAndrew* the distance held to be within the clause as to excepted perils was short—here it is long, so as to be more within the reason of the exception. In this charter-party, too, we have the plural "cargoes," the use of which would seem to contemplate both the outward and the homeward voyage. I agree, too, that if Mr. Matthews be right as to his construction of "forthwith," the clause as to excepted perils will have to be struck out of this charter-party. In the ordinary legal acceptance of the term, "forthwith" means *quam primum*, as soon as possible under the circumstances.

As to the third ground of misdirection, that the captain was not bound to treat the contract as broken, I think that if this had been a case like *Atory v. Bowden* (*ubi sup.*), it would have been a case of *res acta*, and the captain should have minimised the loss. But the captain did not treat the contract as broken; he might have put his owners into danger by so doing. It is said, however, that he should have accepted the subsequent offer, and so reduced the loss. But the reason-

[Ex.]

GORRIS AND ANOTHER v. SCOTT.

[Ex.]

ableness of the captain's conduct was left to the jury, and the only possible straw, if I may use the expression, which can now be caught at in support of the rule upon this last point, is the possible meaning of a collateral contingent observation in the course of the learned judge's direction to the jury.

Lord COLERIDGE, C.J.—I have very little to add. I agree that the sixth and seventh answers would have been against evidence, if given otherwise. I agree also in the view which my brother Brett has taken of the meaning of the decision in *Union Marine Insurance Company (ubi sup.)* It is a most authoritative expression of opinion, for my brother Brett took part in that judgment himself. As to the misdirection, I charged the jury without being aware of *Barker v. McAndrew (ubi sup.)*. The contention as to "forthwith" I do not quite see the importance of. I had, it was admitted, correctly explained the term to mean with all necessary and reasonable dispatch, and the jury found that the vessel did in fact sail "forthwith." Upon the last point, I can only say that before giving the direction complained of, I had referred to *Avery v. Bowden and Reed v. Hoskins* (6 E. & B. 953; 3 Jur. N. S., 238; 26 L. J. 3, Q. B.); and also to *Xenos v. Damube Railway Company* (11 C. B., N. S., 152; 13 B. 825); and in my direction was attempting to follow the law as well as I could estimate it from those cases.

Rule discharged.

Attorney for the plaintiffs, W. A. Crisp.

Attorneys for the defendants, Druce, Sons, and Jackson.

COURT OF EXCHEQUER.

Reported by T. W. STANBURN and H. LUTON, Esqrs.,
Barristers-at-Law.

Wednesday, April 22, 1874.

GORRIS AND ANOTHER v. SCOTT.

Statutory duty—Penalties for breach of—Breach of duty—Special damage to plaintiff—Action for—(Object and intention of statute—Contagious Diseases (Animals) Act 1869 (32 & 33 Vict. c. 70), ss. 75, 103, 106—Order in council—Transit of animals by sea—Regulations as to violation of by shipowner—Action by owner of animals.

*The Contagious Diseases (Animals) Act 1869 (32 & 33 Vict. c. 70), s. 75, empowers the Privy Council, from time to time, to make such orders as they think expedient for, inter alia, "protecting animals brought by sea to ports in Great Britain, from unnecessary snuffing during the passage, and on landing." In pursuance of such power, the Privy Council, on the 20th Dec. 1871, made an order (The Animals Order of 1871), that "with respect to places used for animals on board vessels, the following regulations shall have effect: First. Every such place shall be divided into pens by substantial divisions. Secondly. Each pen shall not exceed 9ft. in breadth, or 1-1/2 ft. in length. Thirdly. The floor of each pen shall have proper battens or other footholds thereon." By sect. 103 a penalty is imposed on any person acting in contravention of, or guilty of any offence against, the Act, or any order or regulation made by the Privy Council, not exceeding 20*l.* for every such offence.*

The plaintiffs shipped a quantity of sheep on board a vessel of the defendant, for transit from Ham-

burgh to Newcastle, and in consequence of the defendant failing to provide proper pens and foot-holds on board the vessel, as directed by the above order, a large number of the sheep were washed overboard in a gale, during the passage, and were drowned; and in an action by the plaintiffs against the defendant to recover damages by reason of his noncompliance with the statutory duty, it was

Held on demurrer, by the Court of Exchequer (Kelly, C.B., and Pigott, Pollock, and Amphlett, JJ.), that, as the object of the statute and the Order in Council was, not to benefit the owners of animals by preventing the animals from being drowned, but to prevent the introduction and spreading of contagious diseases amongst cattle in this country, the plaintiffs, although they had sustained damage which would not have occurred if the defendants had performed their statutory duty, could not sue the defendant for the recovery of such damage, and that the action was not maintainable.

Conch v. Steel (3 E. & B. 402; 23 L. J. 125, Q. B.); *Stevens v. Jeacocks and others* (11 Q. B. 731; 17 L. J. 163, Q. B.); and *Atkinson v. The Newcastle and Gateshead Waterworks Company* (L. Rep. 6 Ex. 404); discussed and distinguished.

The plaintiffs in this action were cattle dealers at Hamburg and the defendant was the owner of the screw steam ship Hastings, which, on the 6th March 1873, was lying at Hamburg. On that day the plaintiffs shipped on board the Hastings a number of sheep for delivery at Newcastle, under the following bill of lading.

*Shipped in good order and well conditioned by Gorris and upon the good steamship Hastings, Capt. Douglas, now lying in the port of Hamburg, and bound for Newcastle, 100 sheep, being marked and numbered as in the margin, and to be delivered in the like good order and condition at the said port of Newcastle, all and every dangers and accidents of the sea, fire, machinery, boilers, steam, and steam navigation of what nature or kind soever excepted, unto Thomas Mingham, of Newcastle, or assigns, he or they paying freight for the same 1*s.* sterling per head. In witness, &c.*

On deck at shipper's risk. Not answerable for washing or throwing overboard. Free of mortality. To be forwarded at shipper's risk and expense, &c.
Hamburg, 6th March 1873.

The Contagious Diseases (Animals) Act 1869 (32 & 33 Vict. c. 70), which is an Act to consolidate, amend, and make perpetual the Acts for preventing the introduction or spreading of contagious or infectious diseases among cattle in Great Britain, enacts (sect. 75) that "The Privy Council may from time to time make such orders as they think expedient for all or any of (inter alia) the following purposes (1.) For insuring for animals brought by sea to ports in Great Britain a proper supply of food and water during the passage and on landing. (2.) For protecting such animals from unnecessary snuffing during the passage and on landing."

In pursuance of the powers conferred on them by that section, the Privy Council, on the 20th Dec. 1871, made an order, cited as "The Animals Order of 1871," which contained the following, amongst other, regulations:

TRANSHIP OF ANIMALS BY SEA.—With respect to places used for animals on board vessels, the following regulations shall have effect:

(1) Every such place shall be divided into pens by substantial divisions.

[Ex.]

GORRIE AND ANOTHER v. SCOTT.

[Ex.]

(2) Each pen shall not exceed 9ft. in breadth or 15ft. in length.

(3) The floor of each pen shall have proper battens or other footholds thereon.

By sect. 103 a penalty not exceeding £20 is imposed upon any person acting in contravention of or guilty of any offence against the Act or any order or regulation made by the Privy Council or a local authority, in pursuance thereof, for every such offence; and where such offence is committed with respect to more than four animals, a penalty not exceeding £5 for each animal may be imposed instead of 20s., and by sect. 106 one half of the penalty is to be paid to the person who sues or proceeds for the same.

The defendant's vessel was not fitted with proper pens nor provided with proper battens or footholds, as prescribed by the above-mentioned order of council, and in consequence thereof a large number of the plaintiffs' sheep were washed overboard by the sea in a gale which the vessel encountered on the passage from Hamburg to Newcastle, and were drowned. Thereupon the plaintiffs commenced an action against the defendant, as owner of the said vessel, to recover damages from him for the loss of their sheep through his breach of the statutory duty in that respect imposed upon him by the Act.

By the first count of their declaration they complained that heretofore, and after the making and passing of the Contagious Diseases (Animals) Act, 1861, "The Lords and others of Her Majesty's Hon. Privy Council, under and in exercise of the powers and authority in them by the said Act in that behalf vested, duly and within the true intent and meaning of the said Act, made a certain order therein, entitled 'The Animals Order of 1871,' with reference to animals brought by sea to ports in Great Britain, and to the places used and occupied by such animals on board any vessel in which the same should be so brought to such ports, and thereby, amongst other items, ordered and made the following regulations, that is to say:—1. That every such place should be divided into pens by substantial divisions; and secondly, that each such pen should not exceed nine feet in breadth and fifteen feet in length." And the plaintiffs further say that afterwards, and after the making and taking effect of the said order, and whilst the same continued and was in full force and effect, the plaintiffs delivered in and on board of a certain vessel called the *Hastings*, to the defendant, as and then being the owner of the said vessel, certain sheep of the plaintiffs, to be carried and conveyed by the defendant, for reward to him, in that behalf, in and on board the said vessel by sea from the port of Hamburg to a certain port in Great Britain, called (to wit), to the port of Newcastle, and there delivered for the plaintiffs, and the defendant then, and as being such owner as aforesaid, took and received, and started on the said voyage, with the said sheep in and on board the said vessel, for the purposes and on the terms aforesaid." Averments. That the said order and regulations respectively remained and continued in full force and effect before and at and from the time of the said delivery to and receipt by the defendant of the said sheep as aforesaid, up to and until and at the time of the termination of the said voyage; and that all conditions were performed and fulfilled, and all things happened and were done, and all times elapsed necessary to entitle the

plaintiffs to maintain this action in respect of the claim in this count made, yet the place in and on board the said vessel, which was used and occupied by the said sheep during the said voyage, was not during the said voyage, or any part thereof, divided into pens by substantial or any other divisions, and the defendant wholly neglected and omitted to divide the said place, or to cause the said place to be divided during the said voyage, or any part thereof; and by reason thereof divers of the said sheep were, during the said voyage, washed and swept away by the sea from and off the said ship, and were drowned and wholly lost to the plaintiffs.

The second count of the declaration was precisely the same as the first, except that in setting out the "Animals Order of 1871," it added, besides the two regulations set forth in the said count, the third regulation contained in such order as follows: "Thirdly, that the floor of each such pen should have proper battens or footholds thereon," and they assigned as a breach or neglect of duty on the defendant's part, that "the floor of the place in and on board the said vessel, which was used and occupied by the said sheep during the said voyage, had not during the said voyage, or any part thereof, proper or any battens or any other footholds thereon, as required in and by the said order, so made under and in pursuance of the said statute, and by reason thereof divers of the said sheep were during the said voyage washed and swept away by the sea from off the said ship, and were drowned and wholly lost to the plaintiffs.

The third count charged that the plaintiffs caused to be delivered to the defendant, and the defendant received from the plaintiffs, certain goods, that is to say, certain sheep, to be by him shipped on board of the ship *Hastings*, and safely and securely carried therein from Hamburg to Newcastle, and there, for freight payable by the plaintiffs to the defendant in that behalf, delivered for the plaintiffs, all and every dangers and accidents of the seas, of fire, machinery, boilers, steam, and of steam navigation of what nature or kind soever excepted; and the defendant was not prevented from so shipping, carrying, or delivering the said goods by any of the perils or casualties aforesaid. And all conditions, things, and times were fulfilled, &c., necessary to entitle the plaintiffs to have the said goods safely and securely carried and delivered by the defendant as aforesaid; yet the defendant did not, nor would safely and securely carry and deliver the said goods as aforesaid, and the same were during the said voyage lost to the plaintiffs.

The defendant, amongst other things, pleaded thirdly for a third plea to the first and second counts, that the said sheep were delivered in and on board the said vessel to the defendant, and were received by the defendant to be carried, as in the counts mentioned, on the said voyage, upon and subject to the terms following, that is to say, that the said sheep should be delivered in like good order and condition to the order and condition in which they were shipped, all and every the dangers and accidents of the seas, of fire, machinery, boilers, steam and of steam navigation, of what nature or kind soever, excepted, and that the said sheep should be carried on deck of the said ship at the plaintiffs' risk, and that the defendant should not be answerable for washing, or throwing overboard, or for the death of any of the said sheep on board

[Ex.]

GORRIS AND ANOTHER v. SCOTT.

[Ex.]

the said vessel; fourthly, by his fourth plea to the said first and second counts the defendant repeated the several allegations in the third plea contained, and in addition thereto said that the said sheep were washed and swept away, as in those counts mentioned, by dangers and accidents of the sea, and steam navigation, within the true intent and meaning of the said terms, and not otherwise; fifthly, by his fifth plea to the same counts, the defendant repeated the third plea, and in addition thereto said that the said sheep were respectively necessarily, and properly thrown overboard, or died on board the said vessel, within the true intent and meaning of the said terms, and that the loss complained of arose and was caused wholly by each throwing overboard and death. Twelfthly. By his twelfth plea, for defence on equitable grounds, the defendant said that the said sheep were delivered on board the said ship at a port beyond the sea, that is to say Hamburg, and that the defendant, when he agreed to accept and receive on board the said vessel the cargo hereinafter mentioned, was in this country, and that the defendant was induced to receive the said cargo on board the said vessel by a statement and allegation then made by the plaintiffs to the defendant in this country, that the plaintiffs were about to deliver a general cargo only, and not sheep or animals, on board the said ship; and the defendant accordingly, at the plaintiffs' request, by telegram, ordered the said master to receive the said cargo, and the defendant, by the said master, as his agent in that behalf, received the same accordingly, on the faith and on the terms that the said cargo consisted of a general cargo only, and not of sheep or animals; and that the plaintiffs, in violation of the said terms, and contrary to the said statement, and without the personal knowledge of the defendant, delivered the said sheep, and not a general cargo, to the said master, and that the loss and matters complained of arose wholly from the said violating the said terms by the plaintiffs, and by their delivering the said sheep to the said master without the knowledge or consent of the defendant.

Demurrer and joinder in demurrer to the first and second counts of the declaration, one ground of demurrer being that the breach of the said regulations only render the defendant liable to the penalty imposed by the Act.

Replication secondly to the twelfth plea, that the said sheep so delivered to the said master, as in the said twelfth plea mentioned, were accepted and received by him in and on board the said vessel, with his full assent and concurrence, as part of the said cargo, and with full knowledge of all and singular the premises in the said twelfth plea mentioned.

Demurrers and joinder in demurrers to the third, fourth, fifth, and twelfth pleas respectively, the grounds of demurrer respectively being—as to the third plea, that the matter therein alleged affords no answer to the breaches of duty on the defendant's part in the first and second counts respectively mentioned, which are respectively by the said plea admitted to have been the cause of the sheep being washed overboard. As to the fourth plea that the matter therein alleged affords no answer to the said breaches, there being no allegation in the plea of a waiver by the plaintiffs of the defendant's performance of the duties in such counts mentioned. As to the fifth plea, that the matter therein alleged affords no answer to

the said breaches, it being consistent with the allegations in the plea that the sheep were so necessarily and properly thrown overboard and died, as therein alleged, by reason and in consequence of such breach of duty respectively. And as to the twelfth plea, that it is perfectly consistent with its allegations that the master of the vessel was, at the time when he received the sheep on board, fully aware of the arrangement between the plaintiffs and the defendant, and consented (which he had a general power to do) to vary and alter the terms of such arrangement.

Rejoinder: Demurrer and joinder in demurrer to the plaintiff's second replication to the twelfth plea, a ground of demurrer being that the concurrence of the master stated in the replication is wholly immaterial.

The points of argument on the part of the plaintiffs: As to the first and second counts—First, that the said counts respectively are good, and show on the face of them respectively that the defendant has, to the damage of the plaintiffs, failed to perform a statutory duty arising under and by virtue of an order in council, made under and in pursuance of sect. 75 of The Contagious Diseases (Animals) Act 1869, which was thereby imposed on the defendant for the benefit of the plaintiffs, as and being the owner of the sheep in the said first and second counts respectively mentioned, and alleged therein respectively to have brought by sea in the defendant's ship to a port in Great Britain; secondly that the provisions of the said section do not actually impose the penalty therein referred to for offences against any order in council, made under its provisions, but merely authorise the Privy Council to impose penalties for such offences, and that it does not appear upon the said pleadings that any penalty was ever actually imposed by the order referred to in the first and second counts respectively; thirdly, that, assuming that any such penalty had been in fact imposed by the said order in council, it would nevertheless be deemed and considered to have been so imposed for the purpose of prevention accordingly, and could not take away the plaintiffs' right to compensation for the damage which they have actually sustained in consequence of the neglect on the defendant's part to comply with the order in council mentioned and referred to in the said first and second counts respectively; fourthly, that independently of the said statutory declaration in the said first and second counts respectively mentioned, these counts respectively show that the defendant omitted to take such necessary and reasonable precaution for the protection of the sheep as he was bound so to do as a carrier for hire of the said sheep.

With regard to the third, fourth, and fifth pleas—(fifthly) that the terms of the said alleged contract, mentioned in the said third, fourth, and fifth pleas respectively, did not (in the absence of any express agreement to that effect), exempt or excuse the defendant from performing the statutory duty imposed upon him, as in the said first and second counts respectively mentioned, and would, in the absence of such express agreement, be deemed to have been made and entered into, subject to such statutory duty; and that it is consistent with the allegations contained in the said third, fourth, and fifth pleas respectively, that the said damage sustained by the plaintiffs, as in these counts respectively mentioned, was primarily occasioned, by reason and in

[Ex.]

GORRIE AND ANOTHER v. SCOTT.

[Ex.]

consequence of the neglect of the defendant to perform the said statutory duties which were referred to above.

With regard to the twelfth plea—(sixthly) that the matter contained in the said twelfth plea affords no answer to the claim made in the declaration, and that it is perfectly consistent with the allegations contained in that plea, that the master of the said vessel was, when he received the said sheep on board, fully aware of the arrangement alleged in the said twelfth plea to have been made between the plaintiffs and the defendant, and that he, at the same time when he received the said sheep, consented, as he had power to do without any express or direct authority from the defendant in that behalf, to vary and alter the terms of such arrangement by accepting the said sheep in lieu of the said general cargo.

With regard to the second replication, to the twelfth plea.—That the master knowing, as he is admitted to have done, of the original arrangements with the plaintiffs and the defendant, had full power, without any express or direct authority from the defendant in that behalf, to alter the terms of such arrangement by accepting the sheep in lieu of the said general cargo.

The defendants' points of argument.—First, that the order of council mentioned in the first and second counts of the declaration, and the 75th section of the Contagious Diseases (Animals) Act 1869, under which they were made, were intended solely for the protection of the "animals," and for the prevention of contagious diseases, and not for the benefit of the owners of animals, and that no action lies for the breach of such order; secondly, that the only remedy for the breach of the said orders is by proceeding for the penalties imposed by the said Act in manner therein pointed out; thirdly, that assuming that an action would lie in respect of the matters declared on in the first and second counts, the defendant is protected by the terms of the bill of lading as pleaded in the third, fourth, and fifth pleas; fourthly, in respect to the fifth plea, that that plea is sufficient without any allegation negating the supposition that the sheep were thrown overboard in consequence of the supposed breach of duty, which should have been replied or new assigned if the plaintiffs rely thereon; fifthly, that the twelfth plea is good in substance; sixthly, that the knowledge and consent of the master as stated in the second replication to the twelfth plea is immaterial, and affords no answer to the matters alleged in the said twelfth plea.

Hugh Shield (with him was *C. Russell, Q.C.*), argued on behalf of the defendant in support of the demurrer to the declaration.—The declaration shows no cause of action. This statute was passed expressly for a public purpose, namely, the prevention of contagious diseases amongst cattle being introduced into this country by means of animals imported either from over the sea, and it in no way contemplated or intended to confer any benefit on individuals. The proposition contended for on the part of the defendant is that a statutory regulation, made merely in the performance or furtherance of a public purpose, and not for the benefit of an individual, and more especially where a penalty is inflicted on anyone breaking or contravening such regulation, will not support an action at the suit of an individual who finds himself aggrieved by such breach or contravention. In

Couch v. Steel (3 E. & B. 402; 23 L. J. 125, Q. B.), an action by a seaman against a shipowner for neglecting to supply and keep on board a supply of medicine, as required by the 7 & 8 Vict. c. 112, s. 18, whereby the plaintiff's health was injured, was held to be maintainable on the ground that, notwithstanding the Act imposed a penalty for the shipowner's breach of duty in that respect, as to the public, yet sailors sustaining a private injury from the breach of the statutable duty were entitled to maintain an action for damages. In the judgment of the court in that case, delivered by Lord Campbell, C.J., his Lordship explains the ground of the decision in an old case in *Rolle, as follows*: "In a case cited 1 Rolle Abr. 106, *Action sur Case*, (M), pl. 16, it appears to have been held that a person having without the king's licence imported cards into England, contrary to statute 3 Edw. 4, he was not liable to an action at the suit of one to whom the king had granted a licence to import cards, paying rent to the king, and who alleged that he was thereby disabled from paying his rent; as the statute provides that the cards unlawfully imported were forfeited, and the remedy given by the statute ought to be pursued. There, however," (says Lord Campbell) "the prohibition does not seem to have been intended for the benefit of the person to whom the licence was granted, and the damage which he sustained may have been considered too remote." That observation of Lord Campbell is strictly applicable here. Again, the case of *Stevens v. Jeacocke and others* (11 Q. B. 731; 17 L. J. 163, Q. B.) is on all fours with the present case. If by the statutory regulations the plaintiff has any property-right, or anything for the benefit of his property, then, for the breach of that right he might have an action. But in *Stevens v. Jeacocke* no kind of property right was conferred on anybody by the Act of Parliament (4 & 5 Vict. c. lvi). Its effect was simply to restrict the common law right which everybody has to fish. So here there is nothing done to confer a property right on anybody, but only to restrict a right to bring cattle by ship to this country without the observance of certain regulations. So, again, in *Atkinson v. The Newcastle and Gateshead Waterworks Company* (L. Rep. 6 Ex. 404), the provisions with regard to the defendant's duty with respect to the water pressure were clearly for the benefit of individual householders in case of fire, and so, though a penalty was imposed by their Act of Parliament on the defendants for any breach of such duty, yet this court held that the plaintiff, who had suffered damage from a fire by reason of such breach, was entitled to recover in an action against them. [FOLLOCK, B. refers to *Blair v. The Lancashire and Yorkshire Railway Company* in the Exchequer Chamber (L. Rep. 8 Ex. 283; 42 L. J. 162, Q. B.). He referred also to *Cullen v. Trimble and others* (26 L. T. Rep. N.S. 691; L. Rep. 7 Q. B. 416; 41 L. J. 132, Mag. Cas.; and 228 Q. B.) as to the implied jurisdiction of justices to convict summarily for offences against the Act.

Herschell, Q.C. (with whom was *James Mellor*), for the plaintiffs, *contra*, supported the declaration. Two objections had been taken against the plaintiff's right to maintain this action. First, that the statute created no duty in respect of the breach of which an action would lie; and, secondly, that there can be no action for the breach of a

[Ex.]

GORRIS AND ANOTHER v. SCOTT.

[Ex.]

duty, in respect of which breach the statute has provided a specific remedy by the infliction of a penalty. The defendant has admittedly committed a breach of the order, and the result of that breach may have been to inflict loss and damage upon the plaintiffs. Speaking generally, an action may be maintained for the breach of a statutory duty where injury accrues therefrom, as here, to an individual; and so the plaintiffs here can recover. But it is said on the defendant's part that this statute confers no benefit on individuals. Now it is clear that a damage has arisen to the plaintiffs from this breach of duty, whether it be a damage contemplated by the statute or not, and a damage which would not have happened if the statute had been complied with. [POLLOCK, B.—If the Privy Council had made an order that pens should be placed on board in order to prevent animals from being washed overboard, would not that have been *ultra vires*?] Whatever may have been the object and intention of the Legislature in the matter, the obvious and inevitable result of the prescribed pens being placed on board is to prevent the occurrence of such an accident as that which has happened in this case. No doubt the intention was to prevent "unnecessary suffering" to the animals, and to that end pens of a particular kind are directed to be used, and it is a necessary result of the legislative enactment that such pens are a protection to the animals from being washed overboard. (Granted that it is done to benefit the animals, but they cannot be benefited without a benefit accruing therefrom to the owner, and it is a fallacy to say that this is not an enactment for the owner's benefit. It is such, whatever the intention was, and having lost that benefit by reason of the breach of duty the plaintiffs are entitled to their action. Had the sheep been thrown down on board and had their legs broken through the want of these footholds, an action would then have been maintainable, and is it to be said that there is to be no action when they are drowned, and utterly lost through the same default? [PIOTR, B.—The damage you allege in the declaration is not that the animals were exposed to "unnecessary suffering." AMPHLETT, B.—They are more likely to take disease if they are crowded and huddled together on the passage.] But again, the statutory law is the basis of the contract between the owner of the animals and the shipowner here, and it must be assumed that the latter will perform and observe all the obligations cast by the law upon him. If that be so, then the declaration is good, because it is not the case of a stranger suing for the breach of a statute, but an owner of animals who had made a contract with the shipowner on the faith of the statute being obeyed. That distinguishes this case from *Stevens v. Jeacocke* and the other cases cited on the other side, in which there was no such contract. But that case is also distinguishable on another ground, namely, that the statute in that case conferred a right and annexed certain specific penalties for its infringement, and the common law right was taken away. The grounds of the decision in that case do not apply to the present case.

KELLY, C.B.—It seems to me that the declaration in this case cannot be sustained, and that the action is not maintainable, and that therefore our judgment should be for the defendant. The plaintiffs are cattle dealers at Hamburg, and the defendant is the owner of a steam vessel, which, in

March 1873, was lying at Hamburg, and on board which vessel the plaintiffs shipped a quantity of sheep for transport to England. The action is brought by the plaintiffs to recover damages from the defendant by reason of a large number of the sheep having been washed overboard in a heavy gale during the voyage, and drowned, in consequence of the defendant having failed to provide on board his vessel fit and proper pens with proper and sufficient battens or other footholds for the sheep as he was bound and required to do under the provisions of the Contagious Diseases (Animals) Act 1869 (32 & 33 Vict. c. 70), and the order in council made and passed in pursuance and under the authority of that Act. That Act was passed for purely sanitary purposes, its object being the prevention of disease amongst cattle imported into this country, and the consequent spreading of such disease amongst cattle in England; and as a means to that end, certain orders and regulations were made and issued by the Privy Council, and are now in force, "for protecting such animals from unnecessary suffering during the passage, and on landing;" and the particular order, which the defendant in this action is charged with violating, provides that "the places used for animals on board vessels, on their transit by sea from any foreign port to this country" shall be "divided into pens by substantial divisions, each pen not to exceed 9ft. in breadth or 15ft. in length," and that "the floor of each pen shall have proper battens or other footholds thereon." The object of these regulations was really to prevent unnecessary suffering to the animals by their being overcrowded, and tumbling and jostling over and against one another on the passage, and so being brought hither in a condition which should render them more liable to become infected with disease. Now, the defendant has violated these regulations, and, as the consequence thereof, the plaintiff's sheep have been washed overboard and drowned, and the answer which is made by the defendant to the claims contained in the declaration is, that the Act which provides all these regulations has imposed a specific pecuniary penalty upon the shipowner for the breach of them, which penalty can be sued for, and that consequently no action for damages, by reason of such breach of duty on the shipowner's part, will lie.

No doubt the general rule in such cases is that where an Act of Parliament prescribes a certain duty, and imposes a penalty upon the breach or non-performance of that duty, the remedy pointed out by the Act must be pursued, and no other. But then it is said that, under certain circumstances, if special damage results to anyone from the breach or violation of the statutory duty, there is then also a remedy for such damage by way of action for such breach of duty, and that is true; but in cases only where, by the Act of Parliament whose provisions are thus violated, a benefit is conferred upon the individual who suffers from the breach of duty. And if the protection or the benefit of the individual owner of the animals were the object and intention of the Act of Parliament, then undoubtedly this action might be maintained; but nothing can be more plain, on looking at the Act, than that such was not the object or intention of the Legislature in passing it, but that the providing these pens and footholds was entirely for the protection of the animals themselves from unnecessary suffering

[Ex.]

GORRIE AND ANOTHER V. SCOTT.

[Ex.]

during the voyage, and that any private individual benefited was not within the intention of the Act at all. Although an indictment may lie for the breach of a public duty, yet it by no means follows that a person aggrieved may be able to bring an action. The case of a railway company with a statutory obligation upon them to erect gates at a level crossing on their line, and to keep them closed at certain times when trains are about to pass, has been referred to. If in consequence of the company's breach of this duty in either not erecting the gates, or not keeping them closed, any person in crossing the line is run down by a passing train and injured, no doubt he may maintain an action against the company for such injury; and for this reason that, although there has been a breach of a public statutory duty, for which a penalty is imposed by Act of Parliament, still it was the obvious intention of the Legislature that individuals should be protected, and special damage had resulted to the individual by reason of the breach of duty. And if, in the present case, the intention of the Act of Parliament had been that the owners of animals transmitted by sea from a foreign port to this country should be benefited and protected from damage, by loss of their animals from perils of the sea, then an action might have been maintainable.

But on looking at the Act, it is perfectly clear that it was passed, and these orders were made, with a totally different object in view than that of protecting the cattle owner from such damage. Take the preamble of the Act to begin with. It shows that the whole and sole object of the Act was "to prevent the introduction into Great Britain of contagious or infectious diseases among cattle, sheep, and other animals, by prohibiting or regulating the importation of foreign animals." All the provisions of the Act relate to cases where there may be danger of infection from animals arriving in this country by sea in a state of disease, and are pointed at the prevention of such an occurrence, and the orders in council, with the breach of which the defendant is here charged, are expressly issued with a view to promoting the health and comfort of the animals on the voyage, and so to prevent, as far as possible, the introduction and spread of cattle disease in this country. Had the Privy Council made an order for any other purpose, it would have been *ultra vires*. It is quite true that the sheep, being washed overboard and drowned, may have endured some "unnecessary suffering," but that is not the suffering intended by the Act of Parliament. No doubt if those sheep, from the want of the proper and necessary pens and hatches, had endured unnecessary suffering on the voyage, and so had in consequence thereof arrived in this country in a diseased or deteriorated condition, there would then have been a special damage to the owner of them, for which I do not say he might not have had his action. But the special damage here alleged is, not that the sheep endured unnecessary suffering, but that they were washed overboard and drowned, which is really a matter totally apart and distinct from the purpose and object of the Act, or from anything that it was intended to prevent. There might be other objections suggested to the maintenance of the present action, but it is sufficient to say that, for the reasons which I have mentioned, the de-

claration is bad, and the action cannot be supported.

PIGOTT, B.—I agree with the Lord Chief Baron entirely, and am of opinion that this declaration discloses no cause of action. I will state shortly my view of the matter. This is a declaration under the Contagious Diseases (Animals) Act 1869, and it alleges that the Privy Council made certain orders and regulations under that Act for the transit of cattle by sea from foreign ports to this country, and that by reason of a breach or violation of three of these regulations by the defendant, the plaintiff's sheep were washed overboard by the sea from the defendants' vessel and drowned. That is made the ground of action, and I do not think it is a good one. Now, what was the object of the Legislature in passing this Act of Parliament? The preamble shows clearly what that was; it recites that "whereas it is expedient to confer on Her Majesty's most honourable Privy Council power to take such measures as may appear from time to time necessary to prevent the introduction into Great Britain of contagious or infectious diseases among cattle, sheep, and other animals, by prohibiting or regulating the importation of foreign animals;" and then, in furtherance of that object, by sect. 75 power is given to the Privy Council "from time to time to make such orders as they think expedient for all or any of the following purposes" (amongst others), "1, for insuring a proper supply of food and water during the passage and on landing to animals brought by sea to this country; 2, for protecting such animals from unnecessary suffering during the passage and on landing;" and then the following orders or provisions are made by the Privy Council in furtherance of that object, with respect to the "transit of animals by sea: 1. Every place used for animals on board vessels shall be divided into pens by substantial divisions. 2. Each pen shall not exceed 9ft. in breadth or 15ft. in length. 3. The floor of each pen shall have proper battens or footholds."

Now, without doubt, the defendant has been guilty of a breach of these regulations; but the object of them was not to prevent the cattle from being washed overboard, but to keep the cattle in good health and condition during the voyage, and so to protect this country from the introduction into it of animals diseased or rendered by suffering on the passage more liable to become diseased. It was never for a moment contemplated to effect any alteration in the relation between the cattle owner and the carrier, except in so far as the special and particular purpose of the Act is concerned. No power is given to the Privy Council to provide something for the purpose of preventing animals from being washed overboard. It would have been altogether different if the result of the defendant's breach of the statutory duty had been that, instead of their being washed overboard, the cattle had contracted a contagious disease. That would have brought the case within *Couch v. Steel* (*ubi sup.*), and would have been a special damage giving the plaintiffs a right of action. But the Legislature were here not legislating for the special injury which the plaintiff complains of, but for an entirely other and different purpose; and the effect of the Act is only to regulate the duty between the carrier and the owner of cattle, not generally, but for the particular purpose of the Act.

EX. CH.] STANTON v. RICHARDSON AND OTHERS; RICHARDSON AND OTHERS v. STANTON. [EX. CH.]

POLLOCK, B.—I also think that this declaration is bad on demurrer. I am inclined to agree with Mr. Herschell with respect to the fact of the present action being founded on contract, or brought by a person with whom there was a contract, and that that distinction removes it from the cases of *Stevens v. Jeacocke* and *Atkinson v. The Newcastle and Gateshead Waterworks Company* (ubi sup.). In *Blamires v. The Lancashire and Yorkshire Railway Company* (ubi sup.) it was held that a non-compliance with certain statutory regulations, as to providing a means of communication between the passengers and the guard of certain trains, was evidence of negligence in an action by a passenger against the railway company to recover compensation for special injuries, the question there being, whether the defendants were guilty of the negligence pointed at by the Act of Parliament in that case, in which the regulations were intended for the express benefit of the passengers, and as a precautionary measure against accidents. Now it must be taken, in the present case, that the plaintiffs' sheep were washed away by reason of the want of certain statutory requirements, but that gives the plaintiffs no cause of action, because the Act was passed *alias infra*. What the Privy Council have power to do under sect. 75 is to make regulations for preserving the health of, and preventing unnecessary suffering during their voyage to "animals brought by sea to ports in Great Britain," but the whole thing is governed by this, that they shall be animals brought into Great Britain,—it is to prevent unnecessary suffering to "such animals," that is animals brought by sea from foreign ports into this country, that the order and regulations are made. The Act was designed, not to prevent such an accident as happened to the plaintiff's sheep, but to prevent the spread of contagious diseases amongst cattle in this country. These batters or footholds would no doubt be an advantage to the cattle owner in case of rough weather, but it is most desirable that the Act should not be construed so as to import into it that which was not the intention of the Legislature, and so to create a ground of action which they never contemplated.

AMPHLETT, B.—I am quite of the same opinion, and it is not necessary for me to add anything to that which has been already said.

Judgment for the defendant.

Attorneys for the plaintiffs, Pyke, Irving, and Pyke, agents for J., G., and J. E. Joel, Newcastle-on-Tyne.

Attorneys for the defendant, Tagledew, Ince, and Greening.

EXCHEQUER CHAMBER.

Reported by J. M. LEST, Esq., Barrister-at-Law.

Monday, May 11, 1874.

ON APPEAL FROM THE COURT OF COMMON PLEAS. (Before COCKBURN, C.J., MELLOR, J., and BRAMWELL, CLARKE, POLLOCK, and AMPHLETT, B.B.)

STANTON v. RICHARDSON; RICHARDSON v. STANTON. Charter-party—Ship unfit for cargo—Refusal to provide cargo—Warranty of seaworthiness—Reasonableness of cargo.

The shipowner contracted with the charterer to load a full and complete cargo of sugar in bags, hemp

in compressed bales, and (or) measurement goods, always sufficient dead weight to ballast the vessel, at Yloilo, and to sail to Cork for orders, to discharge at some point in the United Kingdom.

The rates of freight for wet sugar were specified in the charter-party as higher than those for dry sugar.

Before taking cargo on board the ship was surveyed, and reported to be a first-class risk, and fit to carry a dry and perishable cargo to any part of the world.

A cargo of wet sugar in bags was then shipped by the charterer, but when the bulk had been put on board, it was discovered that there was such an accumulation of molasses in the hold, the result of drainings from the sugar, that the ship would not be seaworthy in her then state; nor could the pumps, in consequence of being clogged, get rid of the drainage, although they were in every respect sufficient for ordinary purposes; nor could any pumps be obtained sufficient to deal with the drainage in a less time than six or seven months.

The ship was ultimately unloaded, and the cargo sent to Europe in another vessel, when the charterer refused to load another cargo.

Cross actions were brought; the one by the shipowner against the charterer for refusing to load a cargo, and also for loading a cargo in such an unfit condition that the ship could not prosecute her voyage; and the other by the charterer against the shipowner, for not taking proper precautions to keep his ship fit for the voyage, and to recover damages for injury to the cargo.

The jury found at the trial, in answer to the judge, that the cargo was a reasonable cargo to be offered; that the ship was unfit to carry the cargo offered to her, or any cargo of wet sugar; that the damage to the sugar was caused by the ship not being reasonably fit to carry a reasonable cargo of wet sugar, and that the ship would not have been seaworthy without new pumps, having such a cargo of wet sugar on board.

Held (affirming the decision of the Court of Common Pleas), that the shipowner was bound to provide a reasonable ship to carry a reasonable cargo of the kind specified in the charter-party, that the charterer was bound to offer such a cargo, and that by reason of the unfitness of the ship, the charterer was entitled to recover; also that the charterer must be taken to be absolved altogether. (a)

These were cross-actions between the owner and charterer of a ship called the *Isle of Wight* upon a charter-party. The facts at the trial, the fourteen questions put to the jury, and the arguments and judgments below are fully reported: (*ante*, vol. 1, p. 449; L. Rep. 7 C. P. 421; 27 L. T. Rep. N. S. 513.) The court below (Bovill, C. J., and Byles and Brett, JJ.) gave judgment for Mr. Richardson, the charterer. From this decision Mr. Stanton, the shipowner, now appealed.

The points set down for argument on the part of the appellant were: That the judgment of the Court of Common Pleas is erroneous; that upon the leave reserved the verdicts should be entered respectively for George Stanton; that Richardson had no right to throw up the charter-party and refuse to load a cargo as he did; that upon the

(a) See notes to this case noticing the effect of the decision, and collating American cases, *ante*, vol. 1, p. 449.—Ed.

EX. CH.]

WOOD V. WOOD AND OTHERS.

[EX.]

true construction of the charter, and upon the facts found relating thereto, Stanton had performed all things on his part to be performed, and that therefore Richardson could not throw up the charter and refuse to load as he did; that there was no such total frustration of the voyage or adventure as to entitle Richardson to throw up the charter and refuse to load as he did; that the learned judge misdirected the jury in telling them that under the present charter there was a warranty on the part of Stanton that the ship was fit to carry a reasonable cargo of Yloilo wet sugar; that the learned judge misdirected the jury in telling them that there was an obligation on the part of the shipowner and master of the ship to have the ship in a fit state for a reasonable cargo of Yloilo wet sugar; that the learned judge misdirected the jury in directing the jury as to what did or did not constitute a total frustration of the objects of an adventure so as to entitle a charterer to throw up a charter and to refuse to load; that the learned judge misdirected the jury in directing the jury that the master in this case should have possessed the necessary knowledge enabling him to deal with a cargo of Yloilo wet sugar.

The respondent's points were: That upon the answers of the jury to the questions raised at the trial, the verdict was properly entered for the Richardsons in both actions; that Stanton was bound to make his ship reasonably fit to carry a reasonable cargo of any of the goods described in the charter-party as a condition to Richardsons' liability to load; that Stanton was bound to have his ship in all respects fit to carry a reasonable cargo of wet sugar within such a time as would not have frustrated the object of the adventure; that even if the Richardsons would have been bound to wait under the charter party until the ship had been made in all respects fit to carry the cargo, they were exonerated in this case from so doing by reason of the substitution of the *Milton* for the *Isle of Wight*, with the consent of Stanton; that by the terms of the charter-party it was an express condition precedent to the Richardsons' liability to load, that the vessel when receiving cargo should be a good risk for insurance, and that at no time prior to the shipment of the cargo on board the *Milton* was the *Isle of Wight* a good risk for insurance within the meaning of the charter-party; that Stanton is responsible to the Richardsons for the loss occasioned by the unfitness of the ship to carry the cargo, and by the want of reasonable skill and care on the part of the captain; that Stanton was never ready and willing to carry in the *Isle of Wight* the cargo which had been provided by Richardsons, and was never in a position to maintain an action against the Richardsons for not loading.

A. L. Smith (E. Ridley with him) for the appellant.—Where there is a particular express warranty, the court will not extend it by implication (*Dickson v. Ziriaia*, 10 C. B. 602), and the stipulation in the charter-party that the ship should be surveyed, excludes any implied warranty as to seaworthiness. It was, in fact, a stipulation for limited liability. The ship was surveyed and reported a good ship, "and fit to carry a dry and perishable cargo to any part of the world." (COCKBURN, C.J.—Every carrier must be taken to impliedly warrant seaworthiness.) The ordinary express warranty that the ship should be tight,

staunch, and strong, not appearing, is an argument that the charterer accepted the report of the surveyor in lieu of it. (COCKBURN, C.J.—If those words had been struck out of a printed form, I might be disposed to agree with you; but such is not the case. There was no need to insert such words; they are mere surplusage.)

Sir J. Karslake, Q.C. (Bull, Q.C. and J. C. Mathew, with him), for respondent, was not heard.

The judgment of the court was delivered by COCKBURN, C.J., as follows:—We are of opinion that the judgment of the court below ought to be affirmed. If words of warranty of seaworthiness had been purposely struck out of a printed form, there might have been some force in the argument that the report of the surveyor was intended to be conclusive, but that is not the case here. Taking the whole charter-party together, we think that there is an engagement to carry sugar, wet or dry (and it is to be noticed, that the rate was to vary according as wet or dry sugar was shipped); the shipowner, therefore, was bound to carry sugar wet or dry. Wet sugar was tendered to him for carriage, and upon shipping it, he discovered that the pumps of his ship were inadequate to carry off the viscous matter which was formed. That is his affair. He is unable to meet the exigencies of his contract; he promised to carry wet sugar, and he fails to do so.

Judgment affirmed.

Attorneys for the appellant, Skum, Crossman, and Crossman.

Attorneys for the respondent, Walton, Bubb, and Walton.

COURT OF EXCHEQUER.

Reported by T. W. SAMPSON and H. LEECH, Esqrs., Barristers-at-Law.

Wednesday, May 27, 1874.

WOOD V. WOOD AND OTHERS.

Mutual marine insurance association—Rules giving committee absolute power to expel members—Exercise of such power by committee.

The declaration alleged that the plaintiff was a member, and the defendants were the committee, of a mutual marine insurance association, by the rules of which the committee, if they should at any time deem the conduct of any member suspicious, or that he was for any other reason unworthy of remaining in the society, should have power to exclude a member by directing the secretary to give him notice in writing that the committee had excluded him, and after the giving of such notice such member should be excluded, and have no claim nor be responsible for or in respect of any loss or damages happening after such notice. Averments, that the plaintiff, as such member, having deposited with the treasurer of the society the proper entrance fee, and having his ship entered in the society's books, was entitled to receive, and, but for the grievance thereinafter mentioned, would have received an indemnity—for any loss or damage to his said ship by the perils of the sea, &c. Yet the defendants, well knowing the premises, but wrongfully, conclusively, and improperly contriving to deprive the plaintiff of the benefit of such indemnity did, wrongfully, conclusively, and improperly, expel the plaintiff from the said society, on the alleged ground that his conduct was suspicious, or that he was, for some other reason, unworthy of re-

[Ex.]

WOOD V. WOOD AND OTHERS.

[Ex.]

maintaining in the said society, without any just, reasonable, or probable cause, and without having given the plaintiff notice that his conduct was to be investigated and adjudicated upon, and without giving him an opportunity of being heard, and without, in fact, hearing him, in vindication of his conduct as a member of the society; that his ship sustained damage by the perils of the sea shortly after his said expulsion, and by reason of such expulsion he lost the benefit of the said indemnity, &c., and was otherwise injured. On demurrer it was—

Held (per totam curiam), that the declaration was bad, and the action not maintainable.

Per Kelly, C.B. and Amphlett, B., on the ground that the plaintiff not having had an opportunity, which the committee were bound, on the broad principles of law and justice, to have given him, of being previously heard in his own defence, the act of expulsion was void, and the plaintiff consequently was still a member of the society, and might enforce his rights in equity, and so had sustained no legal damage.

Per Cleasby and Pollock, BB., on the ground that the declaration contained no sufficiently definite allegation of fraud or (per Pollock, B.) of "conspiracy" to show a cause of action, or to make the defendants responsible.

Per Amphlett, B.—Had the plaintiff's expulsion been effected by fraudulent means on the part of the committee, the plaintiff would have sustained an actionable injury, and have been entitled, upon the allegations in the declaration, to recover damages.

Quare, per Cleasby, B., whether the committee are in any case in the absence of fraud liable to an action for the way in which they may have exercised their functions.

Blissett v. Daniel (in Chancery) before Wigram, V.C. (10 Hare, 494), discussed, approved, and acted upon.

Beaurain v. Sir W. Scott (3 Campb. 388), explained and distinguished.

ACTION by the plaintiff against the defendants as the committee of a mutual marine insurance association, for the alleged wrongful, collusive, and improper expulsion of the plaintiff as a member from the said association.

By his declaration the plaintiff charged that before and at the time of the committing, &c., the plaintiff was a member of a certain mutual marine insurance association or club called the Goole Marine Insurance Society, which said association or club had been formed and established, and was, and still is, established and carried on for the purpose of mutually insuring and indemnifying the several members thereof against losses and damages by the perils of the seas, rivers, navigations, and waters, enemies, pirates, jettisons, other than that occurring to deck cargo, and fire happening to or done by their respective vessels and parts of vessels, entered and insured respectively by them on the books of the said society, upon deposit with the treasurer of the said society of a sum equal to 8l. per cent on the amount of the sum for which such vessels should be insured, and upon other terms contained in the rules of the said society; and the plaintiff, as such member as aforesaid, and having deposited with the treasurer of the said society such sum as aforesaid, had a certain ship or ships duly entered in the books of the said society, upon and in accordance with the terms aforesaid; And

the defendants were the committee of the said society, and one of the said rules of the said society was as follows, viz., "That the management of the affairs of this society shall be at all times hereafter conducted by a committee of not less than nine persons (either members of the society or not) one of which shall be appointed the president of the society; that such committee shall have the entire control of the funds, affairs, and concerns of the society, and shall determine upon the admission, rejection, and exclusion of any vessel insured or proposed to be insured by it, and their determination shall be final and binding on all parties, unless where they afterwards see cause to alter, and do alter the same; provided that no member of the committee shall act as such in the settlement of his own loss; that the ordinary meetings of the committee shall be held in the first week of every month, at Goole, aforesaid, on such day and time as the president for the time being shall determine; that a majority of the committee present at any meeting shall have full power to act, provided such majority do not consist of less than three in number." And a certain other rule of the said society was as follows, viz.: "That if the committee shall at any time deem the conduct of any member suspicious, or that such member is for any other reason unworthy of remaining in this society, they shall have power to exclude such member, by directing the secretary to give such member notice in writing that the committee have excluded such member from this society, and after the giving of such notice such member shall be excluded, and have no claim, or be responsible for or in respect of any loss or damage happening after such notice." And the plaintiff, as such member of the society, and having deposited with the treasurer of the said society such sum as aforesaid, and having his ship or ships so entered in the books of the said society as aforesaid, was, under and in accordance with the rules of the said society, entitled to receive, and, but for the grievance hereinafter mentioned, would have received, from the funds of the said society an indemnity for any loss or damage to his said ship or ships so entered as aforesaid, by the perils of the seas, rivers, navigations, and waters, enemies, pirates, jettisons, other than as aforesaid, during his membership of the said society. Yet the defendants, well knowing the promises, but wrongfully, collusively, and improperly contriving to deprive the plaintiff of the benefit of such indemnity as aforesaid, to which he was so entitled as aforesaid, did wrongfully, collusively, and improperly expel the plaintiff from the said society, on the alleged ground that his conduct was (in the terms of the said 47th rule) suspicious, or that he was for some other reason unworthy of remaining in the said society, without any just, reasonable, or probable cause whatsoever for such expulsion, and without having given the plaintiff any notice that his conduct was to be investigated and adjudicated upon by the said committee; and without giving the plaintiff, or any person or persons on his behalf, any opportunity whatsoever of being heard before them, and without, in fact, hearing the plaintiff or any person or persons on his behalf in defence and vindication of the defendant's conduct as a member of the said society, with reference to the said ground of expulsion, and that before and at the time of his said expulsion from the said society, he had a certain ship called the

[Ex.]

WOOD V. WOOD AND OTHERS.

[Ex.]

Progress duly entered in the books of the said society, and had deposited with the treasurer, of the said society such sum as aforesaid, and the said ship sustained certain damage by the perils of the sea a few days after the expulsion of the said plaintiff from the said society, and, but for the said expulsion of the plaintiff from the said society, he would have been entitled to receive, and would have received, 92l. 2s. 8d. from the funds of the said society, as an indemnity for the said damages so sustained as aforesaid, and that by reason of his said expulsion he has lost the said sum of 92l. 2s. 8d., and has been otherwise, by reason of the said wrong of the defendants, greatly damaged and injured.

Plea: 5. Further, to the said first count, that the defendants deemed the conduct of the plaintiff suspicious, and, in the exercise of their power in that behalf given to them by the said rules, excluded the plaintiff by directing the secretary of the said society to give notice in writing that the committee had excluded the plaintiff from the said society, and such notice was given, and all things were done, and happened, and existed, to entitle the committee to exclude and expel the plaintiff from the said society, and which is the expulsion complained of. 6. And for a further plea to the same count, the defendants repeated the allegations in the fifth plea made, excepting that they deemed the conduct of the plaintiff suspicious, and instead thereof alleged that they deemed that the plaintiff was unworthy of remaining in the said society for other reasons than deeming his conduct suspicious.

Demurrer, and joinder in demurrer, to the first count in the declaration, on the ground that it disclosed no cause of action.

Demurrer, and joinder in demurrer to the fifth and sixth pleas, on the ground that the facts therein respectively alleged are no answer to the plaintiff's cause of action in respect of his expulsion from the said society without being heard in his defence.

Points for argument on the part of the defendants.—1. That no action at law lies against the defendants for the improper exercise of their powers as the committee of the society under the rules set out. 2. That the first count discloses no cause of action which can be held good without contravening 30 & 31 Vict. c. 23. 3. That the first count discloses no cause of action, because it is not alleged that the plaintiff's ships were insured by the society. 4. That it discloses no cause of action, because no harm is properly alleged to have been caused to the plaintiff from acts of the defendants. 5. That it discloses no cause of action, because it was not necessary, on the true construction of the rules, to give the plaintiff an opportunity of being heard, or notice that his conduct was to be inquired into. 6. That it discloses no cause of action, because the wrongful acts of the defendants therein alleged did not deprive the plaintiff of any rights or claims against the society. 7. That the first count does not properly allege a conspiracy by the defendants to injure the plaintiff. 8. That it discloses a partnership between the plaintiff and the defendants, and no cause of action which can be maintained at law. 9. That plea 5 is good in substance, because it traverses the wrongful acts of the defendants in the first count alleged. 10. That plea 6 is good in substance, because it shows that the acts of the defendants in the first count com-

plained of were not wrongful. 11 and 12. Similar points with respect to plea 6.

Points for argument on behalf of the plaintiff.—

1. That the averments in the declaration show a collusive and therefore a fraudulent exercise of the powers of the defendants, as individual members of the committee of the club against the plaintiff, and that such fraudulent exercise of the said powers gave the plaintiff a good cause of action against the defendants. 2. That the demurrer admits the expulsion of the plaintiff to have been a purely arbitrary act on the part of the defendants, without any reasonable or probable cause whatever, and that such act having been accompanied by fraud and misconduct on the part of the defendants (as also admitted by the demurrer) gave the plaintiff a good cause of action against the defendants. 3. That the omission of the defendants to give the plaintiff notice that an inquiry into his conduct was about to be made, and an opportunity of being heard upon such enquiry, was a tortious act in itself, for which the 47th rule afforded no justification. 4. That the rights of property being involved, the discretionary powers conferred by the 47th rule rendered it imperative on the defendants to exercise a judicial, and not an arbitrary discretion. 5. That it is not competent for the defendants to contend that the expulsion of the plaintiff was a void act, thus taking advantage of their own confessedly wrongful act. 6. That, assuming the expulsion to have been a void act, an action is maintainable by the plaintiff in respect of such expulsion, accompanied as it has been by the damage alleged in the declaration. 7. That the word "deem" contained in the 47th rule, does not mean "deem" without any cause whatever; nor does it mean "deem" without giving the person whose conduct is to be inquired into, an opportunity of being heard, but that it means "deem" *judicially*, and that the fifth and sixth pleas are bad, inasmuch as they do not traverse the averments in the declaration that the defendants expelled the plaintiff without any cause whatsoever without inquiry. 8. That the said pleas respectively amount to nothing more than averments of the exercise of the powers conferred upon the defendants by the 47th rule, without affecting to answer the averments in the declaration showing a wrongful exercise of those powers. 9. That the unworthiness of the plaintiff alleged in the sixth plea, did not disentitle him to have a fair hearing on the part of the defendants.

In addition to the count demurred to, there was the ordinary money count; and the defendants also pleaded various other pleas (in addition to pleas 5 and 6 demurred to), e.g., not guilty—denial of plaintiff's membership—plaintiff's ship not duly entered in society's books—that defendants were not the committee—never indebted, and payment before action. Issue was joined on all the pleas, and at the trial of the action, which took place before Pollock, B. and a special jury, at the last Summer Assizes (1873) for Yorkshire, at Leeds, a nonsuit was entered by direction of the learned judge, and a rule was subsequently obtained, in Michaelmas Term last, by *D. Seymour, Q.C.*, on the part of the plaintiffs, to set that nonsuit aside, and for a new trial, on the ground that the action was maintainable on proof of the facts stated in the first count of the declaration. That rule was argued some time ago in this court, and judgment was reserved until after the argument of the above

[Ex.]

WOOD F. WOOD AND OTHERS.

[Ex.]

named demurrers, which now came on to be heard accordingly.

Waddy, Q.C. (with him was *S. Tennant*), for the defendants, in support of the demurrer to the declaration, and in support of the pleas, contended, in the first place, that the declaration was bad inasmuch as it contained no allegation that the plaintiff's ship was insured. [*KELLY, C.B.*—Supposing that the plaintiff was not in strictness validly and legally insured, yet, if he has been wrongfully expelled from a society in order to enter into which he had paid money, does not the declaration show a good cause of action?] *Re the London Marine Insurance Association, Smith's case* (before the Lords Justices in Chancery) (21 L. T. Rep. N. S. 27; L. Rep. 4 Ch. App. 611; 3 Mar. Law Cas. O. S. 280), is an authority showing the necessity for the existence of a valid stamped policy. To the same effect also is the case of *Fisher and others v. the Liverpool Marine Insurance Company (Limited)* in the Queen's Bench (*ante*, p. 44; 28 L. T. Rep. N. S. 867; L. Rep. 8 Q. B. 469). Secondly, on the face of the declaration it is shown that there was an absolute and unconditional power in the committee to expel the plaintiff from the society without being in any way controlled, or called in question for the exercise of, such power. [*AMBLETT, B.* referred to the case in Chancery (before *Wigram, V.C.*) of *Bliss v. Daniel* (10 Hare, 493), where it was held that the power must be exercised with good faith, and that it was not properly exercised at the exclusive instance, and in consequence of the representation of one partner to his co-partners, made without the knowledge and behind the back of the partner to be expelled, and without giving him the opportunity of stating his case and removing any misunderstanding on the part of his co-partners; and that the expulsion was therefore void.] There was no suggestion or allegation in the declaration here that the defendants had acted in the matter otherwise than with perfect good faith.

Seymour, Q.C. (with him was *Lessers*) for the plaintiff, *contra*, in support of his declaration.—Good cause of action is shown on the face of the declaration, and therefore the declaration can be supported. It discloses a duty on the defendants not to expel the plaintiff without first giving him notice of their intention to expel him, and the grounds on which they propose to do so, so that he may have an opportunity of being heard in his own defence. The allegation is, that they did the act complained of "wrongfully, collusively, and improperly." It is true that the word "fraudulently" is not expressly used, but it is submitted that "collusively" here, means fraudulently, and nothing else. In *Batterbury v. Vyes* (5 L. T. Rep. N. S. 283; 2 H. & C. 42; 32 L. J. 177, Ex.), Pollock, C.B., in discussing the meaning of the word, says (12 32 L. J.) collusion implies fraud, and "to collude" is so treated in Webster's Dictionary, where one definition of the word is "a secret agreement for a fraudulent purpose." [*AMBLETT, B.*—In *Gill v. The Continental Union Gas Company* (27 L. T. Rep. N. S. 424; 41 L. J. 176, Ex.; L. Rep. 7 Ex. 332), Bramwell, B. says (at page 337 of 7 L. Rep.) "the word collusion only signified that the defendant and the company agreed together." It is submitted that here, coupled with the words "wrongfully and improperly," it means more than that, and imports

or will at all events sustain, an imputation of fraud. Again, they are not to exclude a partner without "deeming" his conduct suspicious. According to Johnson, to "deem" is to exercise a judicial discretion, and what that is will be found admirably defined in *Rook's Case* (5 Co. Rep. 100a) and *Keighley's Case* (10 Ib. 140a). The defendants' conduct was the reverse of judicial; their duty was to hear before they struck. Nothing short of express words can have the effect of making a man contract himself out of the right of being heard before he is condemned. In an old case, *Rea v. The Chancellor Jz. of the University of Cambridge* (1 Stra. 557), Fortescue, J. (at p. 566), says: "I remember to have heard it said by a very learned man, upon such an occasion, that even God himself did not pass sentence upon Adam before he was called upon to make his defence—'Adam,' says God, 'Where art thou? Hast thou eaten, &c.' and the same question was put to Eve also." So in *Ex parte Ramsay* (18 Q. B. 173; 21 L. J. 238, Q. B.) Lord Campbell, C. J., delivering the judgment of the Court of Queen's Bench, says (at p. 190 of 18 Q. B., and p. 239 of 21 L. J.): "We are to see that judges and functionaries vested with judicial authority do not exceed their jurisdiction. The Chancellor has authority to remove a judge of a County Court only on the implied condition prescribed by the principles of eternal justice—that he hears the party accused." These authorities sufficiently show that the committee ought to exercise their functions honestly, fairly, and according to "the principles of eternal justice," which it is submitted they have not here done. [*POLLOCK, B.*—What damage do you say has been done to the plaintiff? It may be the defendants have not acted rightly, but is it actionable? *KELLY, C.B.*—Your difficulty is as to the expulsion. If it be a valid act, you have no remedy, and if it be void, you are still a member and are not damaged. *POLLOCK, B.*—The declaration does not charge that the defendants conspired.] I submit it shows mala fides, on its face, and needs words equivalent to a charge of conspiracy, that they "wrongfully and collusively contriving," &c., &c. The damage need not necessarily be a pecuniary one. Any damage, mental, moral, physical, or social, is sufficient. [*KELLY, C.B.*, referred to *Beaumont v. Sir W. Scott* (3 Camp. 587), in which an action on the case was held maintainable against the Judge of the Ecclesiastical Court for excommunicating the plaintiff for disobedience of an order which the court had not authority to make, or where the party had not been previously served with a monition, nor had due notice of the order.] The damage here is of the same character as in that case, namely, the pain and annoyance of publicity and notoriety, injury to the character, feelings, and pocket of the plaintiff. [*CLEARY, B.*—In 3 Blacket. Comm. book 3, ch. 7, p. 101, it is laid down as clear law (citing 2 Inst. 623, as an authority), that "if the judge of any spiritual court excommunicates a man for a cause of which he hath not legal cognizance, the party may have an action against him at common law, and he is also liable to be indicted at the suit of the king." Fraudulently to do a void act is to do a wrong, and having done a fraudulent, even though it be a void act to the plaintiff's injury, they cannot take advantage of their own wrong, and say it is void. [*AMBLETT, B.*—They do not say so;

[Ex.]

WOOD V. WOOD AND OTHERS.

[Ex.]

your dilemma is, that if it is void, you are not injured; and if it is not void you have no remedy.] In either case, whether combining to do a void act wrongfully, or, if not void, doing it maliciously, the plaintiff has a remedy. To be driven to Chancery for redress is a wrong and a damage, for which an action will lie: (*Dixon v. Fawcett*, 3 L. T. Rep. N. S. 693; 30 L. J. 137, Q. B.; 3 E. L. 537.) As Holt, C. J., said, in *Ashby v. White*, "Every injury imports a damage, though it does not cost the party one farthing, and it is impossible to prove the contrary; for a damage is not merely pecuniary, but an injury imports a damage where a man is merely hindered of his rights" (1 Sm. L. C. 2nd edit. p. 125). He cited also

Innes v. Wylie, per Lord Denman, C. J., 1 Car. & Kir. 237.

Re Hammermith Rentscharge, 4 Ex. 87; 19 L. J. 60, Ex. 1.

and referred to 2 Lindley on Partnership, p. 908, as to actions against partners.

S. Tennant, in reply.—"Expel" does not necessarily mean an assault *vi et armis*, but merely that he was no longer entitled to be a member. He cited *Hayman v. The Governing Body of Rugby School* (30 L. T. Rep. N. S. 207), where, on demurrer to the plaintiff's bill, praying for a declaration that under the circumstances in the bill, the resolution of the governing body dismissing the plaintiff from the head-mastership of the school was invalid, it was held, by Malins, V. C., that the governing body had power to dismiss the plaintiff without notice, and without assigning any reason; and that, having exercised their power fairly and honestly, and not corruptly, or to effect some collateral purpose, their decision was not liable to be controlled by the court. Here no conspiracy is alleged. The defendants are not in the position of judges, and have only acted in conformity with their rules. The plaintiff's remedy is in a court of equity.

KELLY, C. B.—This case certainly involves some very important considerations, and, but that from two or three different points of view we have all come to the same conclusion, namely, that the action is not maintainable, I should have desired time before I had expressly delivered the grounds upon which, in my opinion, the defendants are entitled to the judgment of the court.

The facts, as they appear upon the record, are that the plaintiff was a member of an association or co-partnership, instituted and carried on by the co-partners, for the purpose of enabling each and every of them to effect insurances with the society upon ships of which they might be the owners; and amongst the rules of the association are those which are set forth upon the record, viz., "that a majority of this committee present at any meeting shall have full power to act, provided such majority do not consist of less than three in number," and "that if the committee shall, at any time, deem the conduct of any member suspicious, or that such member is, for any other reason, unworthy of remaining in this society, they shall have power to exclude such member, by directing the secretary to give such member notice in writing that the committee have excluded such member from this society, and after the giving of such notice such member shall be excluded." I must not be understood to say that a body constituted like this committee is

bound to allege or state any reason for any decision they may pronounce, but it appears that, without anything on the record to show why or on what ground they have so acted, a committee of the necessary number have held a meeting, and have come to a decision deeming the conduct of the plaintiff suspicious, or deeming him unworthy of being in the society, and have accordingly given a notice to the plaintiff that they have met, and that by reason of his conduct having been deemed suspicious, he was unworthy to remain a member, that he was to consider himself excluded, and they did accordingly exclude him from the society, and gave him notice that the society would be responsible for no claim in respect of any loss or damage arising therefrom; and he brings this action, treating the decision or notice, or the act of expulsion in question, of which he complains, as a ground of action, and alleging that he has sustained damage for which he claims compensation in the count now before us; and to that count the defendants demurred, and the question is, whether it is sustainable. I am of opinion that it is not; but not on the ground that the act done by the committee is justifiable in law, it being expressly alleged on the record that it was done and the plaintiff expelled, without his having had an opportunity of being heard in his own defence, and without having had notice, so that he might have had the means, if such existed, of showing that there was no ground for any suspicion against him, and that his conduct had not been, in the due and proper sense of the word, "suspicious," or still less such as to make him unworthy of remaining in the society. On these grounds it is that this is treated as an actionable wrong, for which damages are claimed.

Now, I am of opinion that the committee, before they were justified in giving notice to the plaintiff of his expulsion from the society, and before they came to the decision that his conduct had been "suspicious," or such as to render him unworthy of remaining in the society, were bound to give him notice that they were about to consider that question, so that he might have an opportunity of defending himself against any charge or suspicion which might have been made or entertained against him. If the case rested there, and but for the considerations arising on the record, I should have been of opinion that this was a wrongful act; and, if it had been such as, in contemplation of law, to have occasioned damage to the plaintiff, that the action was maintainable, and that he might have recovered damages; but when we look at the nature of the act of expulsion, and that its effect, if it had any effect at all, was to cause him to cease to be a member of the co-partnership, and that the only damage which he could possibly have sustained from the committee having deemed his conduct suspicious and such as to render him unworthy of remaining in the society, would be that he was deprived of some right, privilege, or benefit to which he would otherwise, under the rules, have been entitled, the question arises whether, by reason of this notice of expulsion, he ceased to be a partner. If he thereby ceased to be a partner then, inasmuch as he had paid a deposit of £1, and had caused the name of a ship belonging to him to be entered in a book, and would have been entitled to proceed to effect an insurance thereon at any time he pleased,

[Ex.]

WOOD V. WOOD AND OTHERS.

[Ex.]

proper, he would have been deprived of that advantage, and would have sustained damage. But I am of opinion that the act itself being unjustifiable and unlawful, for the reason that I have already stated, was void, and that consequently he did not cease to be a partner, but that he remained, and is at this moment, a partner and entitled to enforce any rights that he may possess as such.

The great question in the case then is, whether the act was void. It has been argued with great force, and the argument is well entitled to our serious attention, that these rules are absolutely unconditional in their terms. I quite agree that if the committee exercised the power they possessed under these rules, honestly, properly, lawfully, and in good faith, their decision could not be questioned. Their decision may have been wrong, and unfounded, and without sufficient reason, or without any reason at all; but I am aware of no power in the law to call in question or interfere with the honest and *bona fide* decision pronounced under rules so expressed by a committee existing, like the present, under these articles of Association. Whether they had been right or wrong, and whether they had proceeded on insufficient grounds, or on no grounds at all, if they thought fit to allege that, in their judgment, the conduct of the plaintiff was suspicious, or that his conduct was such as to render him unworthy of remaining in the copartnership, their decision would have been final, and not open to be questioned in a court of law. But I am of opinion that, upon the well-known principle of law that no one should, in any court, or before any tribunal or body of persons authorised to act in any manner whatsoever, be condemned unheard and without having the opportunity given to him of appearing and defending himself against the charge, the defendants were bound to give the plaintiff notice that this charge was about to be brought against him.

Many cases have been cited, in some of which the rule has been laid down in very strong and forcible terms. In other cases, it has appeared that, by the particular nature of the tribunal, or of the body of persons by whom the decision complained of has been pronounced, it was not open to question; or, as in a case (*Copin v. Adamson*) lately before us with respect to a foreign judgment, there may be circumstances under which notice would be the legal effect of the proceedings in question; but the general rule is, as I have before said, that no man should be judged and condemned unheard. The principle is clearly and expressly stated by Parke, B. in his judgment in the case of *Re Hammermith Reutcharge* (4 Ex. 87; 19 L. J. 66, Ex.). Although Parke, B. differed in that particular case from the majority of the court—and I am not prepared to say that majority were not right on this particular point—after alluding to cases, in which the rule had been invariably laid down and acted upon, he expresses himself as follows: "In *Capel v. Child*" (2 Cr. & Jer. 558; 1 L. J., N. S., 206, Ex.) Bayley, B. says, that he knows of no case in which you are to have a judicial proceeding, by which a man is to be deprived of any part of his property without his having an opportunity of being heard. This," Parke, B., proceeds to say, "is an extremely strong case, and shows how powerful the principle of

justice is in all judicial proceedings:—*Quicumque aliquid statuerit, parte inaudita altera, aequum licet statuerit, hanc aequum fuerit.*" I entirely adopt that principle, and apply that observation to the present case. I come next to the case in Chancery of *Blissett v. Daniel* (10 Hare, 493), which is almost parallel and identical with the case now before the court. There a number of persons had entered into a copartnership, with power to a certain number of the partners absolutely and unconditionally to dismiss and expel from the partnership any other partner as they might think proper. I will read the marginal note, because it shows how similar to, if not identical with, the present case, that case was. It is as follows: "Articles of partnership provided that it should be lawful for the holders of two-thirds or more of the partnership shares, for the time being, to expel any partner by giving him notice thereof under their hands, in the form thereby prescribed, and that, immediately after giving such notice, a notice of the dissolution as to the expelled partner should be signed by the partners and published, with power to any other of the expelling partners to sign the name of the expelled partner; and it was provided that, if a partner became bankrupt, insolvent, or was expelled, his interest should cease, as to profit and loss, as if he had died on the day of such bankruptcy, insolvency, or expulsion, and that the amount of his share should be ascertained, and payment secured by the same arrangement as would have been applicable in case of his decease; and it was also provided, that the shares of retired, deceased, bankrupt, insolvent or expelled partners should be disposed of in such way, either to or between some or all of the continuing partners, or by the admission of a new partner or partners, as the holders of a majority of shares should determine. The articles provided that, in the case of making certain arrangements, there should previously be a meeting of the partners in committee, but did not express that any such meeting should be necessary previous to the exercise of the power to expel. The articles also provided for the adjustment of the partners' accounts within sixty days after the 30th June in each year, when an inventory of all the stock, debts, &c., should be made, with proper allowances, so as to ascertain the partnership property, profit and loss, and the shares of the respective partners, which shares were to be carried to their respective accounts; and it was provided, that the share of any partner who might wish to retire, if his retirement were consented to by the majority of the others, was to be taken by the continuing partners at the amount at which the same stood at the time for making the yearly rest or settlement next proceeding; and that the surviving partners were also to take the shares of a deceased partner at the amount at which the same stood at such next proceeding yearly rest or settlement. Held, that the power of expulsion of a partner might be exercised by two-thirds of the partners without any previous meeting of the partners in committee upon the question, and without any cause being assigned for such expulsion; but that the power must be exercised with good faith, and not against the truth and honour of the contract." If it were necessary to consider the effect of the words "wrongfully, collusively, and improperly and without any just, reasonable,

Ex.]

WOOD v. WOOD AND OTHERS.

[Ex.]

or probable cause," in the present declaration, it might be that there is enough on this record to show that the decision in the case which I have just referred to would be conclusive here. But that is not the ground on which I desire to put the present case. The marginal note to *Blissett v. Daniel* proceeds as follows:—"The power was not properly exercised at the exclusive instance of one partner, and in consequence of his representation to the other partners, made without the knowledge and behind the back of the partner who was to be expelled, and without giving to such partner the opportunity of stating his case, and of removing any misunderstanding on the part of his co-partners." In that case the circumstances were entered into more fully, and more in detail than we are permitted by the form of this record to do here. But we may suppose the most favourable case that can be imagined on the part of the committee, and that there had been some complaint made before them affording just ground of suspicion, into the consideration of which they were about to enter, and that perhaps there was something which, unless explained, might have shown suspicious conduct on the part of the plaintiff, such as to render him unworthy to be a member of the society. That case of *Blissett v. Daniel* is a direct decision in point that it was incumbent on the defendants to give the plaintiff the opportunity of stating his case, and that it was unlawful and unjustifiable to come to a decision of expulsion without his knowledge and behind his back. Having said that, we must now consider the legal effect of what has been done. It appears to me that the act was unlawful, and therefore absolutely void, and that it had not the effect of causing the plaintiff to cease to be a member of the association. In this very case of *Blissett v. Daniel*, the decree that was made was as follows: "Declare that the notice of expulsion given to the plaintiff on the 23rd Aug. 1850, was void, and that the plaintiff did not, by virtue thereof, cease to be a partner in the copartnership firm in the pleadings mentioned."

I apprehend that the present plaintiff has not, by reason of this notice of expulsion, which I hold to be absolutely void in law, ceased to be a member of the co-partnership, and that he may file a bill in equity, and thereby entitle himself to all the benefits which may belong to him as a co-partner. Had it appeared that any one or more persons had, by some unlawful act, prevented the plaintiff from deriving some benefit to which he was entitled under the articles of co-partnership, this action might have been maintainable for the wrong so done; but the present action is founded entirely on the act of expulsion. In contemplation of law he has sustained no damage at all from that act, he is exactly in the condition he was in before this notice was served upon him, and whatever rights he possessed then, he possesses still. This act is a void act, and the notice is merely waste paper.

But it has been urged by Mr. Seymour that, even though the act done were absolutely void, yet if it were a wrongful act, the party aggrieved thereby might maintain an action for damages in respect of it; and that the damage suffered need not necessarily be pecuniary, but that any damage, mental, moral, physical or social, would be sufficient to support the action.

I had hoped that the case of *Beaurain v. Scott*, in 3 Camp., to which I referred during the argument, might be an authority in support of that argument. On looking into that case, however, we find that the act done there, viz., the pronouncing sentence of excommunication, is an act of a peculiar kind. It is the act of a judge of an ecclesiastical court, and is in itself, if unauthorised, an indictable offence, and is of that public and important nature that it involves damage in law; and, therefore, although for the reason appearing in that case the sentence was void in law, yet the action was held maintainable by reason of the particular nature and judicial importance of the act done. It may further be observed that, in carrying the sentence into effect, which may be taken to be the act of the judge himself, the excommunication was publicly read during divine service from the pulpit of the parish church at which the plaintiff attended, and to which he belonged, and that his good name and fame were thereby injuriously affected. But the present is a case of a totally different nature. I wish I could feel myself at liberty, under the authority of *Beaurain v. Sir W. Scott*, to hold that this action is maintainable, but when we come to look at it, the notice of expulsion really had no effect at all, it was mere waste paper; and had the plaintiff at once treated it as absolutely void, for the reason that he had not been heard in answer to the charge, and had called upon the defendants to admit him into the association, and to respect his rights as usual, he might, had they not done so, have proceeded (and indeed may yet proceed) to enforce those rights in a court of equity.

I must declare this action to be not maintainable, and consequently that the demurrer to the declaration must be allowed. On the same ground, I am of opinion that the nonsuit directed by my brother Pollock must stand, and that the plaintiff's rule to set it aside must be discharged.

CLEARY, B.—I have come to the same conclusion, but not exactly on the same grounds. My ground is, not that in this case there is an absence of damage, because I should have thought that wherever there is an injury to a right there arises a cause of action; and if the right of this plaintiff was to be a member, and to have all the profits of membership, his *de facto* exclusion from the society is a damage. It is plain that from the moment of the giving the plaintiff notice of his expulsion he became excluded, and had no claim whatever in respect of any loss or damage happening thereon. As I have said, I should have thought that that was in itself an injury to his right sufficient to give him a cause of action.

But I must say I am not satisfied that the committee are, in any case, in the absence of fraud, liable to an action for the manner in which they may have exercised their functions. Let us see what their powers are, and whether they are liable to an action because they do not give a member notice of their intention to exercise them. It appears that one of their rules is, that the management of the society's affairs shall be governed by a majority of not less than nine; there appear to be twenty-two here, and they need not necessarily be members of the society. What are they to do. They have the entire control of the funds, affairs, and concerns of the society; they are to determine upon the admission, rejection, or exclusion of any vessel proposed; and, if they think the conduct of

[Ex.]

WOOD v. WOOD AND OTHERS.

[Ex.]

any member suspicious, they have power at once to exclude him, by directing notice to be served upon him. Now, supposing them to have acted *bona fide*, are they to be liable in respect of every vessel which has been proposed, and which they have rejected, or which they may have improperly admitted, or for the manner, or the negligent manner in which they have proceeded, on a vessel being proposed and rejected. So with respect to the management of the settlement of the claims, are they to be liable to an action at the suit of every disappointed person who makes a claim and does not receive satisfaction? All this is quite independent of the redress which could be got in a court of equity in case the funds were not properly administered.

Now, in consequence of the peculiar nature of the business of the society, the committee were expressly authorised to do that which in ordinary circumstances is a most unsafe thing to do, namely, to act on a mere suspicion. Suspicion generally disqualifies a person from exercising judgment in anything he has to deal with, but here the committee were to act upon it if they entertained it, and were not to wait for real grounds, which would have to be investigated, the only result of which investigation would be that, if any question were put to them, they would be justified in saying, "we act on a general suspicion, and not upon any particular ground." That being so, can it be made a ground of action that they have acted upon suspicion merely? I do not think it can be. I do not think they can be exposed to an action for a mere irregularity, or for negligence in their mode of proceeding.

I will now deal with the other part of the case, namely, the plaintiff's allegation that the defendants "wrongfully, collusively, and improperly" did the act complained of. The word "collusively" is an ambiguous word, and is used very loosely here. It does not, in my judgment, put the defendants to the proof that there was an absence of *bona fides* on their part. The case of *Batterbury v. Vane*, cited by the learned counsel for the plaintiff, was very different from the present one. There the collusion alleged, and the way in which it was alleged, involved the charge of *mala fides* of a particular nature, because the defendant there having made a contract for the execution by the plaintiff of works which were to be paid for on the certificate of the architect only, as a precedent condition, the action was brought against the defendant, and the ground of complaint was that the architect's certificate being a condition precedent to payment, the architect had, in collusion with and by the procurement of the defendant, neglected to certify, whereby the plaintiff was unable to obtain payment. There a specific act was charged. It does not appear to me that there is any such specific charge here, supposing even that, if there were, it could be made the subject of an action against persons in the position of the defendants, acting, as it were, in a judicial capacity, and not as partners, upon which, however, I do not at present, nor is it necessary that I should, venture to express a decided opinion. But I do say that here there is not a sufficiently definite allegation of fraud to make defendants responsible.

POLLOCK, B.—I am also of the same opinion. This is a question involving and depending upon very many important principles of law, and some of them first principles.

In the first place I think there is no force in the objection made by the learned counsel for the defendants that the plaintiff had not insured his ship. I think the allegation that he was a member of the society and had paid his membership money is quite sufficient to give him an interest in it. I think also that there is nothing in the objection that the plaintiff is a member of a copartnership, because, although, as between this plaintiff and the other members it would be necessary for him to go into equity to enforce any rights he might have against the whole body, still it is perfectly competent to him to have an action against these twenty defendants, provided they were guilty of such a dereliction of duty as to give him a legal cause of action. Does the declaration then, disclose such cause? It states that "the defendants did wrongfully, collusively, and improperly expel the plaintiff from the said society." It seems to be conceded that the word expelled here must not be taken to be used in the sense of having physically turned him out of any room, but to mean the same as the word "exclude," as used in the rule under which the committee were acting on this occasion; that is to say, that they passed a judgment on him, saying he was no longer to be considered a member. On this part of the case I trust it will not be supposed that I think the mode of proceeding was a proper or right one on the part of the defendants. It will not be supposed that I think they were doing what was right and proper, under the circumstances, in meeting together and passing a resolution to exclude the plaintiff without hearing him. But whether that was so improper an act as to entitle the plaintiff to proceed in equity against the whole body of this association to restore him to his membership is one question, and whether it was such a wrongful act on the part of the defendants as to render them liable to an action at law is another question; and in my judgment the allegation of "wrongfully, improperly, and collusively," does not go to establish what the plaintiff ought, in this case, to have established, and what by the use of the word "fraudulently" he might have done, namely, that this act was done by fraud, and by an actual fraudulent use of the power given to the defendants by this rule. The words "wrongfully and improperly" may be rejected. The word collusively is a word of vague and ambiguous meaning. It may mean a fraudulent collusion, or a collusion without fraud at all. It is a sound and wholesome rule of pleading that words should be taken most strongly against the pleader, and if words of doubtful meaning, equally capable of an honest and a dishonest meaning are used, they should be construed in their honest and innocent sense; if that were not so, a cause might go to trial at Nisi Prius, and a proposition be put before the jury in doubtful language, capable of meaning any one of several things, and so great difficulty and inconvenience would arise. I am of opinion that these words do not disclose a cause of action.

But now, supposing the plaintiff to be correct in his view of the case, it being admitted that there was no physical expulsion of the plaintiff it merely amounts to this—that the act the defendants have done is a void act. If so, it seems to me to follow that no action can be maintainable. I am sorry to differ from my brother Cleasby, but it does seem to me very doubtful whether there has been a legal right

[Ex.]

WOOD V. WOOD AND OTHERS.

[Ex.]

infringed, so as to entitle the plaintiff to maintain his action, although he shows no damage. Again, there are cases, no doubt, where there is no damage or anything more than nominal damage in which an action would lie, if the defendants could be charged with conspiracy. If a man commits an offence by which a person is put in peril for a while, that person may recover. That is not the case here. The plaintiff is still a member of the society. He is in this position: either he is expelled or he is not. If he is expelled by a right and valid decision of the committee to that effect, then no action lies. If, on the other hand it is a merely nominal sentence of no validity whatever, by reason of his not having had notice and opportunity to defend himself, then, however wrong the society may be in removing him, the removal is altogether a void act, and gives the plaintiff no right of action.

As to the nonsuit, it appeared to me at the trial that the declaration was purposely framed to put before the jury a question which ought never to have been brought before them; and, it being admitted by the plaintiff's counsel, that he could not amend it by making a stronger case against the defendants, I felt it my duty to insist that the word expelled, as here used, did not mean physical expulsion, and that the word collusively was a vague and ambiguous expression which might mean either this, that, or the other.

AMULETT, B.—I am of the same opinion. I should not have added anything to what has been said by my learned brothers, but that, although we agree in the conclusion we have arrived at, there is some difference as to the grounds on which we have arrived at it. Therefore, perhaps, I may in a few words say what portion of that which has been already said I agree with, and what is the real ground on which I have come to the same conclusion.

Now, it appears to me, and has throughout the whole of the argument, that the question here depends upon this, whether or not the plaintiff has, in consequence of the acts of the defendants, ceased to be a member of the partnership. If he has not ceased to be a member, it does not appear to me that by this *brutum fulmen*, as it would be in that case, any wrong really has been done to him, for which he ought to recover damages. But, on the other hand, and this appeared to me to be the only way in which the case for the plaintiff could be successfully argued, if it could be brought to this, that the expulsion of the plaintiff had been effected by fraudulent means on the part of the committee, then undoubtedly the plaintiff would have suffered a great injury, and in my judgment would, upon the allegation in this declaration, have been entitled to recover damages. I thought at first that it was possible that the case might be argued in this way, though I have subsequently arrived at a different conclusion, namely, that it might be said the members of this partnership had agreed to give the committee plenary powers to act for all the other members of the partnership; and when they came to the conclusion that this man was not fit to remain a member, that, so far as the partnership was concerned, however wrong or negligent the conduct of the committee might be in coming to that conclusion, I thought it might be argued that the expulsion was complete, and that he must seek a remedy against the committee

for that expulsion, because it was effected, and he no longer remained a member of the society. It appears to me that the allegations in the declaration are quite sufficient to support an action, because, although the word "fraudulent" is not used, the allegation is, "That the defendants, well knowing that if the plaintiff remained a member of the society he would be entitled to be indemnified out of the society's funds, and wrongfully, collusively, and improperly contriving to deprive the plaintiff of the benefit of that indemnity, wrongfully, collusively, and improperly" expelled him, upon the alleged ground that, according to the terms of the 47th rule, his conduct was "suspicious," and that he was not a proper person to remain a member of the society. If the expulsion had been carried into effect by that conduct on the part of the committee, I should not have doubted, but for the doubts expressed by my learned brothers, that these allegations would have been amply sufficient to support an action. The case, then, according to my view, comes to this,—that, upon the allegation that he had been "wrongfully, collusively, and improperly" expelled without being heard in his own defence, I think it is impossible to hold that the society, having established the committee as a tribunal to determine these questions, could derive any benefit from—I will not use the word *fraud* in any other than a legal sense—but will say, the collusive and improper exercise of discretion by the committee.

Then comes the question whether they were justified, under any circumstances, in expelling a man from the society, by deeming his conduct (to use the words of the rule) "suspicious," or that he was unworthy to remain a member, without communicating with him, and giving him some opportunity of explaining before they deemed him to be a character of that description. The case which recommends itself to my sense of justice is a decision which was come to after great consideration in *Blisset v. Daniel*, that, where there was an absolute power for two-thirds of the members of a partnership to exclude another without any cause being assigned at all, they would not be considered to be exercising that in a *bona fide* manner, if, because some one member had said "I think we should get rid of that man," and persuaded them to get rid of him in that way; and it was held that they ought to have given him an opportunity of being heard, and for this reason, that one man may have had a prejudice against him and gone to the others behind his back and stated the grounds of that prejudice, and prevailed upon two-thirds to sign his expulsion, whereas, if he had been heard, very possibly he might have removed the impression the others had derived from something said behind his back. If, the very day after that decision in *Blisset v. Daniel*, the partners had met and had come to the decision that the plaintiff should be removed from the firm, if the court had decided that they were acting *bona fide*, and not out of spite to him, or for any illicit purpose, but only for the benefit of the partnership, that decision of removal would have been perfectly right. So, here, if the committee had called the plaintiff before them, although they had not been able to show by evidence that he ought justly to be deemed a "suspicious" person, and although they were not able to give legal proof of his conduct, there can be no doubt, that they would have been entitled to expel him. But, according to the alle-

[CHAS.]

THE GREAT WESTERN INSURANCE COMPANY OF NEW YORK v. CUNLIFF.

[CHAS.]

gations in this declaration they never gave him the opportunity of explaining his conduct, and I entertain no doubt (always supposing that these allegations could have been proved), that the plaintiff by going into a court of equity would be restored to his rights.

If, then, that is so, what damage has he really sustained? He has not ceased to be a member; he has still all his rights of membership, and the mere fact that the defendants have done something which is illegal and void, does not appear to me to authorise him in coming to this court to recover damages; and for what? why, for an ineffectual attempt to expel him from the partnership. Moreover, it appears to me that there would be great inconvenience in trying the question whether the plaintiff has been expelled or not, in the absence of the other numerous parties who are interested in the matter. All the partners are interested in having that question decided, and if this action proceeded, we should be trying it behind their backs; a matter that ought not, I think, to be left out of consideration. Indeed, the court has, on various occasions, refused to entertain actions by one partner against another very much on that express ground. If they find the matter is so connected with the partnership that complete justice cannot be done in a court of law, the courts of law have said that such an action could not be allowed, very much on the same principle that it would be very inconvenient to maintain this action. If this action could be maintained, what would be the result? Take the case of *Blissett v. Daniel*. It would be a surprise to lawyers to be told (which would almost follow from Mr. Seymour's argument) that not only could the plaintiff in that case get relief by filing a bill in Chancery, but, would also be entitled to damages from his partners in an action against them in a Court of Chancery. The answer here is, you are not injured, because if you go into a court of equity it would hold that you have not been expelled, and that no action will lie. For these reasons I agree with the opinion expressed by my Lord and my learned brethren, and think that the demurrer to this declaration ought to be allowed.

Judgment for the defendant. Demurrer to the declaration allowed. Rule to set aside non-suit discharged.

Attorney for the plaintiff, W. Eley, agent for F. Summers, Hall.

Attorneys for the defendants, Williamson, Hill and Co., agents for England and Son, Goble.

COURT OF APPEAL IN CHANCERY.

Reported by K. STEWART ROCKE and H. FRAY, Esqrs.,
Barristers-at-Law.

April 20 and 21, 1874.

(Before the LORDS JUSTICES.)

THE GREAT WESTERN INSURANCE COMPANY OF NEW YORK v. CUNLIFF.

Marine insurance—Principal and agent—Allowances—Discount—Negligence—Jurisdiction.

A marine insurance company, carrying on business in New York, employed the defendants, in 1858, as their agents in this country for the purpose of

taking risks, and adjusting and paying losses, for which they were to receive a commission of five per cent. upon the premiums paid in each year. The company also effected insurances in this country through the defendants.

On the 8th Dec. 1865, the defendants received instructions from the company to reinsure fifteen ships upon which their lines were full. The defendants endeavoured to effect the insurances, but in consequence of news of a disastrous gale, they were unable to do so except at exorbitant rates; they therefore wrote the same day to the company, informing them thereof, and stating that they left it to the company, if they deemed it necessary, to insure on their side, where it could be done at a profit, instead of here, where it would have to be done at a loss. After sending this letter, the defendants made no further attempt to insure these ships. Before the company received this letter, one of the ships which the defendants were directed to reinsure was wrecked, and thereby a loss was incurred by the company.

On a bill by the company praying for an account of the transactions between them and the defendants, and for damages in respect of the loss occasioned by the defendants' negligence in not reinsuring the ships as directed:

Held (reversing the decision of Bacon, V. C.), that a claim for damages by reason of the negligence of an agent, could not be enforced in a suit in equity for an account of the transactions between principal and agent, but that the plaintiffs' remedy was by action at law.

Under the "credit" system of conducting marine insurance business, which was the system adopted by the defendants, it is customary for the underwriter to allow a discount of twelve per cent. to the broker upon the balance, if any, owing to the underwriter upon the settlement of accounts with the broker at the end of each year.

In the agreement between the company and the defendants, no mention was made of the remuneration to be received by the defendants for reinsuring ships in this country.

In 1866 the company, who had hitherto been ignorant of the discount allowed by underwriters to brokers, were informed by the defendants that they were remunerated in that way, but the company made no complaint about it. They now contended that the defendants, being their agents, were not entitled to receive any benefit in the course of their agency except for their principals, and prayed that the defendants might be ordered to account to the company for the discount received by them in respect of insurances effected for the company.

Held (reversing the decision of Bacon, V. C.), that as no remuneration was provided in the agreement for insurances effected by the defendants, they were entitled to retain for their own benefit the discount allowed to them by the underwriters.

This was an appeal from a decision of Bacon, V. C.

The hearing in the court below is reported ante, p. 219, where the facts of the case are fully stated.

The Vice-Chancellor ordered the accounts to be taken as prayed by the bill, and directed that in taking those accounts the defendants should be charged with the damages occasioned to the plaintiffs in respect of the loss through the defen-

[CHAN.]

THE GREAT WESTERN INSURANCE COMPANY OF NEW YORK V. CUNLIFFE.

[CHAN.]

dants' neglect to reinsure, and also with the discount received by them from the underwriters over and above the commission of five per cent.

From this decision the defendants appealed.

John Pearson, Q.C. and Millar, for the appellants.—We are entitled to retain the discount allowed us by the underwriters, for in effecting insurances we acted as brokers and not as agents, and are therefore entitled to the usual brokers' remuneration; there being nothing in the agreement between us and the company about remuneration for effecting insurances. By the agreement we were appointed agents for adjusting and paying losses in London, and for taking risks only, and nothing can be imported into the agreement which is not there. The transactions between the broker and underwriter are distinct and separate from the transactions between the broker and the assured. The law of principal and agent does not apply to the matter of this discount received by us from the underwriters, for we did not act as agents in the matter. The practice as to these transactions is stated by Parke, B. in *Power v. Butcher* (10 B. & C. 329), and it is still more fully stated by Blackburn, J. in *Xenos v. Wickham* (2 Mar. Law Cas. O. S. 537; 14 C. B., N.S., 460), so that the custom by which a broker receives discount from an underwriter is thoroughly established and recognised. The discount is paid not upon any particular premium, but upon the balance of accounts between the underwriter and the broker in respect of all his clients at the end of each year. As to the claim for damages in respect of the loss sustained by reason of our failure to reinsure, the remedy is at law and not in this court. The accounts between us and the company are not so complicated as to render them unfit to be the subject of an action at law, and all the questions in this case are rather questions that ought to be tried by a mercantile jury than by a court of equity. But we were not guilty of any negligence; as agents we were bound to use the same discretion and diligence as our principals would have used on their own account, and we were justified in not reinsuring when we were unable to do so except at exorbitant rates. On finding ourselves unable to reinsure at the ordinary rates, we at once adopted the course which the case of *Callander v. O'Riacks* (5 Bing. New Cas. 58) shows to be the proper one, and wrote to our principals, stating that we could not insure at the ordinary rates. But at all events, we are entitled to set-off against the damages the amount saved in respect of the other fourteen ships by the same alleged act of negligence. They also cited

Stewart v. The Greenwich Marine Insurance Company, 2 H. of L. Cas. 120.

Dobell v. Maie, 1 Camp. 533;

Airy v. Bland, 1 Camp. 534a;

Minnell v. Forrester, 4 Taunt. 341n.

Kay, Q.C. and Marten, Q.C. for the respondents.—The defendants acted as our agents in effecting the insurances. They were in a fiduciary position, and could not accept a gratuity. They must, therefore, account to us for the discount received by them from the underwriters:

Queen of Spain v. Farr, 21 L. T. Rep. N. S. 555; 39 L. J., N. S., 773, Ch.

Townhill v. Garden, 29 L. T. Rep. N. S. 218; 28 L. J., N. S., 331, Ch.

Their neglect to reinsure was a breach of trust, and the defendants, therefore, cannot set-off against

the loss the amount that has been saved by their neglect and breach of trust. As for the objection that our claim for damages ought to be enforced in a court of law, we contend that this court has jurisdiction to assess the damages in taking the accounts between us and the defendants, which are too complicated to be dealt with in a court of law. They also cited

Sweeting v. Pearce, 1 Mar. Law Cas. O. S. 134; 5 L. T. Rep. N. S. 79; 30 L. J., N. S., 100, C. P.

Without calling for a reply,

Lord Justice JAMES said: I am of opinion that the decree of the Vice-Chancellor must be discharged. Though filed as a bill for a general account between principal and agent, the bill was really filed for the purpose of getting the opinion of this court upon three questions, and three questions only, which are the sole questions that have to be determined. That is the mode in which the bill itself states the case. The plaintiffs say that there are three questions. The first is that relating to the neglect to reinsure, which was followed by the loss of the ship; the second is the question of interest; and the third is the question of discount. Those are the only questions which have arisen; the plaintiffs say that certain questions have arisen, and they state the questions. That being so, there is no doubt upon the face of the bill an admission against the plaintiffs that but for those questions there would be nothing to litigate about in this court or any other court. That is really the case, and there is nothing to do here except to settle those questions.

Now how do those three questions stand? First of all, with respect to the interest, I am of opinion that the case intended to be made by the bill wholly failed. The case made by the bill, and the case intended to be made by the bill, was not that the defendants were not entitled to claim interest with respect to the moneys which they paid, but that, instead of charging interest from the end of the year, which was the proper time to do it, they charged the interest from the time at which the actual sums were paid during the year; and the plaintiffs allege, therefore, that the interest during that portion of the year ought to be disallowed. The answer to that, as stated by Mr. Pearson, is this: "If we had been minded to do so, we were entitled to have charged interest from the time the premium was paid, or supposed to have been paid, but we did not do so; we only charged interest from the end of the year which is upon the pleadings admitted to be right." It appears to me that the defendants say: "We never did charge interest in that way." There is the allegation; the accounts are produced, and there is no trace of any such interest being charged except at the end of the year. That was the mode of charging interest up to the end of the year, year by year, upon the account as it then stood, and that system went on from the beginning to the end of the agency. The course of dealing between the parties is established by a succession of accounts.

Then the next question is as to the discount, or whatever it may be called, the allowance or gratuity which the brokers receive from the persons with whom they effect insurances. And upon this part of the case the plaintiffs say: "You are our agents, and in the course of that agency you have received a gratuity which you ought not to keep yourselves. You are mere agents, and, according to the principles of this court, a mere agent has

[CHAN.]

THE GREAT WESTERN INSURANCE COMPANY OF NEW YORK v. CUSLIFF.

[CHAN.]

no right to receive any benefit himself in the course of his agency; he has no right to make any profit in the shape of discount or anything of that kind." I believe the principle is laid down in one or two cases which were before me, and in which I acted upon it; it applies to the case of an agent dealing with his principal's money, making purchases for him, or something of that kind, and receiving something in the shape of a gratuity for it. The question in the present case is, whether the agent has been otherwise reimbursed, and whether he has received a gratuity of which his principal can be supposed to have been ignorant. But here—whether the defendants are called insurance brokers, or insurance agents, or merchants doing brokerage business or insurance business, the mere name is a matter of not the slightest consequence whatever—here what was done was this: the defendants were merchants in London minded to do reinsurance business as agents of the plaintiffs, and minded to do other business connected with it, and apparently doing insurance business, not only for the plaintiffs but for other clients who came to them. As stated on the part of the plaintiffs, they were agents to underwrite and to settle losses in respect of policies, and whether they be called agents or not, they were agents or brokers to effect reinsurances in those cases in which reinsurance was thought right by the principals in New York. That was a part of their business. The other part of their business, it is quite clear, was that which was thought to be the most profitable, because it appears from the correspondence that the defendants represented that they would not carry on one part of the business without that; and it was not likely that the plaintiffs would get any other persons to act as agents, without allowing them to obtain the profits of that particular business. Now, with regard to the other part of the business, which is the underwriting and the settling of losses, an actual agreement was made, the terms of remuneration being reduced into writing; but with regard to the effecting of reinsurances, not only were the terms of remuneration not reduced into writing, but no remuneration ever was paid by the plaintiffs, or supposed to be paid by the plaintiffs to the defendants at all. Yet this business was done by the defendants to obtain profit, as they knew it to be a profitable part of their business. It was not profitable by reason of anything which was to be paid by the plaintiffs to them as their paid servants. The view taken by the Vice-Chancellor seems to have been, that the defendants were paid agents of the company, who could not do this business themselves; but they were not paid servants to do the work, receiving remuneration for it; but they were left to make the profit which was incidental to the business itself. That was the character of their employment, otherwise it would not have been a profitable employment. The profit was not to come from the plaintiffs in the shape of any direct payment; it was to be profit which should ensue to the defendants in the ordinary course of that kind of business. That was the business of going to underwriters, and getting the underwriters to accept the risks, paying them the premium for it. That is a well known business. In going to underwriters to obtain the insurances, they also go to Lloyd's, to the persons connected with that kind of business. Whether he be called a broker or not, the person who is the agent for

the merchant for this purpose, goes and effects the insurance and he receives a discount of five per cent. In the particular form which was adopted in the present case, the defendants received a discount of five per cent., which they put into their own pockets. They were paid by the underwriter instead of by their principal. And then by a practice quite as well known, recognised by everybody connected with the business, recognised in the courts of law in this country, and referred to over and over again, upon the settlement of the accounts they received a gratuity of twelve per cent. upon the balance, if the balance happened to be a favourable one—that is, if the underwriter finds it to be a profitable account, he gives twelve per cent. upon the balance to the broker who brought the business to him. It is not upon the particular transaction, as I gather, but it is upon the whole result of the transactions which the broker has introduced to the particular underwriter; all the business done between them during the whole year is taken into account. That is the established remuneration which a broker receives for doing that business. In my opinion that is as right a thing as the five per cent. discount. The plaintiffs have never disputed that the defendants were entitled to retain in their own pockets the five per cent. They say: "We knew that, but we did not know of the other." They never inquired. They say: "We meant it to be according to the usual practice," and they never made any inquiry about it until the year 1866, when it appears, upon their own case, that they had some correspondence with the defendants, who told them what the nature of their profit was. That was communicated to the chairman and some other leading officer of the company in 1866; it was known by two persons, one of whom was the chairman, I think, and the other the deputy-chairman of the company; both these persons knew it in the year 1866. It is not pretended that there was a shadow of complaint by these gentlemen at the time; they allow the matter to go on during the remainder of the year 1866, during the whole of the year 1867, and during a part of 1868, without the slightest suggestion that there was anything wrong in what these parties were doing, and they continued upon the footing that that was to be the mode of their remuneration. There is the fact that this mode of remuneration was known to the company in the year 1866, and the defendants were allowed to go on doing their work upon that understanding. I think that the dispute on the part of the plaintiffs is deficient in honesty as well as in law. I think that they ought not to have disputed the matter when they had allowed the defendants to go on after 1866, even if they had any reason to find fault before. That disposes of the question of interest, and of the question of the so called discount.

Then with regard to the third point: I am clearly of opinion that this never could be the subject of a suit in equity. I asked in vain for any authority in which it is laid down that where there is an outstanding account between principal and agent you can introduce into that account a mere item of damages occasioned by the negligence of the agent in disobeying some instructions of his principal. The most analogous case to it is that which I suggested, of taxing a solicitor's bill and taking cash accounts. I have never heard that, in such a case as that, one can introduce into the account the loss sustained by the negligence of the solicitor in

CHAN.]

THE GREAT WESTERN INSURANCE COMPANY OF NEW YORK V. CUNLIFFE.

CHAN.

carrying on the action improperly, or never investigating the case at all. That must be left to the common remedy of an action at law for negligence. One case with regard to a solicitor was, I think, referred to, in which the demurrer to a cross bill was overruled; there the solicitor, having security for his costs, filed a bill to enforce that security, and there was a cross bill saying that there was nothing due because there had been so much negligence that the solicitor was not entitled to recover. That was totally different; that case was as to the amount due upon the security and the question raised by the cross-bill would necessarily arise with regard to enforcing the security. But with that exception, that single exception, no case is suggested in which an action for negligence has been brought into this court merely because there has been some money account between the person who has been the employer and the person who has been the employed in the matter in which the alleged negligence has arisen. I am therefore of opinion that this bill was not right. The answer contains the same objection as if the bill had been demurred to.

I am of opinion that the demurrer would have been allowed and ought to have been allowed, if there had been a demurrer to the bill; and, that being so, I am of opinion that as all the three points which have arisen and which are the only points raised by the bill being decided against the plaintiffs, the only consequence is that the bill must be dismissed with costs.

LORD JUSTICE MELLISH.—I am of the same opinion. The first question I have to consider is, what remuneration were the defendants entitled to charge the plaintiffs for acting as agents for the plaintiffs in effecting reinsurance and making themselves liable to pay the premiums on those reinsurances to the underwriters? Now the plaintiffs, being a large insurance company in New York, by the letter of the 15th June 1868 proposed to the defendants to act as their agents for the purpose of paying the amount due on policies when losses occurred which they were going to make payable in England. That was the principal matter for which they wished to employ the defendants, and they asked what would be the charge the defendants would make if they were appointed agents for that purpose. And the defendants answered that their charge would be 2½ per cent.; and that those were the usual terms for paying and settling claims. Then the plaintiffs accept that offer, and mention in the letter in which they accept it that "we shall frequently have reinsurance and other business negotiations to make through you," but they ask no question as to what will be the charge which the defendants will make for effecting such reinsurances. The defendants accept the employment and accordingly the business goes on and is transacted between the two parties, and large quantities of reinsurances are effected. In the accounts, so far as we have them before us, they simply charge the plaintiffs with the full amount of the premiums with interest payable from the 1st Jan. succeeding the time when the particular insurances are made; and the plaintiffs go on settling the accounts, and paying from time to time during the eight years, making no objection to that mode of charging. From that it is obvious that they were not charged any brokerage, nor did they pay any.

Then it is quite obvious that they must have known, and they do not deny that they did know,

that the defendants were to be remunerated by receiving a certain allowance and discount from the underwriters with whom they made the bargains. It is easy to ascertain by inquiry what is the usual and ordinary charge which agents who effect reinsurances are entitled to make. If a person employs another who, he knows, carries on a large business, to do certain work for him, and does not choose to ask him what his charge will be, and in fact knows that he is to be remunerated, not by him, but by the other party, which is very common in mercantile business—if he knows that the agent is to be remunerated by the other party with whom the business is transacted, and he does not choose to take the trouble to inquire, and does not think it worth while to ask, what the amount is, he must pay the ordinary amount which such agents do charge. What is the ordinary amount? There is no dispute about it. Mr. Lathers speaks about it; in his affidavit he says—"The ordinary course of transacting marine insurance business at Lloyd's is according to one of two systems known respectively as the cash system and the credit system." Then he goes on to describe the cash system, and then he says—"The credit system is as follows: The broker, as in the former system, is debited with the premium and credited with the five per cent. for brokerage in his account with the underwriter upon the insurance being effected. The account is continued up to the 31st Dec. in each year, and in this account the underwriter is debited with the losses which have arisen upon the risks protected by insurances, and if upon the balance of the account the amount of the premiums less brokerage exceeds the amount of the losses, so that the underwriter has money to receive, the underwriter allows to the broker a reduction of twelve per cent. upon the balance which the broker pays to the underwriter. On the other hand, if the losses exceed the premiums less brokerage, the broker does not receive any allowance upon the amount of the premiums which he pays in account. This deduction or allowance of twelve per cent. is called 'discount.'" That, he says, is the ordinary remuneration which a broker receives. Now what are the reasons alleged by the Great Western Insurance Company why they should not pay to the defendants the ordinary charge—it seems to me immaterial whether you call the agent a broker or not—why they should not pay the ordinary charge, admitted to be so, which is allowed to and received by agents who effect insurances? It is thus stated in Mr. Lathers' affidavit—"In the year 1866 I and the plaintiff company for the first time discovered from the information obtained by Mr. John Bains Parker, the Vice-President of the company, who was then in England, that the firm of John Pickersgill and Sons, although crediting or allowing to the plaintiff company only the brokerage of five per cent. as allowed by the underwriters, in fact obtained from the underwriters an additional allowance or discount as stated in the bill of complaint. The fact is that the firm of John Pickersgill and Son conducted the business of the said reinsurances according to the credit system, and thereby obtained the said discount of twelve per cent. on the balance payable to the underwriters at the end of the year. I had not, nor to the best of my knowledge, information, and belief, had the said company or any person on their behalf, any information or intimation of the said John Pickersgill and

CHAS.]

CORY v. PATTON.

[Q. B.]

son obtaining such benefit or advantage until the discovery of the fact thereof in the year 1866 as aforesaid."

Now the sole question to be decided is whether the circumstance that the Great Western Insurance Company—the business having been carried on, I think, from 1859 to 1868—did not discover this practice as to the underwriters allowing the twelve per cent. upon any profit that might be made upon the business as between the broker and the underwriter, until the year 1866, is any reason why they should be allowed to reopen this matter, and have an account, and obtain a share or the whole of the twelve per cent. for themselves. Even if they had never discovered it until after the whole account was closed, I am of opinion that if a principal employs an agent, and does not state what his remuneration is to be, and the agent goes on and transacts business on that footing, the principal knowing that the agent is to receive his remuneration from the other persons with whom he deals, and not choosing to ask what the amount is, he is bound by what the custom and usage is, though he does not know it. Secondly, I entirely agree with what the Lord Justice has said, that they having discovered it in the year 1866, ought to have stopped at once and not to have gone on dealing for two years more without making any objection, and then saying what they did. There is no reason to suppose that Messrs. Pickersgill and Son would have consented to act for them on any other than the ordinary footing, and if the plaintiffs had gone to them in 1866 and said "You must give us the twelve per cent.," they would have said, "No, thank you; go and take your business elsewhere, and see if you can find another broker who will do your business for less." The case seems to me also quite clear on the question of interest, because the matter has been settled ever since the time of Lord Mansfield, with reference to this very peculiar business of insurance agents and brokers, that though the premium may never have been paid by the assured to the broker, and may not have been paid by the broker to the underwriter, yet, as between the assured and the broker, it is considered to have been paid from the moment of the insurance being effected, and the broker makes his own bargain with the assured as to when the premium is to be paid to him, and the broker makes his own bargain with the underwriter when the premium is to be paid to him. The bargain was, as is proved by the account—and there is nothing unreasonable in it—that the defendants would give the plaintiffs credit up to the end of the year, which is exactly the same time as, according to the credit system, the underwriter gives; and if it was not paid at the end of the year, then interest, as on a mercantile account, was to be charged from that time. That appears to me to be perfectly correct, and there seems to me to be no reason at all why this account should be taken and the matter reopened for the purpose of making fishing inquiries, for which there is no occasion or ground whatever, whether payments were made to the underwriters on the 1st Jan. or some time afterwards. It appears to me that there is no right to make any such inquiries.

I also entirely agree that, as to the last matter, this is not a case for a court of equity, but is only a case for a court of law. I should say that though generally I am very sorry to send suitors from this court to bring their suits in another

court, yet in this particular instance I cannot help thinking that it is really a case for a mercantile jury sitting at Guildhall to say whether there has been negligence in not reinsuring this ship, for which the defendants ought to be liable. I am very glad not to be obliged to express an opinion one way or the other on the subject, no case having been cited to me in which the court of equity ever has taken upon itself to decide such a question.

I am of opinion that the court is not called upon to decide it, when the objection is taken, as it is here.

Appeal allowed and bill dismissed with costs.

Solicitors for the appellants, Walton, Babb, and Walton.

Solicitors for the respondents, Hollans, Son, and Coward.

COURT OF QUEEN'S BENCH.

Reported by J. SMYTH and M. W. McKELLEN, Esqrs., Barristers-at-Law.

May 5, and July 6, 1874.

CORY v. PATTON.

Marine assurance—Concealment of material fact—Insurance made by agent subject to approval of assured—Knowledge of insurer after initialling of slip, but before ratification and before execution of policy.

A slip being in practice the complete and final contract between the parties to a contract of marine insurance, although not enforceable at law or in equity, there is no obligation on the assured to communicate a material fact that comes to his knowledge after the initialling of the slip and before the issuing of the policy; nor does the fact that the contract has been entered into by the agent of the assured and the slip been initialled by the underwriter, subject to the approval of the assured, and that the ratification of the assured does not take place until after the material fact comes to his knowledge, entitle the underwriter to have the fact communicated to him.

In an action upon a policy of marine insurance, the plaintiffs replied to a plea of the concealment of a material fact, that, before they had knowledge of the fact, their agent had entered into an agreement with the defendant to effect this insurance by the latter's initialling a slip; and that if they had communicated the fact to the defendant when they first knew it, he would still in honour, conscience, and good faith, have been bound to subscribe his name to the policy and upon. The court had held this replication good on demurrer, and the jury at the trial found a verdict upon it for the plaintiffs.

Held, upon the authority of Hagedorn v. Olivereson (2 M. & S. 485) that the admitted circumstances,—defendant having entered into this agreement with plaintiffs' agent subject to plaintiffs' approval, and plaintiffs' ratification not having taken place till after he obtained knowledge of the material fact concealed,—made no difference to the legal validity of the verdict upon the replication.

This was an action upon a policy of marine insurance tried before Cockburn, C.J., at Guildhall. A verdict was found for the plaintiffs, but leave was reserved to the defendant to move to enter a non-suit.

Q. B.]

CORY v. PATTON.

[Q. B.]

Defendant pleaded as a 6th plea, concealment of a material fact, viz., that the said ship having set sail and departed on the said voyage with the said goods on board had met with an accident and misfortune whilst proceeding on the said voyage.

To this the plaintiffs replied that before they had any knowledge of the material fact, they, being at a distance from the defendant, by a letter written by them to their agent instructed their said agent to effect the said insurance, and the plaintiffs said that they had no knowledge of the said material fact until after the lapse of a reasonable time for their agent to agree with an underwriter or underwriters to insure the said goods, and to settle with him or them the terms and premium on and for which the said insurance should be effected, and the plaintiffs said that in the ordinary course of business their said agent ought to have agreed and settled as aforesaid before they, the plaintiffs, knew of the said material fact; and the plaintiffs said that before they knew the said fact the said agent did apply to the defendant as such underwriter as aforesaid to insure the said goods and settle and arrange with the defendant the terms and premiums on and for which the defendant would insure the same, and the defendant made a binding agreement with the said agent to insure the same on those terms and for that premium, and became in honour, conscience, and good faith, though not in law bound to submit a policy for insuring the said goods on those terms and for that premium; and the plaintiffs said that if the said material fact and plaintiffs' said knowledge of it, and the premises aforesaid had afterwards been made known to the defendant, he would still in honour, conscience, and good faith, have been bound to subscribe himself to the plaintiffs for such a policy as aforesaid, and the plaintiffs said that the policy in the declaration mentioned was the policy which the defendant was so bound to subscribe as aforesaid; and the plaintiffs said that they, the plaintiffs, knowing as the fact was that in due course of business at the time when they first had knowledge of the said material fact either a policy for insuring the said goods in pursuance of their instructions would be effected, or that such an agreement would be made by some underwriter or underwriters which would in honour, conscience, and good faith bind him or them to subscribe a policy for effecting the said insurance, did in good faith abstain from communicating the said material fact to their said agent or to the defendant which is the concealment in the 6th plea mentioned.

This replication had been held good on demurrer (*ante*, vol. 1, p. 225; 26 L. T. Rep. N.S. 161; L. Rep. 7 Q. B. 304); and the jury found that the alleged practice of merchants was proved. It was admitted, however, that the slip was initiated subject to the approval of the plaintiffs as to the amount of premium, and that they did not ratify their agent's contract until after they knew of the accident to the ship. The point reserved by the Lord Chief Justice was whether these admitted circumstances, which are more particularly described in the judgment, made any difference to the legal validity of the verdict upon the replication.

A rule nisi had been obtained, calling upon the plaintiffs to show cause why the verdict should not be set aside and a nonsuit entered in pursuance of the leave reserved on the grounds that the custom

found by the jury was not sufficient in law to support a verdict for the plaintiffs, and that upon the whole case there was no evidence to support the replication, or any amended replication; also why a new trial should not be had on the ground that the verdict was against the weight of the evidence.

Hugh Shield showed cause.—The effect of the decision of the demurrer in this case was that the limit of the term for obligatory disclosure of material facts is when the underwriter signs the slip; this may be either law or custom, and the plaintiffs have both in their favour. [BLACKBURN, J.—The question is whether the duty to disclose a material fact does not continue until the ratification of the contract. QUAIN, J.—It has been held that the subsequent ratification of an unauthorised stoppage *in transitu* has not the effect of altering retrospectively the ownership of the goods, *Bird v. Brown* (4 Ex. 786). COCKBURN, C.J.—The underwriter said to the assessor's agent, I enter into this contract on condition that your principal ratifies. Is that not on the implied condition that the state of things then existing must also exist at the time of ratification? There is no evidence of any such condition on the underwriter's part when he initialed the slip; and the jury have practically found that the custom alleged in the replication was proved, and that it was not dependent upon the priority of the plaintiffs' knowledge, or their ratification.

Mattheos, Q. C., and *Watkin Williams, Q. C.* supported the rule for the defendant.—The custom proved at the trial did not touch the question of ratification. [QUAIN, J.—Why does not the custom, that nothing after the slip can affect the assessor's duty to disclose, include ratification? There was no binding agreement between the parties before the plaintiffs knew of the material fact concealed. Until ratification there was nothing to bind the plaintiffs, and therefore until then the defendant could not be bound. The fact that the slip was initialed, subject to approval, is cogent evidence that until ratification it was not intended to be binding, as the House of Lords held with respect to a paper containing heads of an agreement sent to a solicitor to reduce into form: (*Ridgway v. Wharton*, 6 H. of L. Cas. 238.) At p. 305, Lord Wensleydale said: "These cases often occur in courts of law, and the question then always is, whether the parties mean to embody the contract, made by parol, in writing? If they do, nothing binds them till it is written." It was held in *Routledge v. Grant* (4 Bing. 653), the defendant having offered to purchase a house, and to give plaintiff six weeks for a definite answer, that before the offer was accepted, the defendant might retract it at any time during the six weeks. So in *Cooke v. Ozley* (3 T. R. 653), defendant having proposed to sell goods to plaintiff, gave him a certain time, at his request, to determine whether he would buy them or not. Plaintiff within that time determined to buy them, and gave notice thereof to defendant; yet the later was not liable in an action for not delivering them, for the plaintiff not being bound by the original contract, there was no consideration to bind the defendant. Lord Kenyon said: "Nothing can be clearer than that at the time of entering into this contract, the engagement was all on one side the other party was not bound; it was therefore *nudum pactum*." [BLACKBURN, J.—Is not *Hagedorn v. Olverton* (2 M. & S. 485, cited in *Story*

Q. B.]

MULLER v. BALDWIN.

[Q. B.]

on Agency, sect. 285.) exactly in point with regard to the present case? There the insurance was in the name of the broker, as well as other persons, and the contract existed from the beginning; it was not dependent upon the approval of a principal. The policy was effected in the usual form by plaintiff as well in his own name as for and in the name of all and every other person, &c., for the benefit of S., an alien enemy, and plaintiff procured a licence to legalise the voyage, and a loss happened; and two years afterwards, S., by letter to the plaintiff, adopted the insurance: it was held that the plaintiff might recover against the underwriter, averring the interest in S. There the broker and underwriter professed to make a final contract between them; there was nothing wanting but mere ratification. [BLACKBURN, J.—Nor is there here.] There is nothing here to show more than a proposal on the underwriter's part. [COCKBURN, C.J.—The initials on the slip go further than that.] They do not constitute a contract with the principal. Until both parties were bound, there could be no contract. Here there was no binding contract on the broker before knowledge of the accident was obtained; much less, therefore, was there a contract binding upon the principal.

COCKBURN, C.J.—We are all agreed that the plaintiff is entitled to our judgment, and that the rule should be discharged; but we will take time to give our reasons. *Cur. adv. vult.*

July 6.—COCKBURN, C.J., delivered the judgment of the court (Cockburn, C.J., Blackburn, Quain, and Archibald, JJ.).—This was an action on a policy of insurance on goods.

The plaintiffs, who are colliery owners and merchants at Cardiff, having had a cargo of coals shipped on their account on board the ship *Ceylon*, by their agents at Newcastle, wrote on the 19th April 1870, to insurance brokers in London to effect an insurance thereon, limiting the amount of premium to 30s. a ton. The broker's clerk thereupon proceeded to Lloyd's, and saw one Rutherford, who was in the habit of underwriting for the defendant, and whose authority was not disputed; and on Rutherford refusing to insure the cargo at less than 35s. a ton agreed to give that amount of premium, whereupon Rutherford initialled the slip. It did not appear that the broker had a discretionary authority to exceed the limits prescribed by the plaintiff as to the amount of premium, and it must be taken that the slip was initialled subject to the ratification of the plaintiff, more especially as in this instance the letter of the plaintiffs to the brokers was shown to Rutherford, who thereupon, according to his own account, initialled subject to approval. By the practice of Lloyd's, as stated by Mr. Rutherford in evidence, "if an agent agrees to give a higher premium than his instructions warrant, and the underwriter initials knowing it, if the principal ratifies, the underwriter is bound." The plaintiffs in the present case did in fact ratify what their brokers had done, and, if this were all, the case would be free from difficulty. But it so happened that between the time of initialling the slip and the signing the policy, viz., on the afternoon of the 20th April, the plaintiff became aware of the loss of the *Ceylon*, but failed to communicate that fact to the defendant.

The case came before this court on demurrer (*ante*, vol. 1, p. 225; 26 L. T. Rep. N. S. 161,

and L. Rep. 7 Q. B. 304), but, as the facts then stood on the record, the fact that the slip was initialled subject to ratification by the assured, was not before the court. Upon the facts as then appearing on the record, this court gave judgment in favour of the plaintiffs on the ground that, according to the usage of those engaged in marine insurance, the initialling of the slip constitutes a complete and final contract, binding upon them in honour and good faith, whatever events might subsequently happen; and that consequently the assured need not communicate to the underwriter facts material to the risks insured against, which came to his knowledge between the time of initialling the slip and that of signing the policy; and the only question now before us is whether the fact appearing on the trial—that the slip was initialled subject to ratification by the assured—constitutes a material difference from the facts as appearing on the record when the former judgment was given, and—by reason that the contract was still open, as was contended on the argument before us—entitles the underwriter to have the loss communicated to him.

Upon this point we have entertained considerable doubt, but as the case of *Hagedorn v. Atterson* (2 M. & S. 485) appears to us to be in point, and to govern the present case, we think ourselves bound to abide by that decision, leaving the defendant to take the case to a court of appeal if he shall be so advised.

Rule discharged.

Attorney for plaintiffs, J. McDiarmid.

Attorneys for defendant *Ingledeu, Ince, and Greening*, for *Ingledeu, Ince, and Vachell*, Cardiff.

June 2 and 5, 1874.

MULLER v. BALDWIN.

Tyne coal dues—Coal exported—To be used on board steamship—Bunker coal—35 s. & 36 Vict. c. xiii.

By the *Tyne Coal Dues Act 1872*, sect. 3, there shall be payable to the commissioners in respect of coals and other articles exported from the port of Newcastle-upon-Tyne the following dues, that is to say, in respect of coals, one penny per ton of twenty hundredweight.

Held, that coals carried away from the port for the purpose of being consumed beyond the limits of the port, although on board, and for the use of the ship carrying them, are coals exported within the meaning of the Act.

This was an appeal from the decision of the judge of the County Court of Northumberland, holden at Newcastle, given in the above action.

The following are the facts of the case:

Previous to the passing of the River Tyne Improvement Act 1850, the Corporation of Newcastle-upon-Tyne held the town and port of Newcastle-upon-Tyne, and divers dues in fee-farm under the Crown, and were conservators of the port extending from a point in the sea at the mouth of the River Tyne to Heddon streams, about seven miles above the town of Newcastle-upon-Tyne. By that Act the conservatorship of the River Tyne and the powers of the corporation became vested in the Tyne Improvement Commissioners.

In the preamble to the Tyne Improvement Act 1850, it is recited (*inter alia*):

Q. B.]

MULLER v. BALDWIN.

[Q. B.]

That the mayor, aldermen, and burgesses of the borough of Newcastle-upon-Tyne, by virtue of prescription and various charters, demand, take, and receive certain dues called "town dues" on coal cinders, grindstones, and salt exported from the said port, which are referred to as the "coal dues."

By the 48th section of the same Act it is enacted (*inter alia*), that three-eighth parts of all the coal dues from time to time paid to the corporation after paying, deducting, allowing and satisfying out of the aggregate amount of such dues, all the costs, charges, damages, and expenses of and incident to recovering, collecting, and receiving the same, should from time to time be carried by the treasurer for the time being of the borough of Newcastle-upon-Tyne to the credit of a separate and distinct account, to be called the Tyne Improvement Fund account, and the moneys from time to time carried, and to be carried to such account, should, subject to the provisions of the Act, be the fund for payment of the expenses of carrying the Act into execution by the commissioners, and be called the Tyne Improvement Fund.

Under the provisions of the River Tyne Improvement Act 1850, the Corporation of Newcastle continued in receipt of the coal dues from time to time, paying ever to the Tyne Improvement Commissioners the net proceeds of three-eighth parts.

In the year 1870, after a protracted negotiation, the Tyne Improvement Commissioners came to an agreement with the Corporation of Newcastle for the purchase of the five-eighths of the coal dues which remained the property of the corporation, under the Act of 1850. The basis of the negotiation was the annual produce of such dues, and it was part of that agreement that in future these and all other dues should be received directly by the commissioners.

This agreement between the Corporation of Newcastle and the Tyne Improvement Commissioners was carried out by an Act of Parliament passed in the year 1870, which is hereinafter referred to as the Tyne Improvement Act 1870. It is by this Act enacted:—

Sec. 3. That the five-eighth parts not by the River Tyne Improvement Act 1850 directed to be carried to the credit of the Tyne Improvement Fund of all the coal dues, and which said five-eighth parts were, by the same Act, directed to be carried to the borough fund of the borough, shall on the 1st Jan. 1871 be transferred to the commissioners, and shall thereafter belong to the Tyne Improvement Fund, and be dealt with by the commissioners as part of such fund, according to the provisions of the said River Tyne Improvement Act 1850, and the related Acts passed subsequently thereto, and all the interest of the corporation in the said five-eighth parts of the said coal dues, shall thereupon be vested in the commissioners.

Sec. 4. From and after the transfer of the said five-eighth parts of the coal dues the commissioners shall, in respect of such five-eighth parts, be entitled to use, exercise, and enjoy all the rights and powers which they are or may be entitled to use, exercise, or enjoy in respect of three-eighth parts of the same dues which were transferred to the commissioners by the River Tyne Improvement Act 1850, including the rights and powers given by the 14th section of the Harbours and Paving Tolls, &c. Act 1861, in as full and ample a manner in all respects as if the said five-eighth parts had been transferred to the commissioners by the River Tyne Improvement Act 1850.

Sec. 5. From and after the transfer of the said five-eighth parts of the said coal dues to the commissioners

the whole of the said coal dues and the said ballast dues and import dues and all other dues and payments which, by the River Tyne Improvement Act 1850, were directed to be from time to time carried by the treasurer of the borough to the said Tyne Improvement Fund shall be paid to and received by the commissioners and be by them paid to the credit of such fund.

By the 7th section it is provided that the commissioners shall pay to the corporation the sum of 130,000*l.* in consideration of the relinquishment and transfer of the dues; and by the 8th section that the corporation shall have an equitable lien on the dues for principal and interest.

In the course of the year 1871 negotiations took place between the Tyne Improvement Commissioners and the various parties interested in the trade of the Tyne, which led to the passing of the Tyne Coal Dues Act 1872.

The Act is entitled an Act to abolish the Tyne coal dues, and in lieu thereof to provide new dues to extinguish the right to increase rates under the Harbours and Paving Tolls, &c. Act 1861, and to extend the time for the completion of the piers and other works.

It is enacted by this Act:

Sec. 2. The expression "coal dues" means the dues heretofore payable on coals, cinders, grindstones, and salt exported from the port.

Sec. 3. That on and after the 1st June 1872 the coal dues shall be abolished, and in lieu thereof and in extinction of the right, power, or claims by the commissioners under the Harbours and Paving Tolls, &c. Act 1861, to indemnify themselves for the loss of compensation paid to them for differential dues by raising any of the rates which they have power to levy, there shall be payable to the commissioners in respect of coals, cinders, coke, grindstones, and salt exported from the port the following dues, that is to say, in respect of coals, cinders, and coke, 1*d.* per ton of 20*wt.*; in respect of grindstones, 3*d.* per ton of 20*wt.*; and in respect of salt, 1*d.* per ton of 20*wt.*; which dues shall be called "River Tyne Export Dues," and shall be carried to the account called the Tyne Improvement Fund, and shall be applicable to all purposes to which the Tyne Improvement Fund shall from time to time be applicable.

Sec. 4. The corporation shall be entitled to a lien or charge in equity on $\frac{1}{4}$ th parts of the said River Tyne export dues for the several instalments of purchase money and interest payable to the corporation under the Tyne Improvement Act 1870, or so much thereof as shall from time to time remain unpaid.

Sec. 5. The commissioners shall be entitled to use, exercise, and enjoy all the rights and powers for recovering and receiving the River Tyne export dues which, before the passing of this Act, they were entitled to use, exercise, and enjoy in respect of the coal dues, as well as all the rights and powers which the commissioners are or may be from time to time entitled to use, exercise, and enjoy for recovering and receiving any other rates, tolls, and duties from time to time payable to them.

Sec. 6. From and after the passing of this Act all right, power, and claim of the commissioners and of the corporation under the Harbours and Paving Tolls, &c. Act 1861, with the consent of Her Majesty in council, to indemnify themselves for the loss of the compensation payable to them for differential dues which ceased to be paid from and after the 1st Jan. 1872 by raising the amount of any rates they had power to levy, shall be extinguished.

When in the year 1870 the Tyne Improvement Commissioners became entitled to the receipt of the whole of the "Tyne coal dues," without the intervention of the corporation, they found it to have been the uniform practice of the corporation, with one exception hereafter to be mentioned, not to charge the coal due on coals carried out of the port on board steam vessels and intended to be used for the purpose of raising steam power to work the engines of the vessels which carried

Q. B.]

MULLER v. BALDWIN.

[Q. B.]

the coal, such coal being called "bunker coal, or coal for ship's use."

The Tyne Coal Dues Act 1872, came into operation on the 1st June 1872, and on the 1st April 1873 the commissioners, for the first time, claimed the right to levy under that Act, as being dues by that Act authorised to be taken on bunker coal or coal for ship's use, and in pursuance of such claim they demanded from the plaintiff under the following circumstances the sum of money in dispute in this action.

On the 19th April last a Norwegian steam vessel, called the *Hakar Adolstein*, sailed from the port of Newcastle-on-Tyne with 530 tons of coal alleged to be bunker coal, or coal for ship's use, on board. The defendant, who was the duly authorised collector of dues for the Tyne Improvement Commissioners, demanded from the plaintiff, who was the master of the said steam vessel, a due of 1d. per ton, amounting to the sum of 2l. 4s. 2d., in respect of the said 530 tons of coal. The plaintiff at first refused to pay upon the ground that the coal was intended solely for ship's use, but afterwards, as the defendant, who was also collector of customs, stopped his vessel, he paid under protest the sum demanded, and then brought in the County Court this action to recover back the sum so paid.

The following is a copy of the particulars of claim as stated in the plaint:

To dues illegally charged on 530 tons coals shipped on board my vessel *Hakar Adolstein* for ship's use at 1d. per ton—2l. 4s. 2d.

The cause came on before the County Court Judge on the 31st Oct. last, when the following admissions were entered into.

We, the attorneys for the above named plaintiff and defendant, mutually agree to admit at the trial of the cause the following facts, viz:

1. That the above named plaintiff was in the month of April last, master of the Norwegian vessel *Hakar Adolstein*, and the above named defendant was at the same time the authorised collector of the dues of the Tyne Improvement Commissioners.

2. That in the month of April last, there was shipped on board the said vessel *Hakar Adolstein*, and carried therein, out of the port of Newcastle-upon-Tyne, 530 tons of coal of 20cwt. each, and that the said vessel cleared for the port of Christiania, in Norway, taking in goods at Newcastle for New York, and the said vessel proceeded to Christiania, and from thence *via* Bergen to New York her ultimate port of destination.

3. That the said vessel is a steam ship.

4. That 45 tons of coal would be required for the purpose of navigation from the Tyne to the port of Christiania, and 300 tons for a voyage from Christiania to New York.

5. That the sum of 2l. 4s. 2d. claimed to be due to the Tyne Improvement Commissioners in respect of the said coals, was paid by the plaintiff to the defendant under protest, and that the said plaintiff is entitled to recover so much of the said sum, if any, as shall have been erroneously paid.

On the trial evidence was given of the usage of the port as regards bunker coal or coal for ship's use from the year 1840, and it was proved that, with the exception of about ten days in the year 1870, the Corporation of Newcastle had never attempted to levy dues on such coal, that at the expiration of these ten days the corporation had

stopped the levy, and had returned the sums paid during these ten days to those who asked for a return, and that the commissioners had not (until ten months after the passing of the Tyne Coal Dues Act 1872) attempted to levy dues in respect of such coal, and it was also proved that dues are not charged on coal used for raising steam in the steam tugs employed in towing vessels in and out of the harbour. Evidence was also given, but objected to by Mr. Bruce (as counsel for the defendants) as not binding the commissioners, that coal taken out of the port for ship's use does not appear as coals exported in the customs' returns, and that steam vessels leaving the port with coal for ship's use only are treated as being ballast and not as carrying cargo. And reference was made, Mr. Bruce again objecting on the same ground, to the use of the word "export" and its meaning in the Acts relating to the customs.

A report made by the Coal Dues Committee of the Tyne Improvement Commissioners, dated Nov. 1871, and also a report made by the Finance Committee of the Tyne Improvement Commissioners, dated 10th April 1873, were put in evidence on behalf of the plaintiff at the trial.

The Tyne Improvement Acts 1850, 1852, 1857, 1859, 1861, 1865, 1866, 1867, 1870, and 1872, and the Tyne Coal Dues Act 1872 were all put in evidence and form part of this case, and reference may be made by either side to any or all of them or any part thereof.

The judge of the County Court gave judgment for the plaintiff.

"I order," he said, "1d. per ton on 345 tons (which is the admitted minimum quantity of coals required for a voyage to New York under the conditions in evidence in this case) to be returned to him, and, in default of a prescribed scale of charges, and in the absence of any evidence to guide me, I allow on this occasion, without attempting to lay down any rule, 20 per cent. additional, as a margin for consumption in port and for contingencies on the voyage out." The amount recovered was 1l. 14s. 6d.

The questions for the opinion of the court are—first, whether the learned judge of the County Court was right in deciding that the plaintiff was entitled to recover the said sum of 1l. 14s. 6d.; secondly, if the plaintiff is not entitled to recover the said sum of 1l. 14s. 6d. is he entitled to recover any other sum, and if any, what sum?

Sir J. B. Karslake, Q.C. (with Russell, Q.C. and Gainsford Bruce) argued for defendant, the appellant.—All coal taken out of the port is exported coal, and the purpose for which it is shipped cannot be of any consequence in interpreting the 3rd section of the Act of 1872; nor can it matter what had been usual before that Act was passed. There can be no reason for drawing the line as the County Court judge has done, nor indeed is it possible to draw any line which can be applied generally. That the word "export" applies to goods intended to be consumed on the voyage of the ship which carries them appears from the Customs Law Consolidation Act 1855 (18 & 19 Vict. c. 96), which prohibits the exportation and importation of spirits from the Channel Islands, but expressly excepts spirits really intended for consumption on the voyage.

Manisty, Q.C. (with him Beresford) for plaintiff.—It appears from the recital of the Act of 1872

Q. B.]

SMITH v. TIDEN.

[Q. B.]

that it was intended to continue the rates and dues in the same manner as they had before been imposed, and the evidence is sufficient to show that "bunker coal" had not been treated as if exported. As to the meaning of the word, the County Court judge is right in saying it must be correlative to "import," and can relate only to goods sent out of the country for merchandise. Webster's dictionary defines it, "To carry out; but appropriately and perhaps exclusively, to convey or transport in traffic produce and goods from one country to another, or from one State or jurisdiction to another, either by water or land." Other dictionaries give similar meanings. This is the obvious sense in which the Legislature has used the word, and if there is danger of abuse, the Legislature alone can interfere.

Sir J. B. Karslake, in reply.—The definition of "export" in the dictionaries will not help the plaintiff's contention; it might be an authority for non-payment of dues upon coal required to Norway, but it does not support the decision of the County Court judge. A steam tug, which merely passes in and out of the port, might perhaps be exempt from these dues, for she could not be said to export coals at all. Here, however, the ship took a whole cargo of coal, for her own use certainly, but chiefly for use after she had called at a foreign port. Why should she not sell the coals there instead of using them herself? and why should she not be exempt for the coal required to bring her back from New York as well as for the voyage out? *Cur. ad. vult.*

June 5.—LESLIE, J., delivered the judgment of the court (Mellor, Lush, and Archibald, JJ.).—The question raised by this appeal is whether coals taken out of the port of Newcastle in a foreign steamer for the purpose of consumption on board in the course of a foreign voyage are liable to the coal dues of 1d. per ton granted to the Tyne Improvement Commissioners by the Tyne Coal Dues Act 1872, on all coals exported from the port of Newcastle. The learned judge of the County Court considered that having regard to the usage of the corporation, while the coal dues belonged to them, of treating coals taken on board for consumption as exempted from duty, the term "exported" must receive a qualified interpretation, and be taken to mean coals exported for the purpose of commerce as distinguished from what are called "bunker coals," that is coals taken on board for the purpose of consumption on the voyage.

We agree as to the reasonableness of making a distinction between coals taken away for sale and coals taken for the necessary use of the vessel; but we are constrained to differ from the learned judge in his construction of the Act. There is nothing in the language of the Act to show that the word "exported" was used in any other than its ordinary sense, namely, "carried out of the port;" and considering how easily and how extensively the privilege of storing for use may be abused, and what quantities may be carried away under the name of bunker coals, we think that if it had been intended to exempt from duty coals taken on board for fuel, some limitation as to quantity would have been imposed. Nothing would have been easier than to insert a proviso to that effect. We cannot, however, speculate upon the intentions of the Legislature which are neither expressed in terms nor conveyed by implication.

Our duty is to interpret the words of a statute according to their plain and grammatical meaning, when, as in this case, they are not controlled by anything to be found in the context. Construing the words of the Act upon this principle, we feel bound to hold that coals carried away from the port, not on a temporary excursion as in a tug or pleasure boat which intends to return with more or less of the coals on board, and which may be regarded as always constructively within the port, but taken away for the purpose of being wholly consumed beyond the limits of the port, are coals "exported" within the meaning of the Act. We therefore give judgment for the defendant.

Judgment for defendant.

Attorney for plaintiff, J. Tucker.

Attorneys for defendant, Cookson, Wainwright, and Pennington, for J. and N. G. Clayton, Newcastle-upon-Tyne.

May 29, and June 5, 1874.

SMITH v. TIDEN.

Bill of lading—Freight payable as per charter-party—Two charter-parties, one to broker by master, the other by broker to charterer without master's authority—Payment of freight—Implied contract—Consensus ad idem.

Plaintiff, as master of a ship lying at London, entered into a charter-party with L., a ship-broker, to carry a quantity of iron from Hartlepool to Gothenburg, at 7s. 3d. per ton, freight to be paid in London, and the owner to have an absolute lien for freight. On the day following, L. chartered the ship to defendants to carry the same quantity of iron from Hartlepool to Gothenburg, at 8s. per ton, with similar provisions as to payment of and lien for freight, and a clause in these terms—"The brokerage of 5 per cent. is due on the execution of this charter to L., by whom the vessel is to be entered and cleared at the port of loading." L. had no authority to act as broker for the plaintiff, or to receive the freight, and neither plaintiff nor defendants had any knowledge of the charter entered into by the other. The iron being shipped, the master, without requiring payment of the freight, signed and gave out bills of lading, making it deliverable to "order or assigns, he or they paying freight for the said goods as per charter-party." At the port of discharge the iron was delivered without the lien being insisted on. L., in the mean time, obtained payment from the defendants of the freight of 8s. per ton, and afterwards stopped payment, leaving the freight of 7s. 3d. unpaid to the plaintiff. Plaintiff having brought an action against defendants to recover the last-mentioned freight:

Held, that under the circumstances there was no contract between the parties, and the defendants were, therefore, not liable.

The bill of lading was not a contract, or evidence of a contract, between plaintiff and defendants, there being no consensus ad idem; and no contract to pay freight to the plaintiff could, under the circumstances of the case, be implied.

This was an action brought for the recovery of 147l. 11s. for the freight, or in respect of the putting on board and carriage of certain railway iron of the defendants, in a steamship called the Gothenburg, of which the plaintiff was master, and, by

Q. B.]

SMITH v. TIDEN.

[Q. B.]

consent of the parties, the following case was stated without any pleadings.

1. The plaintiff was and is the master of the said steamship *Gothenburg*. The defendants are merchants carrying on business in the city of London.

2. On the 17th July 1872, a charter-party was entered into in London between the agents of the owners and Mr. G. B. Lyth, a shipbroker, carrying on business in London, whereby the said ship was chartered to the said R. B. Lyth, to carry 407 tons of railway iron from Hartlepool to Gothenburg. The charter-party (No. 1) was in the following terms:

London, 17th July, 1872.

It is this day mutually agreed between the good steam ship or vessel called the *Gothenburg*, of the measurement, &c., now at Rotterdam, and R. B. Lyth, Esq., of Lendenhall-street, merchant, that the said ship being tight, staunch, and strong, and every way fitted for the voyage, shall with all convenient speed sail and proceed to West Hartlepool, or so near thereto as she may safely get, and there load from the agents of the said freighters 407 tons of railway iron, owners having liberty to take part cargo from Rotterdam to Gothenburg, or to fill up with coals for ship's benefit at Hartlepool, which the said merchant binds himself to ship. The cargo to be brought alongside, &c., and being so loaded shall therewith proceed to Gothenburg, or so near thereto as she may safely get, and deliver the same on being paid freight as follows, at the rate of 7s. 3d. per ton of 20cwt., delivered in full of port charges and pilotages, the set of God, &c., always excepted. The freight to be paid as follows, in cash in London, on receipt of bill of lading: the rails to be supplied to the steamer as fast as she can take in and stow, and to be received as fast as she can deliver, three days in demurrage over and above the said laying days at 20s. per day. The owner and master to have an absolute right of lien on the cargo for all dead freight and demurrage, and all other charges whatsoever. The master to sign bills of lading as presented without prejudice to this charter. Penalty for non-performance of this agreement estimated amount of freight, steamer to be addressed to the charterer's agents at Gothenburg, who, however, are not to charge more than the usual clearance charges in addition to the ship's expenses.

In the margin was this clause: "The brokerage is at five per cent. by the ship on the amount of freight, primage and demurrage, and is due to C. Miller on the signature of this agreement. The vessel to be addressed to, and reported to Hoffman, Shenck, and Co."

3. On the 18th July 1872 the said R. B. Lyth chartered the said ship *Gothenburg* to the defendants by a charter-party made entirely on his behalf, and not on behalf or with the authority or knowledge of the plaintiff or the owners of the ship.

This charter-party (No. 2) was in similar terms to the former, and was for the carriage of 407 tons of railway iron from Hartlepool to Gothenburg, on being paid freight at the rate of 8s. per ton: "The freight to be paid in cash in London, less insurance, on signing bills of lading. . . . The brokerage of 5 per cent. is due on the execution of this charter to R. B. Lyth (ship lost or not lost), by whom (or his agents) the vessel is to be entered and cleared at the custom house at port of loading."

4. At the time of signing the bill of lading, and of the shipment of the goods as hereinafter mentioned, the plaintiff had in his possession a copy of the aforesaid charter-party (No. 1), and neither the plaintiff nor the owners of the ship had any notice or knowledge of the other charter-party (No. 2); and the plaintiff only became acquainted with its terms after this action was brought, nor had the defendants any notice or knowledge of any other charter-party than the second (No. 2), nor did they

know that the said R. B. Lyth had no authority from the plaintiff to enter into the same.

5. The *Gothenburg* duly proceeded to West Hartlepool, and on her arrival there the defendants shipped on board of her a cargo of railway iron for the freight in respect of which this action is brought, and the defendants presented for the plaintiff's signature bills of lading dated 31st July 1872, which he signed and redelivered to the defendants, and of which the following is a copy:

Shipped in good order and condition by Tiden, Nordenfelts, and Co., in and upon the good steamship called the *Gothenburg*, whereof is master for the present voyage Smith, now lying in West Hartlepool, and bound for Gothenburg, 1867 rails, weighing 406 tons, 13 cwt., 1 qr., being marked and numbered as in the margin, and are to be delivered in the like good order and condition at the aforesaid port of Gothenburg (all and every the dangers and accidents of the sea and navigation of whatsoever nature and kind excepted) unto order or to assign, he or they paying freight for the said goods as per charter-party, average accustomed. In witness whereof, &c.

6. The said iron was duly delivered at Gothenburg to the plaintiff, to the order of the defendants under the said bill of lading, on or about the 25th Aug. 1872.

7. On or about the 2nd Aug. 1872, the defendants paid to the said R. B. Lyth the amount of the freight stipulated for by the aforesaid charter-party (No. 2). Shortly afterwards the said R. B. Lyth stopped payment.

8. No payment has ever been made to the plaintiff, nor to the owners of the *Gothenburg*, nor to anyone on their behalf, either in respect of the said charter-party (No. 1), or in respect of the said bill of lading, or in any way in respect of the said cargo, nor had the said R. B. Lyth any authority to receive payment on his or their account.

9. The question for the opinion of the court is, whether under the above circumstances the plaintiff is entitled to be paid by the defendants freight or moneys in respect of the shipment, carriage, or delivery of the said iron. If the court should be of opinion in the affirmative, then judgment shall be entered up for the plaintiff for 147l. 11s., and interest thereon at the rate of 5l. per cent. per annum from the 31st July 1872. If the court shall be of opinion in the negative, then judgment with costs shall be entered up for the defendants.

Cohen, Q.C. (with him *Hollans*) for the plaintiff. —The real question is whether payment to Lyth can be held to be payment to the plaintiff; and it is submitted that it cannot. It cannot be said that the shipowner, by not exerting his lien, and by giving up the goods before the freight was paid, led the other to believe that he was paid, for here freight had been paid long before the delivery up of the goods. Lyth did not act as agent for the plaintiff, but as charterer, and the defendants, thinking he was plaintiff's agent, paid him. If a person ships goods on board a vessel under a bill of lading there arises a contract on his part to pay the freight on delivery of the goods, and independently of any express contract by charter-party. In *Domett v. Beckford* (5 B. & Ad. 524) Parke, B., said: "As soon as these goods (which were the property of the defendant) were shipped in the plaintiff's ship, to be carried from Jamaica to London, the defendant, even before any bills of lading were signed, became liable by law to pay freight, unless that liability be controlled by special custom, and of that there is no proof.

Q. B.]

SMITH v. TIDEN.

[Q. B.]

From the fact that goods were laden on a ship to be conveyed from Jamaica to London, the law will imply a contract by the owner of those goods to pay for the carriage. And to whom is the payment to be made? Clearly to the shipowner or his representative. *Sandemann v. Scurr* (3 Mar. Law Cas. O. S. 446; L. Rep. 2 Q. B. 86; 15 L. T. Rep. N. S. 608) shows that the shipper can bring an action for negligence. [ARCHIBALD, J.—Was there any charter-party in *Donett v. Beckford*?] No. [LYTH, J.—That makes a difference.] The ship here was not put up as a general ship; and the fourth paragraph of the case shows that the defendants did not pay Lyth as charterer, but as agent for the plaintiff.

E. G. Williams, Q.C. (with him *Lanyon*), for the defendants, contended, that under the circumstances there was no liability on their part to pay. There is really nothing in the charter-party to show that Lyth was acting as agent; he proposed to act for himself, and was dealt with by the defendants, not as agent, but as principal. [MELLOR, J.—What, then, is the meaning of the last clause as to brokerage, in the charter-party?] Where the charterer does not employ a broker he not unfrequently stipulates for payment to himself of brokerage. The master, under the circumstances of this case, signed the bills of lading as agent for the charterer, not the owner. The ground of the judgment in *Sandemann v. Scurr* (*ubi sup.*) was that the shipper had no notice of the charter-party; if he had such notice, the liability would, no doubt, have been held to be on the charterer. The master is the charterer's agent to carry out the charterer's contract. [LYTH, J.—But the charter is not a demise of the ship, but only a contract by the owner to carry goods at such rates as the charterer shall procure them at.] In *Major v. White* (7 C. & P. 41), Parke, B., laid it down that, if a person ship goods on board a vessel, knowing that she is chartered, the consignee of the goods can maintain no action against the owner of the ship, if the goods be injured by bad stowage. The same view is expressed by Lord Tenterden in *Cole v. Newbury* (1 Cl. & Fin. 292): "Two propositions of law are clear as applicable to a case like this: the first is, that in the common case of goods shipped on board a vessel belonging to a person, of which the shipment is acknowledged by a bill of lading signed by the master, if the goods are not delivered the shipper has a right to maintain an action against the owner of the ship; the other, which is equally clear, is this, that if the person in whom the absolute property of the ship is vested, charter that ship to another for a particular voyage, although the absolute owner provides the master, crew, provisions, and everything else, and is to receive from the charterer of the ships certain sum of money for the use and hire of the ship, an action can be brought only against the person to whom the absolute owner has chartered the ship and who is considered the owner *pro tempore*, during the voyage for which the ship is chartered. It cannot be maintained against the person who has let out the ship on charter, namely, the absolute owner." *Marquand v. Banner* (6 El. & Bl. 232), was also referred to. [ARCHIBALD, J., referred to *Gilkinson v. Middleton* (2 C. B., N. S. 134).] That case was dissented from by the Privy Council in *Kirchner v. Venus* (12 Moore P. C. C. 361). See also

Hov v. Kirchner, 11 Moore P. C. C. 21; *Maclean on Merchant Shipping*, p. 433, and the cases there cited; *The Mercantile and Exchange Bank v. Gladstone and others*, L. Rep. 3 Ex. 23; 18 L. T. Rep. N. S. 641; 3 Mar. Law Cas. O. S. 87.

There is another ground on which the non-liability of the defendants may be based, namely, the existence of a mutual mistake so that there was no contract between the parties, no *consensus ad idem*. In *Benjamin on Sales* it is said: "From the general principle that contracts can only be effected by mutual assent, it follows that where, through some mistake of facts, each was assenting to a different contract, there is no real valid agreement, notwithstanding the apparent mutual assent." In *Rogles v. Wichelhaus* (2 H. & Colt. 906), to a declaration for not accepting Surat cotton, which the defendant bought of the plaintiff, "to arrive ex *Peerless* from Bombay," the defendant pleaded that he meant a ship called the *Peerless* which sailed from Bombay in October, and the plaintiff was not ready to deliver any cotton which arrived by that ship, but only cotton which arrived by another ship called the *Peerless*, which sailed from Bombay in December; and the court held, on demurrer, that this was a good plea, there being no *consensus ad idem*.

Cohen, Q.C., in reply, referred to—

Doe v. Oliver, 2 Smith's L. Cas. 671; and *Peck v. Lazenby*, *ante*, vol. 1, p. 163; L. Rep. 12 Eq. 378; 25 L. T. Rep. N. S. 589.

Cur. adv. vult.

June 5.—The judgment of the Court (Mellor, Lyth, and Archibald, JJ.) was now delivered as follows by Lyth, J.—This is an action to recover freight for the carriage of railway iron from Hartlepool to Gothenburg under the following circumstances: On the 17th June 1872, a charter-party was entered into between the plaintiff, as master of the ship *Gothenburg*, then lying in the port of London, and one Lyth, a shipbroker, whereby the plaintiff engaged to proceed forthwith to Hartlepool and there take on board 407 tons of railway iron and carry the same to Gothenburg, on being paid freight at the rate of 7s. 3d. per ton; the freight to be paid in London on signing bills of lading; the owner to have an absolute lien for all freight, dead freight, demurrage, and all other charges. The master to sign bills of lading as presented, without prejudice. Having obtained this charter, Lyth, on the following day, the 18th June, chartered the *Gothenburg* to the defendants to carry the same quantity of railway iron from Hartlepool to Gothenburg at 8s. per ton, freight to be paid in London, less insurance, on signing bills of lading. This charter contained a similar clause of lien for freight, dead freight and demurrage, and a clause in the following terms: "The brokerage of 5 per cent. is due on the execution of this charter to B. B. Lyth, by whom the vessel is to be entered and cleared at the port of loading."

It was argued, and with reason, from this latter clause that the defendants knew they were treating with a broker, and not with the owner; but it was proved as a fact that Lyth had no authority to act as broker for the plaintiff either to effect the charter or to receive the freight.

Neither the plaintiff nor the defendants had any notice or knowledge of the charter entered into by the other of them until after delivery of the cargo. The master knew nothing of the

Q. B.]

PETROCCHINO AND OTHERS v. BOTT.

[C. P.]

charter-party between Lyth and the defendants; the defendants knew nothing of the charter-party between the master and Lyth. The vessel proceeded to Hartlepool and there took in from the defendant, the 407 tons of railway iron. Having shipped the cargo, the defendants presented a bill of lading, making the cargo deliverable to "order or assigns, he or they paying freight for the said goods as per charter-party," which the master signed, and gave out, without requiring payment of the freight. At the port of discharge the iron was delivered without the lion being insisted on; meanwhile, and on the 2nd Aug., Lyth obtained payment of the freight of 8s. per ton from the defendants, pursuant to his charter, and shortly afterwards stopped payment, leaving the freight of 7s. 3d. per ton unpaid.

It thus appears that each of the parties to the action acted under a mistake. The master supposed that the bill of lading which he signed, referred to his charter-party with Lyth. The defendants, on the other hand, supposed that it referred to the charter-party which they had made with Lyth. Each of them was ignorant of what was in the mind of the other; each acted in good faith, and neither of them did anything calculated to, or which did in any way mislead the other.

Under these circumstances, the bill of lading being ambiguous, and equally capable of being applied to the one charter-party as to the other, we cannot hold it to be a contract, or evidence of a contract, between the parties. It does not express what was common to both minds, and therefore it is not binding upon them.

But it was contended that, putting aside the bill of lading, the mere shipment of the goods raised an implied contract by the shippers to pay a reasonable freight to the master for the carriage. Under certain circumstances this may be so; but no such implication can arise in the present case. The diversity of mind and purpose which vitiates the bill of lading and prevents that from being evidence of the contract, existed at the time of the shipment. The goods were put on board in the supposed fulfilment of one charter-party, by which the shippers were to pay 8s. per ton to Lyth; and they were accepted in supposed fulfilment of another, by which Lyth was to pay 7s. 3d. per ton to the master. At no stage of the transaction were the parties *ad idem*.

It follows that there was no contract, express or implied, upon which the plaintiff can recover against the defendants. Had he insisted on payment on signing the bill of lading, as he might have done, or had he enforced his lien at the port of delivery, he might have protected himself from loss; not having done so, he has no means of obtaining payment from the defendants. We therefore give judgment for the defendants.

Judgment for the defendants.

Attorneys for plaintiff, *Hollams, Son, and Coward.*

Attorney for defendants, *H. P. Sharp.*

COURT OF COMMON PLEAS.

Reported by *EMERSON SMITH and J. M. LEE, Esqs., Barristers-at-Law.*

Jan. 24 and April 30, 1874.

PETROCCHINO AND OTHERS v. BOTT.

Bill of lading—Responsibility of shipowner in respect of cargo—When terminated—Delivery of cargo on to the quay—Usage at the port as to delivery of cargo—"Delivery from the ship's deck."

Goods were shipped under a bill of lading which contained these words, "to be delivered from the ship's deck, where the ship's responsibility is to cease." The usage at the port required that the unloading should be done by the dock company, at the expense of the shipowner on to a quay, and then that the consignee should send lighters into which the goods were delivered also by the dock company, and also, if within a specific time, at the expense of the shipowner. The usage was followed, but one bale of goods was lost after delivery on to the quay, and before delivery into the lighters.

Held by Brett and Denman JJ. (Hoyman J. dubitante) that the shipowner was not responsible for the loss to the consignee.

THIS was an action tried before Brett J. at the sittings in London after Hilary Term 1873, when a verdict was directed for the defendant, leave being reserved to the plaintiffs to move to enter the verdict for them for 41l. Accordingly a rule nisi was granted on 18th April, against which case was shown on 24th Jan. 1874.

The action was upon a bill of lading by the plaintiffs, who were merchants in London and Calcutta, and was brought for the non-delivery of goods by the defendants, the shipowners, in accordance with the bill of lading. By the bill of lading the goods were shipped on board the *Zeno* bound for the port of London, and were "to be delivered in the like good order and condition from the ship's deck, where the ship's responsibility is to cease." The cargo of the plaintiffs consisted of hides, and one bale was lost. It appeared that the *Zeno* was reported as having arrived in London on 4th May 1872, and the custom of the Port of London is that when a steamer comes into the docks she has to unload on to a quay, and the goods so unloaded are subsequently fetched away by lighters of the consignee. The dock company unload by means of their own servants, but the shipowners have to pay for the work so done. Notice is sent to the consignee of goods immediately on a ship's arrival, and if he applies within twenty-four hours the cost of delivering them into his lighters, which is also done by means of the dock company's servants, is defrayed by the shipowner, but if there is any delay beyond that time, then the goods are warehoused by the dock company, and the owners of the cargo pay the expenses of their doing so. The employment of the servants of the dock company is compulsory upon the shipowners; and the freight release is delivered up before any of the cargo is touched.

In this case notice was duly sent to the plaintiffs, and their agents Culverwell, Brooks and Co., employed a man called Gray, to go with lighters and bring the bales from the docks. It was proved that the cargo was in the ordinary course unloaded on to the quay on 4th May, that every-

C. P.]

PETROCCHINO AND OTHERS V. BOTT.

[C. P.]

thing was taken out of the ship, and that all the bales were delivered on to the quay. The plaintiffs were interested in sixty-nine bales only, and it was proved that their bales were taken away by Gray's lighters on the 6th, 8th, 14th and 30th of May; one bale was lost, but there was no evidence to show how.

The jury were asked: First, were 69 bales marked P. B., delivered from the ship to the dock company on the quay?—Answer, Yes. Secondly were 69 bales marked P. B., delivered by the dock company on board the lighters, sent by Culverwell, Brooks, and Company?—Answer, No.

On these answers it was contended that the second finding of the jury was equivalent to a verdict for the plaintiff, and the rule granted was in this form, "Why the verdict entered for the defendants should not be set aside and entered for the plaintiff on the ground that the second finding of the jury was equivalent to a verdict for the plaintiff, and why a new trial should not be had on the ground that the first finding was against the weight of the evidence."

Cole, Q.C. and *E. E. Webster*, for the defendant, showed cause.—The terms of the bill of lading are important; they are "to be delivered in like order and condition from the ship's deck, where the ship's responsibility is to cease." Now the goods were delivered from the ship's deck within the true meaning of the bill of lading. The jury have found that they were delivered on to the quay, and the custom of the port of London was that they were unloaded by the dock company's servants, and were fetched from the quay afterwards by the plaintiffs' lighters. We contend therefore that as soon as the shipowner has placed the goods on the quay, his dominion over them ceases, and the dock company are thenceforward the agents of the consignee. It is true that if application be made by the consignee within twenty-four hours, the cost of delivering into his lighters has to be defrayed by the shipowner. This, however, does not make the dock company agents only of the shipowner; they are the agents of both parties for the purpose of delivery. For to whom does the consignee apply? Not to the shipowner, but to the dock company. [*Baer J.*—The dock company insist on the shipowner employing their men as agents in unloading.] Yes, that is so, and it may be argued that immediately upon the assumption of the duty of unloading by them the dominion over the goods, and the responsibility of the shipowner is at an end. All this is proved to be in accordance with the usage of the port of London, and the charterparty must be taken to have been made by persons knowing the course of business, and recognised custom at the port of discharge. And the fact that this bill of lading is not in the ordinary form, but contains the stipulation I have read, agrees exactly with the supposition of a knowledge of the practice. The case of *Gatliffe v. Bourne* (Biog. N.C. 314), shows that unless delivery is controlled by special limitations, the practice usually observed at the port is sufficient; and here the practice of the port of London has been followed, and, taken together with the terms of the bill of lading, absolves the shipowner from all liability after the goods have been delivered from the ship's deck.

H. Graham (*Thesiger, Q.C.* with him) in support of the rule.—The defendant's construction of the bill of lading involves a contradiction. The bill of

lading says the delivery is to be to Messrs. Petrocchino Brothers or their assigns. Now the dock company cannot be either, and at the most a delivery to them is all that is proved. It is suggested that they were agents, and this would not be enough; but it is not clear that they were even agents, for they were paid by the defendant entirely. They were not employed for the plaintiffs' convenience, but for the defendants' in order that the ship might be cleared. Then the defendants do not get any receipt from the dock company, so there cannot be a complete delivery as this is not done. [*Baer J.*—The consignees do not give a receipt.] No, but the dock company were throughout treated as the agents of the defendant, and this shows that possession by them was possession by the defendants. Then the clause which has been laid so much stress on, "to be delivered from the ship's deck, where the ship's responsibility is to cease," applies solely, as I contend, to unloading into lighters. In *Catley v. Winstingham* (Pekie's N.P. Ca. 202) it appears that the master of a vessel is bound to guard goods loaded into a lighter sent for them by the consignee until the loading is complete. *Cur. adv. vult.*

April 30.—*Baer J.*—This case has stood over, owing to doubts entertained by my brother Honyman; but as he will be unable to be present in court for some time to come, we must act upon our own judgment without his assistance.

The action is brought upon a bill of lading: the goods of the plaintiffs were put on board the defendant's steamer to be carried from India to the Victoria Docks in London. The case was tried before me; and it appeared from the facts as established by the finding of the jury that sixty-nine bales were put on board the steamer at Calcutta, and were discharged on the quay in London; but that only sixty-eight were loaded on board the lighters sent to receive the sixty-nine bales on behalf of the plaintiffs. The value of the missing bale was £11. It was urged before us by the plaintiffs' counsel, that the shipowner was liable to make good the loss, and that there had been no delivery to the consignees; for delivery to the dock company at the quay was a delivery for the convenience of the shipowners. The defendant contended that he was not liable for any loss after the goods had left the ship.

By the bill of lading the goods were to be delivered in London to the plaintiffs from the ship's deck, where the ship's liability was to cease. These last words are very important, and the contract was so far fulfilled that all the bales were delivered in London from the ship's deck. The general rule is that where goods are to be delivered at a port, the usage of that port is to be followed; and when by that usage delivery is to be made in a prescribed manner, that manner must be complied with, unless it be inconsistent with the terms of the bill of lading. In London the course of business is for a steamer to unload at a quay, and for the dock company afterwards to put the cargo on board lighters: the shipowner pays the dock charges if the goods are applied for within twenty-four hours; otherwise the dock company put them into a warehouse, and the consignee becomes liable for storage. In my view the cargo is not delivered direct to the consignee.

Now the dock company seem to be proper intermediaries for the delivery of the cargo to the consignees: the goods are forwarded by two steps,

EX. CH.]

ALLISON v. THE BRISTOL MARINE INSURANCE COMPANY (LIMITED).

[EX. CH.]

viz. delivery on the quay, and delivery from the quay. The bill of lading evidently refers to the course of business in the port of London, and its terms are apt and well chosen for that purpose, and it follows that the responsibility of the shipowner ceased when the goods of the plaintiffs were taken off the steamer's deck and put upon the quay: he is not liable for the loss of any part of them happening after the cargo was unloaded. Whether the dock company are liable to the plaintiffs, I give no opinion.

As the verdict at the trial was entered for the defendant, this rule must be discharged.

DENMAN, J.—The only doubt which I entertained was occasioned by the hesitation of my brother Honyman; otherwise I see no reason to hesitate as to our decision. I entirely agree with my brother Brett, and I need say no more than this. I do not know what would now be the opinion of my brother Honyman; but I am sure that I should not adopt any other conclusion than that arrived at by my brother Brett.

Rule discharged (a)

Attorneys for plaintiffs, Markby, Tarry, and Stewart.

Attorneys for defendant, Lowless, Nelson, and Jones.

EXCHEQUER CHAMBER.

ON APPEAL FROM THE COURT OF COMMON PLEAS.

Reported by J. M. LEST, Esq., Barrister-at-Law.

May 12 and June 24, 1874.

ALLISON v. THE BRISTOL MARINE INSURANCE COMPANY.

Marine insurance—"Freight" and "freight payable in advance"—One half freight payable in advance—One half payable on delivery of cargo—Loss of ship—Half cargo saved—Total or partial loss.

The plaintiff's ship was chartered to carry a cargo of coal from Greenock to Bombay, where the plaintiff was to be paid at the rate of 42s. a ton "on the quantity delivered." It was also agreed that one half of the freight should be paid "on signing bills of lading," and the remainder "on right delivery of the cargo." The coal was shipped, and one half the freight paid, and the plaintiff afterwards effected two policies of insurance with the defendants, one being for 500*l.* on "freight" valued at 2000*l.*, the other being for 700*l.* on "freight payable abroad," valued at 2000*l.*

During the voyage the ship was wrecked, but one half of the cargo was saved and delivered to the consignees at Bombay.

The defendants refused to pay for a total loss, and made a payment into court of 440*l.* in respect of the two policies, as for a partial loss, on the ground that one half the freight had been earned.

The Court of Common Pleas (Borrell, C.J., and Brett and Grove, J.J.) having given judgment for the plaintiff, it was on appeal:

Held by Cockburn, C.J., Mellor, J., and Amphlett, B., dissenting from Cleasby and Pollock, B.B., (reversing the decision of the court below), that the defendants were liable as for a partial

loss only, and that the plaintiff could recover nothing more than the sum of 440*l.* paid into court.

Per Cockburn, C.J. and Amphlett, B.—As payment of freight in advance cannot be recovered back in case of loss, it is paid in respect of, and is distributable over the entire cargo, so that the shipowner cannot appropriate the whole of the amount prepaid to that portion of the cargo which is delivered, but can only have the benefit of the prepayment pro rata.

Per Mellor, J.—The prepayment of the freight transferred the risk from the shipowner to the charterer, and the shipowner, thus losing only one half, could recover no more than he had lost.

Per Amphlett, B.—The prepayment of the freight was not a payment on account of freight actually earned, but on account of what might contingently be earned in respect of the whole cargo.

Per Cleasby, B.—The shipowner was entitled to recover the whole of the unpaid half of the freight, inasmuch as he had insured and lost it.

This was an appeal by the defendants from a decision of the Court of Common Pleas (Borrell, C.J. and Brett and Grove, J.J.), discharging a rule to set aside a verdict entered for the plaintiff upon admissions taken at the trial, and to enter instead the verdict for the defendants, if the court should think there was no loss of freight beyond what the defendants had paid.

The facts are fully stated in the judgment of Amphlett, B. For a full report of the case below see ante, p. 54.

The plaintiff's points for argument:—That the policies being upon freight attached to such interest as the plaintiff in fact had in the freight of the vessel upon the insured voyage; that the plaintiff having been paid half the freight for the insured voyage in advance, had no interest in such half, and that his interest was limited to the remainder or unpaid half of the freight for the voyage; that the policies therefore attached to the unpaid half of the freight for the insured voyage; that as half the cargo, and consequently half the freight upon the insured voyage was lost, the plaintiff having already been paid half the freight for the voyage, lost the whole of the remaining or unpaid half of the freight, which was the freight insured by the defendant; that there was therefore, under the circumstances, a total loss of the subject-matter of this insurance.

The defendants' points for argument.—On the true construction of the charter-party, the sum paid in advance in England, namely, one guinea per ton of coal shipped, was not freight properly so called. It was compensation paid for taking the goods on board and undertaking to carry them. The only freight stipulated for was one guinea per ton on each ton carried and delivered. The plaintiff having carried and delivered one half the cargo, was entitled to claim freight on that half, and his failure to collect it from the shipper affords no ground of claim against the underwriter; the contract in this case must be read distributively. It is not a lump sum for an entire cargo; it is a separate contract for each ton of coal. The shipper bound himself to pay one guinea on each ton rightly delivered, and the court below has by its judgment erroneously absolved the shipper from this payment; the shipper was not to return the one guinea received in advance on any of the tons received on board, but the judgment appealed from

(a) Honyman J. was present during the argument, but in consequence of illness did not sit during Easter and Trinity Terms.

EX. CH.]

ALLISON v. THE BRISTOL MARINE INSURANCE COMPANY (LIMITED).

[EX. CH.]

compels this return by allowing the advance on the lost goods to be set-off against the freight on those delivered. The plaintiff has repaid the shipper the advance of one guinea per ton on the last half of the cargo; for the plaintiff has (by the payment of the premium of insurance) provided at his own expense the fund out of which the shipper has got back one guinea per ton on the lost half. Yet the court below has decided that the shipper is entitled to set-off against the plaintiff's claim the whole of the advance, and has thus practically awarded him payment twice of the advance made on the lost half of the cargo. It appears from the statement of facts that the shipper has received from his underwriters the whole cost of the lost goods, and the whole amount of the advances made on them to the plaintiff, so that as to the lost half of the cargo he is in the same position as if he had never shipped it. If he is now allowed to take the other half without any payment for carriage and delivery, he will make a clear profit of one guinea per ton on this second half at the expense of the shipowner, a result that seems to demonstrate that there is error in the judgment appealed from.

Benjamin, Q.C. (with him *C. Russell, Q.C.*), for the appellants, the underwriters, the defendants below.

Watkin Williams, Q.C. (with him *McLeod*), for the respondent, the shipowner, the plaintiff below.

Cur. adv. vult.

June 24.—The following written judgments were delivered:

AMPHLETT, B.—The action in this case was brought by the plaintiff, the owner of the ship *Merchant Prince*, on two policies of insurance on the freight of that ship on a voyage from Greenock to Bombay, to recover for a total loss.

The first of the said policies was dated the 13th April 1867, whereby the defendants insured 500l. on "freight valued at 2000l.," and the second policy was dated on the 23rd April 1867, for 700l. on "freight payable abroad valued at 2000l." The plaintiff also effected two other policies with two other underwriters on the freight payable abroad of the *Merchant Prince*, for the same voyage as above, for the sums of 500l. and 300l. respectively.

The said ship was chartered for the voyage in question to a Mr. De Mattos, by a charter-party dated the 7th March 1867, which provided that the ship should load a full cargo of coals at Greenock for Bombay, "freight to be paid on unloading and right delivery of the cargo, at and after the rate of 42s. per ton of twenty per cent. on the quantity delivered." And it was further provided that such freight was to be paid, say one half in cash on signing bills of lading, less four months' interest at bank rate, but at not less than five per cent. per annum, five per cent. for insurance, and 2½ per cent. on gross amount of freight in lieu of consignment at Bombay, and the remainder on right delivery of the cargo, less cost of coal short delivered, in cash, at current rates of exchange for bills on London at six months' sight. On the 15th April 1867, bills of lading were signed by the captain of the said ship for 2178 tons of coals, and on or about the same day the plaintiff received from De Mattos 2286l. 18s., for which the plaintiff gave the following receipt, indorsed on the bill of lading:—"Received from W. N. De Mattos, Esq., the sum of 2286l. 18s. sterling, being advance of half freight on within shipment, the owner having paid

all charges, including consignment, commission at Bombay, as per charter-party, 2286l. 18s." On the 20th April 1867, De Mattos effected an insurance on the said cargo of the *Merchant Prince* for the said voyage. The insurance was stated in the policy to be on 2178 tons of coal, and increased value thereof, by prepayment of freight, value at 4500l. On the 27th April 1867, the said ship left Greenock for Bombay, and on the 8th Aug. 1867, she struck on a reef and there became a total wreck. About 1050 tons (which may be referred to as a moiety of the coals forming the cargo) were saved from the wreck and ultimately landed at Bombay. At the trial, a verdict was by consent entered for the plaintiff for the full amount, with leave to move to enter the verdict for him or to reduce the damages, and a rule nisi having been granted by the Court of Common Pleas, cause was shown against it in Trinity Term, and the same was discharged and judgment given for the plaintiff for the full amount of his claim with interest.

The judgment of the Court of Common Pleas proceeded upon the principle that, according to the true construction of the charter-party, the prepaid moiety of the freight was to be taken in payment of the freight upon the saved part of the cargo, in which case the latter would be satisfied, and there would be a total loss of the other moiety of the freight to the shipowner; and the question we have to determine is, whether that judgment is correct.

It may be observed, in the first place, that the effect of that judgment is, that the charterer, while setting off the whole of the prepaid moiety of the freight against the freight on the saved moiety of the cargo, is at the same time entitled to recover a moiety of what he so paid in advance from his own underwriters, and will thus obtain for himself at the expense of the shipowner or his underwriters, a bonus or profit of 1l. a ton in respect of the coal lost over and above the value of such coal. It is, I think, impossible not to suspect some error in a judgment which has led to a result so strange and inequitable. It was said, indeed, in argument before us, that this startling result arises from the mode in which the charterer effected his insurance, and that the apparent anomaly would not have existed if valued policies had not been allowed by our law, and the charterer had effected an insurance simply on the prepaid moiety of the freight; but I cannot concur in this view, for suppose he had insured separately the prepaid moiety of the freight in identical terms with the insurance effected by the shipowner in respect of the other moiety of the freight, the underwriters of the last mentioned moiety would, according to the principle of the judgment, have borne the whole loss, and the other underwriters nothing; a result which appears to me equally strange and inequitable as the former. I venture, however, with great deference, to think that the assumption upon which the judgment proceeds is erroneous, and that the prepayment of a moiety of the freight ought not in this case to be taken as a payment on account of the freight actually earned by delivery of the cargo, but on account of what might contingently be earned in respect of the whole cargo.

No doubt it might have been stipulated, as it frequently and perhaps generally is in practice stipulated, that the prepayment of freight should be taken as a payment on account of freight actually earned; but in the charter-party in question there is

EX. CH.]

ALLISON v. THE BRISTOL MARINE INSURANCE COMPANY (LIMITED).

[EX. CH.]

no express provision to that effect, and I am of opinion that there are sufficient indications to be found in it that it was not so intended by the parties. Freight is by the charter-party to be paid after the rate of 42s. per ton on the quantity delivered, and such freight is to be paid one half in cash, on signing bills of lading, with certain deductions, and the remainder on the delivery of the cargo. Now all this proceeds upon the assumption that the whole freight will be earned, and does not contemplate or provide for the case of a loss either total or partial. It is clear that the half to be prepaid must be calculated on the whole cargo, without reference to possible loss, and, as it is admitted on all hands, that according to English law, however much it may be disapproved of by high authority, no part of such prepayment could be recovered back in any event, it appears to me that the most reasonable construction of the charter-party is to hold that for all purposes the prepayment should be taken as made in respect of the whole cargo, and, consequently, in the event which has happened, distributable between the part lost and the part saved. This view of the case appears to be strengthened by the deduction allowed for insurance, which denotes, according to Lord Selborne in *Watson and Co. (appas.) v. Shankland (resp.)* (ante, p. 115; 29 L. T. Rep. N. S. 349; L. Rep. 2 H. of L. Sc. Ap. 304) (which in other respects has not, I think, any material bearing on the present case), that it was in the contemplation of both parties that each should bear the risk of or insure for one moiety of the freight. This construction, too, has at least the merit of doing complete justice between the parties in every event. In the actual case before us, the result will be that the charterer will have to pay to the shipowner, to the relief of the latter's underwriters, one moiety of the freight upon the cargo saved, and be recompensed for the same out of the moneys received on his own policy, which virtually covers freight as well as cargo. If, on the other hand, the shipowner and charterer had each insured for the value of a moiety of the freight, the loss would have fallen, as in justice it ought, equally between the respective underwriters. Or, lastly, if neither had insured, or, in other words, if each had been his own insurer, each would have borne a moiety of the loss, which again would be quite just, inasmuch as the premium of insurance in respect to the charterer's moiety was allowed to him out of the prepayment of freight.

For these reasons I am of opinion that the plaintiff was not entitled to recover from the defendants as for a total loss, and, it being admitted that in that case the defendants have paid into court all that is due from them, I think that the judgment of the court below ought to be reversed, and the rule to enter a verdict for the defendants made absolute.

CLEARY, B. (delivering the judgment of himself and Pollock, B.).—In this case the plaintiff, a shipowner, claimed a total loss upon valued policies on freight, the voyage being from Greenock to Bombay. The defendants paid into court half the amount. The plaintiff alleged that he had insured the freight which he was to receive at the termination of the voyage, and that, as in consequence of the perils insured against he was entitled to receive none, there was a total loss. The defendants contended, that, in the events which had happened, the plaintiff was entitled to receive, at the termination of the voyage, half the freight

insured, so that there was a partial loss only. Thus the subject of dispute between the parties, viz., the right to freight at the termination of the voyage, under the circumstances, depended upon the proper construction of the charter-party, which was admitted to be the only question raised in the case, and was the only one argued before us.

[The learned judge recapitulated the leading terms of the charter-party and the facts, with dates, and proceeded:] The question is, Was the captain bound to deliver the cargo which arrived free of freight beyond that already paid, or could he have insisted upon payment of the one half freight upon the quantity delivered?

There is nothing unusual in the terms of this charter-party. It is quite common for the shipowner to be put in funds by a prepayment of freight, although, properly speaking, freight is what is earned by the carriage of goods to their destination, and when that is done the deductions made in the present case are intended to put the shipowner in the same position as if the freight had been paid at the end of the voyage, the first deduction being interest for the estimated duration of the voyage of four months which the owner gained by the prepayment; the second the amount of insurance which he saved by having the payment actually made, and no longer subject to risk requiring insurance; and the third, the commission, or the commission which he would have to pay to the broker to whom the ship was consigned at the other end for collecting the freight. All this is only a mode of calculating the amount to be paid for one half the freight, and clearly imposes no obligation upon the charterer. According to the law of England, a payment made in advance on account of freight cannot be recovered back in the event of the goods being lost and incapable of delivery. This must be considered as settled, having been decided as long ago as 1683, and not departed from since, though Cockburn, C.J., has expressed a wish that the law was otherwise, and in conformity with the law of most other countries: (see *Dyras v. Schiller*, ante, vol. 1, p. 111; 23 L. T. Rep. N. S. 741; L. Rep. 6 Ex. 325.) And the consequence is, that the amount so prepaid for freight is no longer at the risk of the shipowner, but at the risk of the charterer, and he has an insurable interest which he may, if he thinks proper, insure as a part of his insurance on the cargo or otherwise. But whether he does or not can make no difference as to the freight which becomes payable upon the shipowner being ready to deliver at the port of destination. If there had been a charter in the present case without any clause for prepayment of one half, and the goods had been put on board and half lost, what would have been the freight payable? Undoubtedly freight at the stipulated rate upon the half cargo carried to its destination.

The meaning of the word "freight" must be the same, in my opinion, whether there be a prepayment or not, and thus in the present case all the freight which became payable was the one half which had already been satisfied, and so the other half which was insured was totally lost. And this is the meaning of the word "freight" expressed in the charter-party—"freight to be paid upon unloading and right delivery of the cargo at and after the rate of 42s. per ton upon the quantity delivered."

Ex. Ch.]

ALLISON v. THE BRISTOL MARINE INSURANCE COMPANY (LIMITED).

[Ex. Ch.]

Some confusion is introduced into the case by the circumstances that the payment to be made is of one half of the freight, and this gives rise to the idea that there is afterwards a joint risk in the whole freight, whereas it is in reality a case of debtor and creditor, and not of joint risk and a payment of a sum on account of freight to be earned and fixed by agreement of the parties at half the estimated freight. But, to get rid of this source of error, suppose that the payment was of 1000*l.* on account of freight. The owner would make certain deductions on account of the earlier and sure payment, and, receiving the balance, which might be 950*l.*, would give a receipt for 1000*l.* on account of freight (as he has in the present case for 2286*l.* 18*s.*). Upon the arrival of the ship, it most appear that the freight earned came to 1500*l.* The charterer gets the full benefit of the 1000*l.* paid, and pays the balance, 500*l.* If he has insured his prepaid freight for 1000*l.*, he can be entitled to receive nothing, because he has lost nothing by perils, but had the full benefit of his prepayment. If the freight due on the arrival of the ship had been 750*l.* from cargo being lost to a larger amount, he would have the benefit of his prepayment to the extent of 750*l.*, and would be entitled to receive the 250*l.* lost from the underwriters as a partial loss. The case here is the same. There is a receipt for 2286*l.* 18*s.*, the amount of half the estimated freight. It is still a payment on account of freight, and De Mattos was entitled to and had the full benefit of it.

I will only add upon this part of the case, that the error (if I may be allowed the expression) is in concluding that because the shipowner and charterer are each interested in one half of the freight, therefore their interest in the whole is the same. But that is not the case, because, independent of the equality of amount, there is a priority of payment. The prepayment should satisfy that which was first earned to the amount of the prepayment. It is like the case of a mortgage for 2000*l.*, to which two persons are entitled in halves, but one not to be paid off in preference to the other, so that if the security is insufficient, the part only should be paid. Each is interested to the same extent by half, but they have not the same interest in the whole.

The learned counsel for the defendants relied very much, in the course of his argument, upon the deduction of the five per cent. for insurance of the half freight, which he repeatedly described as money paid to the charterer, to be applied for that purpose, so as to give the shipowner an interest in its being so applied, and make the insurance accrue to his benefit. But this appears to us to be a mistaken view of that deduction, which is in reality only a mode of arriving at an equivalent for what the shipowner would receive at the end of the voyage, and placing the charterer in the same position as the shipowner would have been in as regards insurance, and with the same option to insure or not. The learned counsel also relied very much upon the obvious gain to the charterer, if he insured his cargo at a value increased by the prepayment, in the event which happened, viz., of one half being lost by the perils. It was said that he would be repaid one half of his advance by the underwriters on the goods, and then have got the one half of his goods delivered free of freight, and so have the benefit of the whole advance. This was explained

by the learned counsel for the defendants, but not so fully as it might have been, probably because he thought the matter too clear to need further explanation. It is accounted for in this way. If the charterer had insured his real interest at risk, viz., the prepaid freight, 2286*l.*, then, if at the end of the voyage the freight payable had amounted only to that sum, he would have had the full benefit of the payment made in discharge of the freight, and would of course have recovered nothing under his policy, and no profit could have been made. But by means of a valued policy on the goods in which the value of the goods is increased by the amount of prepaid freight, this falsehood (as it may be called) is introduced, viz., that all the goods are supposed to be so increased in value, whereas in reality those only are increased in value which arrive at their destination; and thus, if any be lost, the charterer recovers not upon the real value, but upon that value increased by the proportions of freight, and he so makes a profit by insuring the goods beyond their value. He may do this in any case by inserting beyond the value, if the underwriters agree to it, and they cannot object to it because they get paid the premium in proportion. This is the explanation of the profit made by Mr. De Mattos, viz., that the goods lost were insured beyond their value, so as to secure a profit instead of a mere indemnity.

We cannot depart from the settled meaning of the word "freight," and the meaning expressly given to it in this charter-party, viz., the amount to be paid at the end of the voyage for what is ready for delivery at the stipulated rate. This had been wholly satisfied by the advance made, and so the shipowner was entitled to receive no more, and the captain was right in delivering the half cargo free of freight.

The case of *Watson and Co. v. Shankland* (ante, p. 115; 20 L. T. Rep. N. S. 349; L. Rep. 2 H. of L. Sc. App. 304), was referred to on the argument by Mr. Benjamin. In that case a question of Scotch law arose upon a charter in similar terms to the present, and the question was, whether a sum paid on account of freight could, upon a loss of the cargo, be recovered. The argument appears to have been, that according to Scotch law it must be taken to be not a prepayment of freight properly so called, but an advance on account of freight. The judgment of the House of Lords was, that it was unnecessary to decide whether it was a prepayment or an advance, because, assuming for the sake of argument that it was not a prepayment, but an advance, still it could not be recovered back by reason of the neglect to insure. And upon the assumption that it was not a prepayment but an advance, it was necessary to account for the deduction and give some meaning, and the meaning given would be an improper one if it was founded upon the assumption, *argumenti causa*, unless the assumption agreed with the real fact. In the present case we know that the commission deducted was not upon the assumption referred to, but upon the fact of prepayment, and that it was not in reality what was suggested in that case, but was, as it is called in the receipt, consignment commission, which is saved by the prepayment. The result is, that the freight which was insured was wholly lost by the perils, and the judgment of the court below, which is founded upon that conclusion, must in our opinion be affirmed.

I beg to add one other remark upon the construc-

EX. CH.]

ALLISON V. THE BRISTOL MARINE INSURANCE COMPANY (LIMITED).

[EX. CH.]

tion of this contract. Charter-parties containing provisions for prepayment, or advances to the masters with the same effect as prepayment, have been usual as long as I remember, and it is not too much to say that thousands of such charters have been effected upon which the captains of vessels have acted in all parts of the world, with the responsibility of delivering or refusing to deliver the cargoes; and in order to discharge their duty, they must have made themselves more or less acquainted with the effect of prepayment. And their duty ought to be a plain one, and not depend upon nice distinctions, and it is a plain one if they have to consider only what is the freight earned and what amount has been prepaid. In the present case there appears to have been no question between the shipowner and the charterer as to the proper mode of performing the contract. The captain delivered the goods free of freight, because a sum of money equal to the freight earned had been paid. But a third party, the present defendants, now say that the captain was so ignorant of his rights as to have delivered goods free of freight when he had a claim of 1000*l.* It would be strange, and he may have acted in ignorance of the proper effect of the agreement. I could not properly construe an agreement, especially in a court of error, by what the parties understood to be the effect of it, but I must say my own clear view of the legal effect of an agreement in common use is confirmed by finding that the parties to it, who may be taken to be well acquainted with such agreements, acted in conformity with that view.

MELLOR, J.—The plaintiff was the owner of the ship *Merchant Prince*, and the defendants are an insurance company. The action is brought to recover against the defendants, as for a total loss, on several policies of assurance effected by the plaintiff with the defendants, on freight valued at 2000*l.*, and if, under the circumstances of the case, the plaintiff is entitled to recover as for a total loss, the judgment of the court below must be affirmed; but if the loss is to be considered as a partial loss only, the defendants have paid into court sufficient to cover such partial loss, and the judgment of the court below must be reversed.

The facts are singularly few, and the question turns entirely on the true construction of a charter-party, dated the 7th March 1867, made between the plaintiff and one W. N. De Mattos. [Terms of charter-party, &c., recapitulated.]

It was admitted, on the argument before us, that the question turned upon the proper construction of the charter-party, and the payment of one half freight in advance on the signing of bills of lading. It was contended for the plaintiff that the freight being made payable on unloading and right delivery of the cargo, at and after the rate of 42*s.* per ton, was a mere mode of estimating the total freight, and that the words such freight is to be paid, "say one half in cash on signing bills of lading, less four months' interest," &c., secured as a payment of the total freight, and assuming the total freight to which he would have been entitled on unloading and right delivery at Bombay to be 4000*l.* in round numbers, he had only received 2000*l.*, and was entitled to claim from the defendants for the residue, as representing his loss by the perils insured against. I cannot accede to that view of the case, and I do not think such is the true effect of the charter-party. The agree-

ment that the freight was to be paid on unloading and right delivery of the cargo, at and after the rate of 42*s.* per ton of 20*cwt.* on the quantity delivered, is followed by a stipulation that each freight "was to be paid, say one half in cash on signing bills of lading, less four months' interest at bank rate, but not less than five per cent. per annum, five per cent. for insurance, and 2½ on gross amount of freight in lieu of consignment commission at Bombay, and the remainder on right delivery of the cargo," &c. Not only, therefore, was one half of such freight to be paid in cash on signing bills of lading, but there was a deduction of five per cent. for insurance in respect of the amount paid in advance. And the charterer did accordingly, on the 20th Aug. 1867, effect an insurance "on 2178 tons of coal, and increased value thereof, by prepayment of freight, valued at 4500*l.*" It was agreed on all hands that no part of the freight so paid in advance could ever thereafter be recovered back from the plaintiff by the charterer, and, consequently, the sea risk of so much of the freight as was paid in advance was transferred from the plaintiff to the charterer. It seems to me that the effect of the contention on the part of the plaintiff must be that the payment in advance was really a payment of the freight upon one half of the cargo, leaving the freight on the other half of the cargo to be paid on right delivery. The agreed freight was to be at and after the rate of 42*s.* per ton on the quantity delivered, but there is nothing by which half the cargo can be separated from the remainder, and car-marked as the portion in respect of which the freight was paid in advance. The whole cargo was insured by the charterer as made more valuable by the prepayment of half freight in advance, and it appears to me that under the words, "at and after the rate of 42*s.* per ton on the quantity delivered," both the freight and payment must be distributed over the entire cargo, and that the payment in advance was equivalent to the payment of 1*l.* 1*s.* on every ton of the cargo, so as to reduce the amount of the freight payable by the charterer on delivery to the like sum per ton.

I cannot agree that the true mode of estimating the loss sustained by the plaintiff is to lump the freight at, say 4000*l.* for the voyage, and seeing that inasmuch as he received payment in advance of 2000*l.* only, that, therefore, his loss is the difference between that sum and 4000*l.* I think that he lost by the perils of the sea 1*l.* 1*s.* upon all the coals that were lost, and became incapable of delivering by reason of such perils, and that, under the circumstances, it constituted a partial loss only, and that he was only entitled to be indemnified by the defendants to that extent. And as the amount paid into court covers that loss, the defendant is entitled to succeed, and the judgment of the court below ought to be reversed.

COCKBURN, C.J.—I concur in the conclusion of my brothers Mellor and Amphlett in this case.

The facts are simple. The plaintiff claims for a total loss on a policy of insurance on freight to be earned on a voyage of the ship, the *Merchant Prince*, from Greenock to Bombay. If, according to the terms of the charter-party, the plaintiff, as between himself and the charterer of the ship, was, under the circumstances, entitled to claim a portion of the freight, he cannot recover on a claim for a total loss. The question turns, therefore, on his right under the charter-party; in other words,

EX. CH.]

THE RACER.

[ADM.]

on the true construction of the charter-party [Terms of the charter-party recapitulated.] Bills of lading were signed by the captain for a certain amount of coals, and a sum was thereupon paid by the charterer to the owner, calculated to amount to one half of the freight, so as to satisfy the stipulation of the charter-party. A portion of the cargo was lost on the voyage by the perils insured against. The remaining portion was delivered up by the captain on the completion of the voyage to the consignees of the charterer, without any further demand of freight, on the assumption that the freight was only demandable in respect of the portion actually delivered, and that such freight was satisfied by the amount paid in advance on account of freight. But the insurers are not bound by the acquiescence of the shipowner in this view of his rights, and if the shipowner was entitled in point of law on the true construction of the charter-party to claim additional freight, the insurer is justified in insisting that there has not been a total loss of freight; and if this contention is right, the loss can only be a partial loss, in which case, there having been a payment into court as on a partial loss, the defendants will be entitled to our judgment.

The question depends on whether the remainder of the freight being payable on the right delivery of the cargo, the portion of the freight paid in advance can be appropriated to the amount of cargo actually delivered, or whether the amount so prepaid must be considered as paid in respect of the entire cargo and distributed over the whole cargo, including the part of it which was lost, as well as the part delivered. It appears to me that this question must be considered irrespectively of the insurance which the shipowner or the charterers may have effected for the protection of their actual or supposed interests; in other words, according to the terms of the charter-party, and the rights and liabilities of the parties as thereby created. Now I cannot but suppose that, on a charter-party of this description, a payment of freight in advance, which, by the English law, in case of the loss of the cargo, cannot be recovered back, presupposes, in the contemplation of the parties, a delivery of the entire cargo, and is paid in respect of the entire cargo, and is therefore distributable over the entire cargo; for which reason it is not, as it appears to me, competent to the owner of the cargo to appropriate the whole of the amount prepaid to that portion of the cargo which is actually delivered, and he can only have the benefit of each prepayment *pro rata* on the cargo delivered.

On this short ground I am of opinion that one half of the freight remained payable on the cargo delivered, and that, consequently, there was no total loss, so that the claim of the plaintiff, as for a total loss, fails.

POLLOCK, B. concurred in the judgment of Cleasby, B. *Judgment reversed.*

Attorney for the plaintiff, Nash.

Attorneys for defendants, Argles and Rawlins.

THE ADMIRALTY COURT OF THE CINQUA PORTS.

Reported by J. P. ASHALL, Esq., Barrister-at-Law.

Saturday, May 9, 1874.

THE RACER.

Salvage—Pilotage—Ambiguous signal—Interpretation—Condition of vessel.

Where a vessel makes an ambiguous signal, it will be construed by the Court of Admiralty according to the condition of the vessel when boarded; if she is damaged and is in need of assistance, the signal will be treated as signal for assistance, and those answering it as salvors; if she is not damaged and wants only a pilot, the signal will be treated as a signal for a pilot only.

THIS was a cause of salvage instituted on behalf of the owner, master, and crew of the lugger *Stag*, of Dover, against the schooner *Racer*, her tackle, apparel, and furniture, and the cargo now or lately laden thereon, and the freight due for the transportation thereof, and against the owners of the said schooner, her cargo and freight, and their bail intervening.

The petition, which sets out the facts of the case, was as follows:

1. The *Stag* is a lugger belonging to the port of Dover, of about 16 tone builders' measurement, and of the value of 170*l.*; on the occasion hereinafter mentioned she was manned by a crew of five hands all told.

2. About 7 a.m. on the 20th Jan. 1874, the *Stag* was cruising between Sandgate and Folkestone; the wind at the time was blowing a strong gale from the S.W., accompanied with thick driving rain, and there was a heavy sea. Under these circumstances the crew of the *Stag* sighted the schooner *Racer*, the vessel proceeded against in this cause; she was then about four miles from and standing in towards the land with her ensign flying just above her topgallant yard, as a signal for assistance. Those on board the *Stag* at once made for the *Racer*, and about 8 a.m. came up with and spoke her. The master of the *Racer* said he wanted to go to Dover, and requested some of the lugger's crew to come on board. The crew of the lugger told him it was impossible for them to board where they then were, and said he must follow in toward the land where they would make an attempt to do so; accordingly the *Stag*, followed by the *Racer*, stood in towards the land.

3. The *Racer*, at this time, had lost her topsail, main-sail, and main boom, her boat was stove in and useless, the cooking galley washed down, her bulwarks started from stem to stern, and part of her steering gear had been carried away.

4. After some time some of the crew of the *Stag* ventured, at great risk to their lives, into the lugger's boat, and after considerable difficulty managed to get under the schooner's lee. The *Racer* was at the time rolling nearly gunwale under; the waves, on several occasions, nearly threw the lugger's boat on to the schooner's deck, and it was only by great exertions that the men in the boat were able to keep her clear. After some time the captain of the *Racer*, choosing his opportunity, caught hold of Henry Landall, one of the lugger's men, by the shoulders, and Landall managed to get on board. When Landall got on board, he told the master of the *Racer* to get his tackle and hoist the boat in, or the boat's crew could not possibly get on board, but while the master of the *Racer* was getting the tackle ready the sea was such that it was found impossible to keep the lugger's boat near, and she was obliged to return to the lugger. In getting on board the lugger, the men in the boat ran considerable risk, and in securing the boat her main thwart was broken, three of her planks and her gunwale were stove, and two oars were lost. When the *Racer*'s crew had succeeded in getting on board the lugger, she bore up for Dover, and arrived there about 11 a.m.

5. The said Henry Landall took charge of the *Racer*. He found only one seaman, a Portuguese, and two coloured boys on deck, and thereupon asked the master

[ADM.]

THE RACER.

[ADM.]

where the crew were. The master replied that they were asleep; but on going down below, the said Henry Landall found only a boy, who was lying on the cabin floor, completely disabled from a severe injury to his head, having been knocked down by the main boom. The said Henry Landall also learned that the mate of the vessel had been washed overboard and drowned in the course of the voyage.

6. About 11 a.m. Henry Landall gave orders to get ready, and assisted himself in clearing away the starboard anchor and chain. He then made for Dover under foremast-staysail, fore-try-sail, and square topsail, the latter being in ribbands. All the other sails had been blown away; and the vessel being so shorthanded, and without proper sails, Landall had the greatest difficulty in making Dover Harbour; but being thoroughly acquainted with the locality, he was enabled to steer the *Racer* through the broken water close to the Admiralty Pier and so make the harbour. The master of the *Racer* was utterly unable to have taken the vessel in himself, as he was wholly ignorant of the set of the tides and currents.

7. As the *Racer* entered the harbour she was boarded by two more of the lugger's crew, who, with Landall, took her through the Wellington Bridge gates, and moored her in safety.

8. It is always a matter of difficulty to make Dover Harbour with a south-westerly gale, and the difficulty was on this occasion greatly increased by the strong flood tide which was running tending to set the ship past the entrance, and also by the vessel being shorthanded and almost crippled.

9. By the aforesaid services, which were promptly and efficiently rendered, the *Racer*, her cargo and crew, were rescued from a position of considerable danger and placed in perfect safety. In her then condition, if she had failed to make the harbour, she would undoubtedly have been carried out into the North Sea, as it would have been impossible for her to get into Ramsgate or any other neighbouring port.

10. In rendering the aforesaid services, the plaintiffs ran considerable risk, both to their lives and property.

11. The *Racer* is a schooner of 149 tons register, and was bound on a voyage from Bahia to London, laden with a cargo of coffee. The value of the ship was £500., and her cargo and freight £600.

The answer filed on behalf of the defendants was as follows:

1. On the morning of the 29th Jan. 1874, the *Racer*, being bound on a voyage from Bahia to Antwerp, was off Felkestone, and as she required certain repairs, the master determined to put into Dover, and accordingly made the ordinary signal for a pilot.

2. Soon afterwards the lugger *Stag* came up and hailed the *Racer*, and those on board her, on being informed that the master of the *Racer* wanted a pilot for Dover, offered their services as pilots.

3. The wind was in the south-west, with a fresh breeze, and there was some sea. The *Stag* and the *Racer* stood in together towards the land, and then a boat from the *Stag* put off to the *Racer*, and one of the plaintiffs, with no serious difficulty or risk, boarded the *Racer* from the boat.

4. The said plaintiff then proceeded to pilot the *Racer* into Dover Harbour. The *Racer* had suffered certain damage, but there was no difficulty in bringing her to the harbour, and she sailed into the harbour with great ease. The steam tug of the harbour was at hand, and her services were offered to the master of the *Racer*, but the master of the *Racer* declined them as being, as they in fact were, unnecessary. Some damage had been done to the steering gear of the *Racer*, but that was repaired before the said plaintiff came on board.

5. The allegations contained in articles 1, 3, and 11 of the petition are true, except that the *Racer* was bound to Antwerp and not to London, and it is true, as stated in article 5 of the petition, that one of the seamen had been disabled from a severe injury to his head, having been knocked down by the main boom, and that the mate of the *Racer* had been washed overboard and drowned in the course of the voyage, namely, on the 3rd Nov. 1873.

6. Save as hereinbefore appears, the several allegations contained in the petition are untrue.

7. The service rendered by the plaintiffs was nothing more than pilotage service rendered to a vessel which had suffered some damage.

The plaintiff filed a conclusion admitting that the *Racer* was bound for Antwerp, but denying the other statements in the answer, except so far as they were consistent with the plaintiff's petition.

Evidence was called for both plaintiffs and defendants, and it resulted in substantially establishing the allegations in the plaintiffs' petition.

R. E. Webster, for the plaintiffs, submitted that on the facts there was a salvage service entitling the plaintiffs to salvage reward.

W. G. F. Phillimore, for the defendants.—On the facts it is clear that there was no salvage service. The service was pilotage to a damaged ship entitling the plaintiffs only to double pilotage and the amount of damage done to their boat: (*The Enterprise*, 2 Hag. Adm. Rep. 178n.) The signal was really a signal for a pilot and not for salvage assistance. At any rate it cannot be put higher than an ambiguous signal; and, where such a signal is given the question whether the service is to be considered salvage or pilotage must be judged by the result. In *The Little Joe* (Lush. 88), the salvors, who went out to a vessel hoisting an ambiguous signal, recovered no remuneration, because they rendered no service. Here they are entitled to pilotage only, as they have rendered only pilotage service.

R. E. Webster, in reply.—The true rule, as laid down in *The Little Joe* (*ubi sup.*) and other cases, is, that an ambiguous signal is to be interpreted according to the state of the ship at the time it is given. If the ship really wants no more than a pilot, she is liable only for pilotage; but if her condition is such that she requires further assistance, the signal is to be read as a signal of distress. *The Enterprise* (*ubi sup.*) is only a very short report, and does not disclose the facts upon which it was decided. In *The Aztec* (21 L. T. Rep. N. S. 797; 3 Mar. Law Cas. O. S. 326), it was argued that because the salvors rendered assistance at the master's request to a vessel damaged but not actually in distress at the time they boarded her, they could not recover, but it was held that it was impossible to get rid of the salvage character of the service when they had once been engaged as salvors. *The Bomarsund* (Lush. 77) shows that the condition of the ship to which the services are rendered is the main point to be considered where the signal is ambiguous:

The Hedvig, Spinks Ecc. & Adm. Rep. 21;

The Donsler, 10 Jar. 865.

These men get their living in the meritorious occupation of rendering assistance to vessels in distress, and this court always encourages them and does not criticise their acts too narrowly.

Sir R. PHILLIMORE.—The first question which I have to consider is, whether the service rendered by the plaintiffs was purely pilotage or partakes of a salvage character.

There is no dispute that a signal was made from the *Racer*; that signal was a Union Jack with a portion of the ensign torn away and hoisted above her topgallant-yard. This signal, I am of opinion, was an ambiguous signal; and my predecessor, very early in the exercise of his jurisdiction in this court, laid down a rule—to which I think he always adhered—as to the character he should give to an ambiguous signal, and the interpretation he should put upon services rendered under such a signal. In *The Hedvig* (Spinks Ecc. & Adm. 21), Dr. Lushington said:

PRIV. CO.]

THE PIVRE SUPERIORE.

[PRIV. CO.]

"Now the vessel having sustained damage, and two of her crew having received considerable injury, a signal was hoisted; and, according to the rule which I laid down on a former occasion, I hold it to be a signal for assistance and not for a pilot. But, again, what was the nature of this case? Was it a case in which the words 'pilotage' or 'pilot' could with safety and propriety be applied? Why, the vessel was thirty-five miles out at sea. There are no pilots to be found there; that is out of pilotage ground altogether. It is true the vessel might require nothing; but to be conducted to a place of safety; but that is not pilotage, it is salvage assistance." And in the note to that case, there are these words: "In the case of the *Felix* (April 4), the court said, I have determined to decide the questions in this way: if a vessel is in a damaged state I shall determine that it is a signal for assistance, because the vessel wants it; but where the vessel is not in a damaged state, and a pilot only is wanted, I shall construe it to be a signal for a pilot. That seems consistent with probability." To that ruling the learned judge substantially adhered in subsequent cases. It is true that the circumstances in the various cases before him might vary, but to the rule there laid down he adhered.

The condition of the *Races* at the time of the services appears from the petition. That condition is there pleaded, and has been admitted by the defendants; and, moreover, it was proved in evidence that her master thought his ship in such a condition as to compel him, although on a voyage to Antwerp, to put into Dover for repairs. I am of opinion that the service must therefore be considered a salvage service and not mere pilotage. But at the same time, the services were of a very simple and ordinary character, and do not call for large remuneration. In truth, the case ought not to have been brought into court at all, and I can only express my regret that no tender has been made; if there had been a tender I should not have thought it right to allow all costs, but only a *sum nomine expensarum*. But I have to deal with the facts of the case as they are before me; and, looking at the damage sustained by the salvors and the values at risk, I shall award 30*l.* and costs.

Solicitors for the plaintiffs, Fox and Carder.

Solicitor for the defendants, Wollaston Knocker.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

Reported by J. F. ASHALL, Esq., Barrister-at-Law.

March 20 and 21, and May 12, 1874.

(Present: The Right Honrs. Sir JAMES W. COLLIER, Sir BARNES PEACOCK, Sir MONTAGUE SMITH, and Sir R. P. COLLIER.)

THE PIVRE SUPERIORE.

Damage to cargo—Jurisdiction—Admiralty Court Act 1861 (24 Vict. c. 10), sect. 6—"Goods carried into any port in England or Wales"—Ship calling for orders—Goods delivered at foreign port.

When a foreign ship carrying cargo, acting in pursuance of the contract of affreightment, which gives the option of several ports of call, English and foreign, puts into an English port of call

for orders, she carries her cargo into the English port within the meaning of the Admiralty Court Act 1861 (24 Vict. c. 10), sect. 6; and though she be ordered to a foreign port, and there discharge her cargo, the Court of Admiralty has jurisdiction to entertain against her a suit by the assignees of the bills of lading of the cargo, for damage to cargo, and to arrest her on her return, after discharging, to this country.

This was an appeal from an order of Sir Robert Joseph Phillimore, the learned Judge of the High Court of Admiralty of England, made in a cause of damage to cargo, and rejecting the admission of a petition on protest to the jurisdiction of the court filed by the appellant.

The appellant is the owner of an Italian barque called the *Pivre Supérieure*. The *Pivre Supérieure* having been arrested by the respondents, the appellant appeared under protest to the jurisdiction of the court, and filed the petition in question, setting out the grounds on which he submitted that the High Court of Admiralty had no jurisdiction in the suit.

The petition was, so far as material, as follows:

1. By charter-party, dated London, the 30th March, 1872, and Genoa, the 6th April, 1872, between the defendant and Ferdinand Schiller, for self and partners of Messrs. Burdett, Schiller, and Co., of Calcutta, merchants and freighters, it was mutually agreed that the above-named ship should, with all convenient speed, having liberty to take outward cargo and passengers from Europe to a port on the way for owner's benefit, sail and proceed thence to Akyah, for orders to load at either Akyah, Rangoon, or Bassein, and there load from the agents of the said freighters a cargo of rice in bags, which the said freighters bound themselves to ship, and being so loaded, should proceed thence to Belle Isle, Scilly, Quenstown, or Falmouth, at the option of the master, for orders whether to discharge at a good and safe port in the United Kingdom, or on the Continent between Havre and Hamburg, both ports inclusive, or so near thereto as she might safely get and deliver the same in any dock freighters might appoint agreeably to bills of lading, on being paid freight as therein mentioned, the master to sign bills of lading at any current rate of freight required without prejudice to such charter-party, but not under chartered rate.

2. Pursuant to the said charter party the said ship proceeded to Rangoon, and there loaded a cargo of rice in bags, for which the master of the said vessel signed and delivered a bill of lading, which, so far as material, was, and is in the words and figures following, that is to say:

Shipped in good order and well conditioned, by Gladstone, Wyllie and Co., in and upon the good ship or vessel called the *Pivre Supérieure*, whereof is master for this present voyage Consignee, and now riding at anchor in the Rangoon River, and bound for Belle Isle, Scilly, Quenstown, or Falmouth, for orders to discharge at a port in the United Kingdom, or on the Continent between Havre and Hamburg, both inclusive, 5000 bags rice, each 10*lb.* net, 5000 bags, each 10*lb.* net, being marked and numbered as per margin, and are to be delivered in the like good order and condition at the aforesaid port of as ordered (all and every the dangers and accidents of the seas, rivers, and navigation of whatever nature or kind soever excepted), unto order or to its assigns, or they paying freight for the said goods at the rate of 3*l.* 1*0s.* (three pounds fifteen shillings) sterling per ton of 20 cwt. net weight, delivered with average accustomed. In witness whereof, the master or purser of the said ship or vessel hath affirmed to three bills of lading all of this tenor and date, one of which being accomplished, the others to stand void.

Dated in Rangoon, this 26th March, 1873.

F. CONSOLIDE.

3. The said vessel sailed with the said cargo from Rangoon, and her master, in the exercise of his said option, proceeded therewith to the said port of Falmouth

for orders, and there received orders from the plaintiffs or their agents to proceed with the said cargo to Bremen, which is a port on the Continent between Havre and Hamburg, and to discharge the said cargo at Bremen.

4. The said master accordingly sailed from Falmouth in the said vessel with the said cargo to Bremen, and there delivered the said cargo.

5. The said vessel after having discharged her said cargo of rice at Bremen left Bremen on a new voyage for Cardiff, to load coals there, and subsequently arrived at Cardiff, where she has been arrested by the plaintiffs in this suit.

6. The plaintiffs allege themselves to be assignees for valuable consideration of the said bill of lading, and alleged that the said cargo of rice suffered damage in the said vessel, and they have instituted this suit as such assignees for the recovery of losses which they alleged themselves to have sustained by negligence or misconduct, or by breach of duty or breach of contract on the part of the master or crew of the said vessel.

7. Save as aforesaid, the said cargo of rice was never brought into any port in England or Wales.

8. The defendant submits that the said cargo of rice was not carried into any port in England or Wales within the true intent and meaning of the 6th section of the Admiralty Court Act, 1861, and that by reason thereof this honourable court has not jurisdiction to entertain this suit.

The petition concluded with a prayer to the judge to pronounce against the jurisdiction of the court, and to dismiss the suit with damages and costs.

The respondents thereupon gave notice that they should move the judge in court to reject the admission of the petition by reason that under the circumstances therein stated the court had jurisdiction to entertain the cause.

The 6th section of The Admiralty Court Act 1861 is as follows:—

The High Court of Admiralty shall have jurisdiction over any claim by the owner or consignee or assignee of any bill of lading of any goods carried into any port in England or Wales in any ship, for damage done to the goods or any part thereof, by the negligence or misconduct of or for any breach of duty or breach of contract on the part of the owner, master, or crew of the ship, unless it is shown to the satisfaction of the court at the time of the institution of the cause, any owner or part-owner of the ship is domiciled in England or Wales: Provided always, that if any such case the plaintiff do not recover 20*l.* he shall not be entitled to any costs, charges, or expenses incurred by him therein, unless the judge shall certify that the cause was a fit one to be tried in the said court.

It was admitted by the respondents that the Court had not any jurisdiction to entertain the cause, unless such jurisdiction was conferred by sect. 6 of The Admiralty Court Act 1861.

The motion came on for argument, and the learned judge of the Court below, after hearing counsel on both sides, made an order on each motion rejecting the admission of the petition with costs, and ordering the appellant to enter an absolute appearance in the cause, but he gave leave to the appellant to appeal: (See *ante*, p. 102; 29 L. T. Rep. N. S. 702.)

From this order the shipowner appealed, and submitted that the order appealed from ought to be reversed, and that the motion ought to have been rejected with costs for the following amongst other reasons,

1. Because upon the facts stated in the said petition the High Court of Admiralty has not jurisdiction to entertain the cause.

2. Because upon the facts stated in the said petition the cargo of rice therein mentioned was not carried into any port in England or Wales

within the true intent and meaning of the 6th sect. of "The Admiralty Court Act 1861."

Millward, Q.C. and Clarkson.—The words of this section, although general in terms, must be receive some limitation; if they do not, then a ship chartered to carry goods from one foreign port to another foreign port, and compelled to put into an English port by stress of weather, would be amenable to the jurisdiction for a breach of contract committed on the voyage, although there was no contract obligation to put into the English port at all. The mere accident of putting into an English port can give no jurisdiction. The question to be considered is whether there is any intention of dealing with the cargo within British territory. The waiting for orders in an English port is a mere accident of the voyage, and if a ship waits without injury to her cargo, or without breach of contract, she does not carry her cargo into an English port within the meaning of the words of the Act. Where a contract is entered into for the carriage of goods from this country to a foreign port, and is broken by the shipowner, the Admiralty Court has no jurisdiction, even if the ship returns; how can there be any jurisdiction, then, over a foreign contract to deliver abroad where there is no breach connecting the ship with this country? The inconvenience of holding otherwise would be immense to shipowners and shippers by general ships. There must be, as we submit, a contract to deliver in this country before the mere bringing into an English port will give jurisdiction to the court; but even if the meaning of the words is more extensive, there must be such a carrying into port as shows an intention to deal with the goods there in a way which gives a right of action.

The Bahia, Br. & Lash, 61;

The Ironides, 6 L. T. Rep. N. S. 59; Lash, 456;

1 Mar. Law Cas. O. S. 290;

The Daisy, 9 L. T. Rep. N. S. 236; Br. & Lash,

102; 1 Mar. Law Cas. O. S. 392;

The Kasan, Br. & Lash, 1;

The Petria, ante, vol. 1, p. 71; 24 L. T. Rep. N. S.

849; 1 Rep. 3 Adm. & Ec. 430.

Butt, Q.C. and Cohen, Q.C. (Gainsford Bruce with them) for the respondents.—There can be no doubt that these goods were carried into an English port within the literal meaning of the Act, and the defendants have failed to shew a more restricted meaning, stopping our right of recovery. The mere fact of the port into which this ship came being a port of call only will not deprive the court of jurisdiction, as a breach of contract occurring in or before putting into such a port might give a right of action covered by the Act. In *The Bahia* (Br. & Lash, 61) the ship put into an English port by accident only, and yet it was held that there was jurisdiction. *The Kasan* (*ubi sup.*) and *The Ironides* (*ubi sup.*) at most show that there must be a carrying into an English port from a foreign port by the ship proceeded against. There is no greater inconvenience in arresting a ship in the middle of her voyage in such a case as this, than in arresting a general ship at a port of call in a case where there is undoubted jurisdiction; the same argument would apply to all cases of collision, salvage, &c. The inconvenience does not counterbalance the advantages given by the Act to British owners of cargo. If the defendant's contention is right, the master might, after leaving Falmouth, have transhipped his cargo, and returned to this country

Priv. Co.]

THE PIEVE SUPERIORE.

[Priv. Co.]

without proceeding to Bremen, and yet the Admiralty Court would have no jurisdiction. The case has in effect been decided.

The Teutonia, ante, vol. 1, p. 214; 24 L. T. Rep. N. S. 531; 36 L. T. Rep. N. S. 49; L. Rep. 3 Adm. & Ecc. 304; L. Rep. 4 P. C. 171.
The Padria, ante, vol. 1, p. 71; 24 L. T. Rep. N. S. 849; L. Rep. 3 Adm. & Ecc. 436.
The Heinrich, ante, vol. 1, p. 79; 24 L. T. Rep. N. S. 915; L. Rep. 3 Adm. & Ecc. 424.
The Wilheim Schmidt, ante, vol. 1, p. 82; 25 L. T. Rep. N. S. 82.

Milward, Q.C., in reply.

The arguments will be found more fully reported in the report of the case in the court below, where they were substantially the same as on appeal.

May 12, 1874.—The judgment of the court was delivered by Sir MONTAGUE E. SMITH.—This is an appeal from an order of the Judge of the High Court of Admiralty, rejecting a petition on protest to the jurisdiction of the court, in a cause *in rem* instituted against the ship *Pieve Superiore*, for damage to cargo under the 6th section of The Admiralty Court Act 1861.

The facts alleged in the petition on protest are: that the appellant, the owner of the ship, lived in Genoa; and that, on the 30th March 1872, a charter-party was made in London between him and Mr. Schiller, on behalf of the house of Borradaile, Schiller and Co., merchants of Calcutta, by which it was agreed the ship should proceed to one of certain named ports in India, and there load a cargo of rice in bags, for which the master was to deliver bills of lading. The ship accordingly went to Rangoon, and was there loaded by Messrs. Gladstone, Wylie, and Co., with a cargo of rice; and in pursuance of the charter, the master signed bills of lading, describing the ship to be "bound for Belle Isle, Scilly, Queenstown, or Falmouth, for orders to discharge at a port in the United Kingdom, or on the continent between Havre and Hamburg," and making the cargo deliverable to order, or assigns, on payment of freight at the rate of 3*l.* 15*s.* sterling per ton. It is further alleged that the ship went into the port of Falmouth, with her cargo, for orders; and whilst lying in that port, the master received orders to go to Bremen to discharge; that she went there and discharged her cargo, and afterwards sailed to Cardiff on a new voyage, and was arrested in that port in the present suit.

The concluding paragraphs of the petition are the following: "The plaintiffs allege themselves to be assignees, for valuable consideration, of the said bill of lading; and allege that the said cargo of rice suffered damage in the said vessel; and they have instituted this suit as such assignees for the recovery of losses which they allege themselves to have sustained by negligence or misconduct, or by breach of duty, or breach of contract, on the part of the master or crew of the said vessel. Save as aforesaid, the said cargo of rice was never brought into any port in England or Wales. The defendants submit that the said cargo of rice was not carried into any port in England or Wales within the true intent and meaning of the 6th section of the Admiralty Court Act, 1861; and that by reason thereof this honourable court has not jurisdiction to entertain this suit."

The petition on protest being filed before the plaintiff's petition setting forth the particulars of his damage, ought to state the facts which

show want of jurisdiction. But this petitionⁿ does not allege whether the misconduct or breachⁿ of contract complained of arose before or after the ship left the port of Falmouth. It is consistent with it that the causes of complaint or some of them, arose before she left that port, and their Lordships think it must be assumed that this may have been so in dealing with the question raised by the protest. The only objection taken to the jurisdiction is "that the said cargo of rice was not carried into any port in England or Wales within the true intent and meaning of the 6th section of 'The Admiralty Court Act 1861.'"

The section is as follows: "The High Court of Admiralty shall have jurisdiction over any claim by the owner or consignee, assignee, or of any bill of lading of any goods carried into any port in England or Wales in any ship, for damage done to the goods, or any part thereof, by the negligence or misconduct of, or for any breach of duty or breach of contract on the part of the owner, master, or crew of the ship, unless it is shown to the satisfaction of the Court, that at the time of the institution of the cause, any owner or part owner of the ship is domiciled in England or Wales."

Their Lordships are satisfied that this enactment does not confer a maritime lien, for the reasons given in the judgment of this committee upon the effect of the previous clause of the Act (the 5th) in the case of the *Two Ellens* (ante, vol. 1, pp. 40, 208; 24 L. T. Rep. N. S. 592; L. Rep. 4 P. C. 169). The clause in question does no more than give to the Court of Admiralty jurisdiction to entertain suits in cases that can be brought within its scope, and which, it is to be observed, may be instituted *in personam* as well as *in rem*.

The clause is undoubtedly framed in large and general terms, and Dr. Lushington, a judge of high authority, in a judgment delivered soon after the passing of the Act, thought it was intentionally so framed: (*The Bahia*, Br. & Lush, 61.)

It was insisted for the appellant, and not denied by the respondent's counsel, that the words "carried into any port" must receive some limitation, otherwise, it was said, if a ship with cargo on board, being under no obligation to enter an English port, was driven to take refuge in such a port by stress of weather or other accident, the jurisdiction would be founded. The learned counsel for the appellant, however, felt great difficulty in defining what the limitation should be, but ultimately contended that to bring a claim within the clause, the goods must be carried into a port in England or Wales, for the purpose of delivery, or in which, from circumstances, they become deliverable. The latter branch was introduced with reference to some decisions which had upheld the jurisdiction, notwithstanding that the entry into an English port was not contemplated by the contract. But supposing the suggested definition to be correct so far as it goes, their Lordships are not prepared to hold that it contains an exhaustive interpretation of the clause.

Cases must frequently arise at ports of call and intermediate ports, giving occasion for the remedy it was intended to afford to English merchants against foreign shipowners, by proceedings in the English Court of Admiralty. Besides the instances where causes of action have arisen before the arrival of the ship at such ports, take the cases of damage done to goods, or of un-

[PRIV. CO.]

THE PIQUE SUPREMOE.

[PRIV. CO.]

justifiable delay, in the port of call itself; or the case of a ship bound, without calling for orders, to go direct to London to discharge her cargo, and the master improperly putting into some other English port, and refusing to take the cargo on. Instances of this kind would certainly be within the scope of the mischief intended to be dealt with; and their Lordships are reluctant in construing the Act so to interpret words, large enough in their ordinary meaning to embrace such cases, as to exclude them from its operation, and thus leave foreign masters who may have broken their contracts free to take away their ships from this country in the sight of English consignees, who would be powerless, as they were before the Act, to stop them.

The Legislature has used the words "carried into any port in England or Wales," and may have done so designedly to meet cases of the kind to which reference has just been made. It has said nothing of delivery, nor of the purpose for which the goods may be carried into port. The general words of the clause "any claim . . . for any breach of contract on the part of the owner, &c., of the ship" must undoubtedly be construed to have relation to the contract in the bill of lading; and it may have been the intention of the Legislature to give the jurisdiction only in the case of claims arising on contracts to carry the cargo to some port in England or Wales. It is not, however, necessary to consider whether the operation of the Act ought to be limited to this extent, for if it were there would not be an abatement of jurisdiction in the present suit. In this case the parties contemplated that the goods would, or at least might, be carried into and delivered in an English port, and the bill of lading signed by the master at Rangoon in pursuance of a charter-party made in London, so provided. The master in fact put into the port of Falmouth for orders in part fulfilment of the contract of carriage, and might, in further fulfilment of it, have been ordered to discharge there, or at some other English port. Their Lordships think that under these circumstances the jurisdiction, at least in respect of then existing causes of suit, arose when the goods were so carried into the port of Falmouth, and was not taken away when the ship was subsequently ordered to a foreign port to be discharged.

If the jurisdiction of the Court of Admiralty over the claim once attached, that court, in their Lordships' opinion, would be competent at any subsequent time to entertain a suit either *in personam*, or *in rem* by arrest of the ship whenever it came within reach of its process. They therefore think, assuming the jurisdiction to have once attached, that it was competent to arrest the ship in this suit on her arrival upon a new voyage at Cardiff. The arrest, however, there being no maritime lien, could not avail against any valid charges on the ship, nor against a *bona fide* purchaser; for, as already stated, the object of the statute is only to found a jurisdiction against the owner, who is liable for the damage, and to give the security of the ship, the *res*, from the time of the arrest. This is clearly explained by Dr. Lushington in *The Alexander* (1 W. Rob. 258-294), and *The Pacific* (Br. & Lush. 243), and by this committee in *The Two Elms* (*ubi sup.*)

The statute being remedial of a grievance, by amplifying the jurisdiction of the English Court

of Admiralty, ought, according to the general rule applicable to such statutes, to be construed liberally, so as to afford the utmost relief which the fair meaning of its language will allow. And the decisions upon it have hitherto proceeded upon this principle of interpretation.

One of the earliest decisions (*The Bahia, ubi ante*), gives the widest interpretation to the word "carried." In that case the cargo was consigned to Dunkirk. The ship, in consequence of an accident, put into the port of Ramsgate, and the master refused to carry on the cargo to Dunkirk, or to give delivery at Ramsgate. It was there contended by the defendant's counsel, but without success, that the words "carried into any port in England," meant so carried under a contract to that effect. In upholding the jurisdiction of the English Court of Admiralty, Dr. Lushington, after stating the facts, said "That this is a great grievance cannot be denied, and the court ought to give, if necessary, great latitude to the construction of the Act of Parliament, in order to extend the remedy to this case. However, it appears to me that the section was carefully worded to give the utmost jurisdiction in the matter. It uses the words 'carried into any port in England or Wales,' and does not use the words 'imported.' I apprehended the phrase 'carried into' was advisedly used instead of the word 'import.' " It does not appear that this decision was appealed from.

The present Judge of the Court of Admiralty, Sir R. Phillimore, adopted the view of Dr. Lushington in deciding the case of *The Patria* (L. Rep. 3 A. & E. 459). There, a German ship bound under a bill of lading to take a cargo of coffee to Hamburg, put into Falmouth shortly after the commencement of the French and German war—Hamburg was then blockaded. On the removal of the blockade the master refused to go on to Hamburg, or to deliver the cargo at Falmouth, and Sir R. Phillimore sustained the jurisdiction of the court over claims arising on these breaches of contract; and again there was no appeal.

There was recently another important cause in the Court of Admiralty, also arising out of the war between Germany and France, which came before this tribunal on appeal (*The Teutonia, ante*, vol. 1, p. 214; 24 L. T. Rep. N. 8. 521; L. Rep. 4 P. C. 172). In that case the *Teutonia*, a German vessel, called at Falmouth, one of the ports of call under the bill of lading, for orders, and was ordered to Dunkirk to discharge. On nearing the French port she found that war was imminent, and put back to Dover. She was again directed to go to Dunkirk, but the master refused to go there, or to deliver the cargo at Dover without payment of freight. For this refusal a suit was brought against the ship in the English Court of Admiralty under the clause in question. It failed on the merits, but the previous decisions were apparently unnoticed in, for no objection was taken to the jurisdiction.

In the case of *The Bahia* and *The Patria* (*ubi sup.*), the arrival at an English port was not contemplated by the contract, and the ships put into our ports by reason only of circumstances extrinsic to it; nor did they then enter them for the purposes of discharging their cargoes, which only in any sense became deliverable there by reason of the subsequent refusal of the master

Q. B.]

DUDGON v. PENBROKE.

[Q. B.]

to take them on to the port of destination. Their Lordships, in pointing out the distinction between these cases and the present, must not be understood to question their authority. They are fully sensible of the difficulty of construing this loosely drawn clause, and giving a satisfactory interpretation of it. It is sufficient for them to decide that under the circumstances of this case, to which they have above adverted, the objection taken in *Hesine* to the jurisdiction is not, upon the facts disclosed in the protest, sustained.

For these reasons their Lordships think the order of the Judge of the High Court of Admiralty is right, and they will humbly advise Her Majesty to affirm it, and to dismiss this appeal with costs.

Appeal dismissed.

Solicitor for the appellant, *Thomas Cooper*.

Solicitors for the respondents, *Pritchard and Sons*.

COURT OF QUEEN'S BENCH.

Reported by J. SWEET and M. W. McKELLAR, Esqrs.,
Barristers-at-Law.

May 28, and 29, June 2, and July 6, 1874.

DUDGON v. PENBROKE.

Marine insurance—Time policy—Unseaworthiness—Illegal voyage.

When a jury have found that a vessel was not unseaworthy to the knowledge of the owners, they can recover on a time policy, even though the unseaworthiness as a fact materially contributed to the loss.

Where a ship, not licensed by the Board of Trade to carry passengers, does carry them, if such carriage is the act of the master alone without the knowledge of the owners and contrary to their intentions, the policy is not vitiated by the illegal carriage of passengers.

Wilson v. Rankin (2 Mar. Law Cas. O. S. 161, 287; L. Rep. 1 Q. B. 162; 12 L. T. Rep. N. S. 20), approved.

DECLARATION against underwriter on a time policy for twelve months, from the 24th Jan. 1872, on a steamship called *The Francis*, on ship valued at 8000*l.*, machinery at 4000*l.*, claiming a total loss.

Pleas, First, denial of making and subscribing the policy; secondly, denial of plaintiff's interest; thirdly, that ship, &c., was not lost by the perils insured against or any of them; fourthly, that defendant was induced to become an insurer to the plaintiffs, and to subscribe the said policy as alleged by misrepresentation made by the plaintiffs and their agents in that behalf to the defendant of facts then material to the risks of the said policy and material to be known to the defendant; fifthly, that before and at the time of the making of the alleged insurance, the plaintiffs and their agents wrongfully and improperly concealed from the defendant certain facts and information which they before then knew and had received, and of which the defendant then was ignorant, which said matters so concealed as aforesaid, were at the time of the making of the said insurance material to the risks of the said insurance and material to be known to the defendant; sixthly, that after the making of the said policy of insurance, the plaintiffs well knowing that the said ship was wholly unseaworthy, wrongfully, and improperly, and without any justifiable cause or reason caused, and ordered her to proceed from the port of London,

in such wholly unseaworthy condition as aforesaid, on the voyage on which she was afterwards lost, and the said ship remained as the plaintiffs always well knew, in such wholly unseaworthy condition from the time she left the said port as aforesaid, until she was lost as aforesaid, and the said ship, machinery, and premises were lost as alleged by reason of such unseaworthiness of the said ship, and not otherwise; seventhly, that the said ship was before and at the time of the making of the said policy, and up to the time of the alleged loss a passenger steamer, within the 318th section of the Merchant Shipping Act 1854, and after the making of the said policy of insurance, and before the alleged loss, the said ship was sent by the plaintiffs, being the owners of the said ship, with passengers on board on a certain voyage, and proceeded to sea on such voyage, being the voyage on which the said ship, machinery, and premises were lost as alleged, without the owners of the said ship having transmitted to the Board of Trade the declarations required in that behalf by the provisions of the said statute, and without the owners or master of the said ship having received from such board such a certificate as is provided for by the provisions of the said statute in that behalf; and the plaintiffs, as the owners of the said ship, had not nor had the master if the said ship ever received any such certificate as aforesaid, before the time of the alleged loss, up to which said time the said passengers had from the commencement of the said voyage remained and continued on board the said ship, all which several premises the plaintiffs always well knew, and by reason of the said premises the said voyage became and was illegal, and that the plaintiffs caused the said policy to be made for the express purpose of covering the said ship, machinery, and premises, and indemnifying themselves against the loss thereof on the said illegal voyage; eighthly, never indebted.

Issue on all the pleas.

Demurrer to the sixth and seventh pleas, and joinder in demurrer.

The case was tried at Guildhall, before Blackburn, J., and a special jury. The material facts proved at the trial are stated in the judgment *infra*. Certain questions were put by the learned judge to the jury, which questions with the answers of the jury thereto are also fully set forth *infra*. On the findings of the jury the learned judge directed the verdict to be entered for the plaintiffs on the third and sixth pleas. A rule nisi for a new trial was subsequently obtained, which now came on for argument along with the demurrer.

Mitford, Q.C., Watkin Williams, Q.C., and A. L. Smith showed cause against the rule, and argued in support of the demurrer.—They contended that the findings of the jury justified the entry of the verdict for the plaintiffs. Whatever was meant by the representation that the vessel had been thoroughly repaired, the question was left to the jury, who pronounced upon it. The policy was a time policy, and in the case of such a policy there is no implied condition as to seaworthiness: (*Gibson v. Small*, 4 H. L. Cas. 353.) In *Russell v. Thornton* (4 H. & N. 778; in error 6 H. & N. 140) the time policy was held void, because the assured's agent concealed the material fact that the vessel had been aground, had received some heavy blows, and had made her way in a sinking state to the port of Carthage, where she

Q. B.]

DUDGEON v. PEMBROKE.

[Q. B.]

than was. The principle that the *causa proxima*, not the *causa remota*, is to be regarded applies here, the proximate and immediate cause of the loss being the stranding of the vessel: it would be different if the loss were proximately occasioned by the absolute inherent defect of the vessel, viz., if through such absolute inherent defect a vessel goes down at her moorings, it could not be said that she was lost by perils of the sea. [COCKBURN, C.J.—But the stranding of a vessel may be by reason of her inherent unseaworthiness.] In *Ionides v. The Universal Marine Insurance Company* (1 Mar. Law Cas. O. S. 353; 14 C. B., N. S., 259) the policy on 6500 bags of coffee on board a ship belonging to the Federal States of America contained the following warranty:—"Warranted free from capture, seizure, and detention, and all the consequences thereof, or of any attempt therat, and free from all consequences of hostilities, &c." The vessel, owing to the extinguishment by the Confederate troops of a light usually burning there, ran ashore on Cape Hatteras without any possibility of getting off again, and the officers of the Confederate States took and retained the captain and the rest of the crew on shore as prisoners. The wreck took place on the 17th July; on the 18th the weather was rough, and nothing could be done, but on the 19th certain persons, appointed by the Federal Government for the purpose, came down and got 150 bags of coffee on shore apparently undamaged, and it was proved that they might have got on shore 1000 more had not for the interference of the Confederate troops. The weather becoming again boisterous the ship broke up and all the cargo on board was lost. It was held that under these circumstances the insurers were liable as for a partial loss in respect of the coffee which remained on board incapable of being saved, the proximate cause of the loss being a peril of the sea and not the hostile act of the Confederate troops in extinguishing the light. The principle of this decision is applicable here. So is the *ratio decidendi* of *Lovie v. Janson* (12 East, 648). There an American ship insured from New York to London, "warranted free from American condemnation," for the purpose of evading her national embargo, slipped away in the night, was, by force of the ice, wind, and tide, driven on shore, where she sustained only partial damage, but was seized the next day, and afterwards with great difficulty and expense got off, and finally condemned by the American Government for breach of the embargo; and it was held that as there was ultimately a total loss by a peril excepted out of the policy, the assured could neither recover for a total loss nor for any previous partial loss arising from the stranding, &c., which in the event became wholly immaterial to the assured. Lord Ellenborough said: "The object of a policy is indemnity to the assured, and he can have no claim to indemnity where there is ultimately no damage to him from any peril insured against. If the property, whether damaged or undamaged, would have been equally taken away from him, and the whole loss would have fallen upon him, had the property been ever so entire, how can he be said to have been injured by its having been antecedently damaged? To put one instance to the same effect: supposing ship and cargo to be damaged in the early part of a voyage by the ordinary sea perils, and afterwards wholly destroyed

by fire before the voyage is finished; of what consequence to the owner is the damage which may have occurred from one or several successive causes of injury before the fire? and if the property, whether undamaged or not, would have been equally annihilated, is not its previous deterioration rendered wholly immaterial?" This was the ground on which the court in that case gave judgment for the defendant, as subsequently stated by Lord Ellenborough, namely that "the immediately operating cause of the total loss was one from which and its consequences the defendant was by express provision in the policy exempted." In *Dixon v. Sadler* (4 M. & W. 405), to a declaration on a time policy, stating a loss by perils of the sea, the defendant pleaded that though the vessel was lost by perils of the sea, yet that such loss was occasioned wholly by the wrongful, negligent, and improper conduct (the same not being barratrous) of the masters and mariners of the ship, who wilfully, wrongfully, negligently, and improperly (but not barratrously) throwing overboard so much of the ballast that the vessel became unseaworthy, and was lost by perils of the sea, which otherwise she would have encountered and overcome. The jury at the trial having found a verdict for the defendant, the underwriter in this issue, it was held on motion for judgment *non obstante veredicto*, that the plea was bad, and that the underwriters were liable for the consequences of the wilful, but not barratrous, act of the master and crew, in rendering the vessel unseaworthy before the end of the voyage, by throwing overboard a part of the ballast. Parke, B., in delivering the judgment of the court, said: "The question depends altogether upon the nature of the implied warranty as to seaworthiness, or mode of navigation, between the assured and the underwriter in a time policy. In the case of an insurance for a certain voyage, it is clearly established that there is an implied warranty that the vessel shall be seaworthy, by which it is meant that she shall be in a fit state as to repairs, equipment, and crew, and in all other respects, to encounter the ordinary perils of the voyage insured, at the time of sailing upon it. If the assurance attaches before the voyage commences, it is enough that the state of the ship be commensurate to the then risk; and, if the voyage be such as to require a different complement of men, or state of equipment, in different parts of it, as if it were a voyage down a canal or river, and thence across the open sea, it would be enough if the vessel were, at the commencement of each stage of the navigation, properly manned and equipped for it. But the assured makes no warranty to the underwriters that the vessel shall continue seaworthy, or that the master or crew shall do their duty during the voyage; and their negligence or misconduct is no defence to an action on the policy, where the loss has been immediately occasioned by the perils insured against." Next, as to the seventh plea, alleging the illegality of the voyage on the ground that passengers were carried without the requisite certificate from the Board of Trade in accordance with the provisions of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104, ss. 303-318). Sect. 318 of the Act provides that "It shall not be lawful for any passenger steamer to proceed to sea, or upon any voyage or excursion with any passengers on board unless the owner thereof has transmitted

Q. B.]

DUDGEON v. PEMBROKE.

[Q. B.]

to the Board of Trade the declarations hereinbefore required, nor unless the owner or master thereof has received from such Board such a certificate as hereinbefore provided for, such certificate being a certificate applicable to the voyage or excursion on which such ship is about to proceed," &c. And sect. 319 enacts that "If the owner or master, or person in charge of any passenger steamer, receives on board thereof, or on or in any part thereof, or if such ship has on board thereof, or on or in any part thereof, any number of passengers which, having regard to the time, occasion, and circumstances of the case, is greater than the number of passengers allowed by the certificate, the owner or master shall incur a penalty not exceeding 20*l.*, and also an additional penalty not exceeding 5*s.* for every passenger over and above the number allowed by the certificate, or, if the fare of any of the passengers on board exceeds 5*s.*, not exceeding double the amount of the fares of all the passengers who are over and above the number so allowed as aforesaid, such fares to be estimated at the highest rate of fare payable by any passenger on board." In *Redmond v. Smith* (7 M. & G. 457), the court, in an action on a policy of insurance, held had on general demurrer a plea alleging that there was not any agreement signed by the master and seamen, or any of them, specifying what wages each seaman was to be paid, the capacity in which he was to act, or the nature of the voyage in which the ship was to be employed, as required by 5 & 6 Will. 4, c. 19, s. 2. Tindal, C. J., said (p. 474): "a policy on an illegal voyage cannot be enforced; for it would be singular if the original contract being invalid, and therefore incapable to be enforced, a collateral contract founded upon it could be enforced. It may be laid down, therefore, as a general rule, that where a voyage is illegal, an insurance upon such voyage is invalid. This has been decided in many cases. But it appears to me that the 5 & 6 Will. 4, c. 19, was passed for a collateral purpose only; its intention being to give merchant seamen a readier mode of enforcing their contracts, and to prevent their being imposed upon. The present case is undoubtedly brought within the provisions of the 1st section of this statute by the allegations contained in the sixth plea. The 4th section enacts that if the master does not comply with the previous requisitions, he shall be liable to a penalty; but it is nowhere said that such non-compliance shall make the voyage illegal," &c., reasoning which is strictly applicable to the circumstances of the present case, where a penalty is also imposed on the master for non-compliance. See also *Swett v. The Royal Exchange Assurance Company*: (4 Taunt. 856.) It is submitted further that the captain, not having authority to take passengers on board, was not the agent of the owner for that purpose, and that his act cannot bind the owner or affect the policy. In *Wilson v. Rankin* (2 Mar. Law Cas. O. S. 161, 287; L. Rep. 1 Q. B. 162; 12 L. T. Rep. N. S. 20), the master without the knowledge or privity of the owner stowed a portion of the cargo on deck, and sailed without any certificate from a clearing officer that the whole cargo was below deck, contrary to 16 & 17 Vict. c. 107, ss. 170, 171, and 172. This court held that although the master had general authority from his owner to stow the cargo, no authority could be implied to load it so as to violate the statute, neither was

it an act of the master which the owner must be presumed to have assented to; that the fact of the ship having sailed without the certificate did not render her unseaworthy at the commencement of her voyage so as to prevent the policy attaching, and consequently that the plaintiff, the shipowner, was not precluded from recovering on his policy against the underwriter. *Farmer v. Legg* (7 T. R. 186.) was also referred to. In *Cunard v. Hyde* (El. Bl. & El. 670) it was held that where a master sails without the certificate required by the Customs Consolidation Act 1853 (16 & 17 Vict. c. 107) or loads in the mode prohibited by that Act, an insurance on the cargo is not thereby vitiated, unless the insured be, at the time of effecting the insurance, privy to the act of the master. Lord Campbell, C. J., said: "It is quite clear that the insured cannot be liable to lose the benefit of the insurance on account of the misconduct of the master, unless they were privy to and cognisant of such misconduct at the time when the insurance was effected. This I should have said, even if the statute had contained a positive prohibition, instead of merely imposing a penalty. The object of the enactment was to protect human life and property in the case of goods shipped at the time of the year mentioned in the clauses. It would be monstrous injustice to say that the owners of the goods are to lose their insurance wherever the master violates these regulations; such was not the object of the Legislature. If anything illegal were contemplated by the owners it would be another question; without that, we cannot hold the contract of insurance void." Finally, it is submitted that the weight of the evidence was in favour of the vessel being seaworthy.

Bull, Q.C., Sir J. B. Karslake, Q.C., and Cohen, Q.C., in support of the rule and of the pleas demurred to. It must be taken to be settled (by *Gibson v. Small*, 16 Q. B. 123; 4 H. Cas. 353, and *Fruess v. Sarsfield*, 6 E. & Bl. 199) that in time policies there is no implied warranty of seaworthiness; and it is not contended here that there was any such implied warranty. Nor can it be said that the ship was lost through her inherent unseaworthiness. Phillips (Marine Insurance vol. 1, par. 1132) says: "The commonplace maxim that in cases of doubt to which of two or more perils a loss is to be assigned, '*Causa proxima non remota spectatur*,' has been not infrequently resorted to, by which was meant, originally at least, that a loss is to be attributed to the peril in activity at the time of the ultimate catastrophe, when the loss is consummated. But much of the jurisprudence is contradictory to the maxim taken in this sense, and it seems to have served rather to divert attention from the proper inquiry, and to becloud instead of elucidating the subject. I understand the result of the jurisprudence to be that in case of the concurrence of different causes, to one of which it is necessary to attribute the loss, it is to be attributed to the efficient predominating peril whether it is or is not in activity at the consummation of the disaster." This amounts to a denial of the proposition that because a vessel goes down in sea water, and nothing but its inherent unseaworthiness is the cause, it is lost by a peril of the sea. The cases usually cited against the view now contended for are *Green v. Elmalié* (Peake's N. P. 212) and *Livie v. Janson* (12 East, 648). In the former case the vessel was driven by stress of weather on an enemy's coast and there captured.

Q. B.]

DUGGON v. PEMROKE.

[Q. B.]

There was then a complete loss by an excepted peril; if not captured the vessel might have been safely got off. In the latter case there was a total loss, also by the capture of the vessel. *Hagedorn v. Whitmore* (1 Stark N. P. 157), where a merchant ship (under a mistake) was taken in tow by a British ship of war, and was thereby exposed to a tempestuous sea, which injured goods on board of her, and which was held a loss from the perils of the sea, Lord Ellenborough, C.J., saying that "the loss might have been alleged to have been occasioned by capture and detention, since it was not occasioned by the act of an individual but by the captain of one of His Majesty's ships," settles nothing as to the point now in dispute. The same may be said of *Dixon v. Sadler* (5 M. & W. 405, confirmed in error 8 M. & W. 895), where the loss was occasioned by the throwing out of ballast. The reasoning of Erie, C.J., in *Louise v. The Universal Marine Insurance Company* (*ubi sup.*) is in favour of our contention: "The maxim '*Causa proxima non remota spectatur*' is peculiarly applicable to insurance law. The loss must be immediately connected with the supposed cause of it. Now the relation of cause and effect is matter which cannot always be actually ascertained; but if in the ordinary course of events a certain result usually follows from a given cause, the immediate relation of the one to the other may be considered to be established. Was the putting out the light at Cape Hatteras so immediately connected with the loss of this ship, as to make the one the consequence of the other? Can it be said that the absence of the light would have been followed by the loss of the ship, if the captain had not been out of his reckoning? It seems to me that these two events are too distantly connected with each other to stand in the relation of cause and effect;" and on this reasoning the decision of the court proceeded. *Hahn v. Corbett* (2 Bing. 205) was a clear case of loss by perils of the sea, the ship being stranded on a shoal within a few miles of the port of destination, was disabled from proceeding, and lost; and then while laying in the sand, was seized by the commander of the place where she was stranded, and the goods confiscated by him. *Montoya v. The London Assurance Company* (6 Exch. 451), *Naylor v. Palmer*, (8 Exch. 739; 10 Exch. 382), and *Bondrell v. Hestigg* (Holt. p. 149), were also referred to. Whenever the loss is directly referable to the act of the assured himself, the underwriter is discharged. In *Bell v. Carstairs* (14 East, 374), where a neutral ship insured here, was captured by a French ship and condemned in the French court as prize, on the ground that the ship was not properly documented, according to the existing treaty between France and the United States, it was held that the neutral assured could not recover their loss against the British underwriter, although there was no warranty or representation that the ship was American; the neglect of the shipowners themselves, who are bound at their peril to provide proper national documents for their ship, being in such a case the efficient cause of the loss. (See *Duer on Insurance*, vol. 2, p. 635.) Lord Ellenborough in that case said, "It is material to look at the alleged ground of condemnation in order to see whether it has been occasioned by any act or neglect on the part of the assured; for if it has been so occasioned it would not be a loss against which the assured

would, upon any principle of reason or justice as applied to this species of contract, be required to indemnify him; the indemnity stipulated on his part being only against the perils described in the policy, as far as they operate upon the policy insured adversely, and not through the medium of any act or neglect on the part of the assured himself providing the loss of the policy insured." It is submitted that sending a vessel to sea in an unseaworthy condition is as much a breach of duty on the part of the assured, as sending her to sea without the proper documents. It is now a misdemeanour to send a ship to sea in such a condition. (See 34 & 35 Vict. c. 110, s. 11.) If the plaintiff had been damaged by his own wrongful act he cannot recover. In *Thompson v. Hopper* (6 El. & Bl. 172) the court held that a good defence is shown by a plea alleging that the plaintiff, knowingly, wilfully, wrongfully, and improperly sent the ship to sea at a time when it was dangerous to go to sea in the state and condition in which she then was, and wrongfully and improperly caused and permitted the ship to be and remain on the high seas near to the sea shore for a great length of time in the state and condition aforesaid, and without a master and without a proper crew to manage and navigate her on her voyage, during which time the ship by reason of the premises was wrecked. "Although," said Lord Campbell (p. 191) "I still deny any warranty of seaworthiness, I think that, if this plea be true in point of fact, the loss must be considered as accruing from the wrongful act of the insured, which can give them no claim to indemnity. . . . Here we have personal misconduct charged upon the plaintiffs, which misconduct produced the loss. By the English law of insurance, the assured are not obliged to keep the ship seaworthy throughout the voyage, or during the period of the risk; and if she is lost by supervening unseaworthiness arising from the negligence of the captain, the underwriters are liable, as if the ship were burnt from his negligence. But it is a maxim of our insurance law, and of the insurance law of all commercial nations, that the assured cannot seek indemnity for a loss produced by their own wrongful act. The plaintiffs' counsel said truly that the perils of the sea must still be considered the proximate cause of the loss; but so it would have been if the ship had been scuttled or sunk by being wilfully run upon a rock. According to the statement in this plea, the plaintiffs efficiently caused the loss by their wrongful act; and if so, I think there was no necessity expressly to characterize that act as being either felonious or fraudulent." On the trial of this case, there was evidence from which the jury might have drawn the conclusion that though the unseaworthiness of the vessel was not the immediate cause of her loss, the loss would not have occurred if the ship had been seaworthy when she went to sea. No question on this was left to the jury; and it was held that the plea was proved if that misconduct of the plaintiff occasioned the loss, though it was not its immediate cause; and a new trial was granted on this ground. Lord Campbell, C. J., said: "In holding upon the demurrer that the third plea was a good bar to the action, we did not proceed on the narrow ground that the unseaworthiness was the direct and proximate cause of the loss. We considered that the plea was framed upon the principle that a man shall not be allowed

Q. B.]

DUDGEON v. PEMBROKE.

[Q. B.]

to avail himself of his own wrong." Further on his Lordship says: "The maxim, '*In jure non remota causa sed proxima spectatur*,' is qualified by our legal maxim, '*Dolus circumstanti non purgatur*;' and *dolus* means any wrongful act tending to the damage of another." Is it to be said, then, that, to exempt the assurers from liability the misconduct of the assured must be the direct and proximate cause of the loss. We think that, for this purpose, the misconduct need not be the *causa causans*, but the assured cannot recover if their misconduct was *causa sine qua non*. In that case they have brought the misfortune upon themselves by their own misconduct, and they ought not to be indemnified. The very object of insurance is to indemnify against fortuitous losses, which may occur to men who conduct themselves with honesty and with ordinary prudence. If the misconduct is the efficient cause of the loss the assurers are not liable. For this doctrine it will be enough to cite the leading case of *Bell v. Cartairs* (*ubi sup.*). It may be taken that the plaintiff cannot recover where the loss is occasioned by his own wrongful act; and it is not laid down anywhere that this wrongful act must have been wilfully or intentionally done by the plaintiff. According to this principle if the inherent unseaworthiness of the ship was the real cause of her loss the owner cannot recover. [BLACKBURN, J.—How can an act be wrongful unless there is an implied obligation to do or not to do some particular thing, which obligation is not performed?] *Gibson v. Small* (*ubi sup.*) and such like cases do not decide that there is no duty on the part of the shipowner to send the vessel to sea in a seaworthy condition, and since those cases were decided, it has been made a statutory misdemeanor not to do so. Apart from this statute, a moral duty existed: there is now a corresponding legal duty. The inherent vice of the goods constituting a cargo is not insured against: why should the inherent vice of the vessel be? [BLACKBURN, J.—Neither side asked me at the trial to leave to the jury the question whether by the negligence of the plaintiffs or their agents, the vessel was sent to sea in an unseaworthy condition. We must take it, however, that in point of fact the vessel was sent to sea in an unseaworthy condition, and that owing to that she was lost.] If the loss was occasioned by neglect of the owner, it is submitted that he cannot recover. In *Bell v. Cartairs* (*ubi supra*), Lord Ellenborough, C. J. said: "It is material to look at the alleged ground of condemnation in order to see whether it has been occasioned by any act or neglect on the part of the assured; for, if it has been so occasioned, it would not be a loss against which the assured would, upon any principle of reason or justice as applied to this species of contract, be required to indemnify him." The third plea, in *Thompson v. Hopper* (*ubi sup.*), which was held to be a bar to the action, is almost identical with the sixth plea here. [BLACKBURN, J.—Though not identical, it is no doubt in substance the same.] And the question of notice is of no importance. Throughout the judgment of the majority of the court in that case no stress is laid on the fact of notice. [BLACKBURN, J.—The judgment went on the ground that the cause of the loss was the personal wrongful act of the plaintiff.] Nothing, however, is said as to knowledge. [BLACKBURN, J.—But is

not that implied in the language of Lord Campbell?] That knowledge is not necessary is decided by *Faucus v. Sarfield* (6 El. & Bl. 199), where it was held that where a vessel is sent to sea in a state not fit for the particular voyage, and without encountering any more than ordinary risk, is obliged, owing to the defective state in which she sailed, to put into a port for repair, the shipowner, though the defects were not known to him, and he has acted without fraud, cannot recover against the insurer the expenses of such repairs as were rendered necessary in consequence of the unseaworthy state of the vessel, though there be no warranty of seaworthiness. If the expense of repairs would not fall on the underwriter, why should the consequences of non-repair fall on him? [BLACKBURN, J.—Does that decision amount to more than this: that the underwriter is not liable for what may be mere wear and tear, and not the less irresponsible for that, because increased by the unsound state of the vessel?] The whole court held good the fourth plea, which was in these terms: "that the said vessel sailed on the said voyage in the declaration mentioned in an unseaworthy and unsound state and condition for the said voyage, and continued in the said state and condition during all the time in this plea mentioned; and that neither at the time when she so sailed, nor at any time before the final loss in the declaration mentioned, was the said vessel staunch and strong, or reasonably fit to withstand and safely encounter or bear the ordinary force and violence of the winds and waves on that voyage; and that she did not from the time of her so sailing on the said voyage up to the time when she so put into the said port, meet with or encounter any storm or tempest, or any more severe weather, &c., than is usual or ordinary on the said voyage, or than a vessel, reasonably sound, strong, and fit for that voyage, could and would have encountered and borne without damage or injury; and that the said leakiness, damage, and injury, by reason of which the said vessel put into the said port for repairs, and the necessity for the said repairs being done, were caused by and arose from the said bad and defective condition of the said vessel, and the exposure of the said vessel in the said condition to the usual and ordinary force and violence of the winds and waves on that voyage." And nothing whatever is said in the judgments in that case about wear and tear. That plea is substantially the same as the sixth plea here; and it is submitted that the judge was wrong in directing the verdict to be entered for the petitioner on that plea. Then as to the seventh plea, alleging the illegality of the voyage, it is submitted that that plea is good, and that the plaintiff cannot recover. It is made a penal offence by the Merchant Shipping Act 1854, to enter on such a voyage as this without the requisite certificate from the Board of Trade. *Farmer v. Legg* (7 T. R. 186) it is submitted, a direct and conclusive authority. There, in an action on a policy of insurance on an African vessel engaged in the slave trade, the principal question was whether the ship had been navigated in the manner prescribed by 31 Geo. 3, c. 54, s. 7, which rendered it necessary that the certificate of the captain's having served, as that Act required, should be attested by the owner or owners of the ship or ships in which the service was performed. Lord Kenyon, at the trial, being of opinion that the certificate did not answer the

[Q. B.]

DUDGEON v. PEMERCOE.

[Q. B.]

requisition of the statute, nonsuited the plaintiff, and the court discharged a rule to set aside the nonsuit.

BLACKBURN, J.—We will take time to consider our judgment upon the more important points of law, and as to the large sums of money at stake. But with reference to the 7th plea, as to the vessel carrying passengers without the necessary certificate from the Board of Trade, we can give judgment at once. [His Lordship read the plea at length.]

Now the second case of *Cunard v. Hyde (ubi sup.)* decided that where the deck cargo was put on board, with the privity of the owner, in order that the Act of Parliament might be defeated, and that the vessel should make an illegal voyage, that was a good defence to the action; in other words that the plea was good. For the same reason I think that the plea here is good. But in the present case the jury have found that these persons were not passengers—a finding as wrong as can be—and also that it was not the intention of the shipowner that the vessel should carry passengers. The question then comes to this, whether the act of the captain, if he chooses to do it, thereby making himself liable to a penalty, in taking passengers on board without the knowledge of the shipowner has the effect of making the voyage illegal so as to vitiate the policy of insurance. I think, on the authority of the first case of *Cunard v. Hyde (ubi sup.)*, that a plea alleging that would not be a good plea. On this plea, therefore, our judgment must be for the defendant on the demurrer. But so far as the verdict affects that plea, our judgment must be for the plaintiffs.

QUAIN, J.—I am of the same opinion.

As soon as we see from the Act of Parliament that its object was to prohibit a voyage, the illegality attaching to the prohibited voyage attaches also to the policy covering it. The law on the subject is summed up in Duer (Lect. iii. sect. 50) thus: "It is not in all cases that the breach of a statutory provision by the owners or master of a vessel, even when it induces a forfeiture, by a necessary consequence avoids the insurance. Its influence upon the contract depends on the nature, consequences, and design of the prohibition. We have seen that an illegal traffic is never permitted to vitiate the contract, unless it occur in the course of the voyage insured, or of an entire voyage of which that insured is a component part. By parity of reasoning, the statutory provision, the breach of which discharges the insurers, must bear a direct and immediate relation to the voyage insured. It must operate, either by its terms, or by a necessary inference, as a prohibition of the voyage, where no such connection subsists between the actual voyage and the provisions of the statute; where, consequently, the relation between the illegal act and the policy is not direct, but remote and incidental, so that neither the design or tendency of the latter is to aid or promote the commission of the former, the validity of the contract is not impaired or affected. In each of the cases that have been cited the statutory provision alleged to be violated, bore a direct relation to the voyage insured. It was, in effect, a prohibition of the voyage unless performed with the crew or master that the law required. Hence the insurance shared, of necessity, the illegality of the voyage to which it referred. But it is obvious

that the acts inducing a forfeiture or other penalties, may be wholly unconnected with the particular voyage. They may not expressly or impliedly render the voyage illegal; and, in such cases, although the insurers are certainly not liable, in the event of the seizure of the vessel, they continue liable for all risks that their contract properly embraces."

Now the words of the Act of Parliament in the present case are: "It shall not be lawful for any passenger steamer to proceed to sea, or upon any voyage or excursion with any passengers on board, unless the owner thereof has transmitted to the Board of Trade," &c.; and "If the owner or master, or other person in charge of any passenger steamer, receives on board thereof, &c., the owner or master shall incur a penalty," &c. What is alleged in the plea was therefore directly in the teeth of the Act of Parliament; and I think, therefore, that the defendant is entitled to judgment upon the demurrer to this plea. But I entirely agree with my brother Blackburn that the plea was not proved, and that there was no evidence in support of this part of it, viz., "All which several premises the plaintiffs always well knew." The plaintiffs knew nothing at all about it, and the captain of the vessel had no authority whatever to take these persons on board, and to bind his master by such an act. I think that the verdict should be entered for the plaintiffs.

Judgment for defendant on the demurrer as to the rest.

Cour. ad. vult.

July 6. — The judgment of the court (Blackburn and Quain, JJ.) was now delivered as follows by BLACKBURN, J.—This was an action against an underwriter on a time policy for twelve months from the 24th Jan. 1872 on the *Frances* steamer, on ship valued at 8000*l.*, machinery at 4000*l.*, claiming a total loss. The material pleas were the 3rd, that the ship was not lost by the perils insured against; 4th, misrepresentation; 5th, concealment; 6th, that after the making of the policy, the plaintiffs well knowing that the ship was unseaworthy, wrongfully, and without any justifiable cause, set her to sea from the port of London on the voyage on which she was lost; and the ship remained, as the plaintiffs always well knew, in such unseaworthy condition from the time she left the port aforesaid until she was lost, and the ship was lost by reason of such unseaworthiness and not otherwise. There was a seventh plea of an alleged illegality, the questions on which we disposed of at the time this rule was argued, and which need not further be noticed. Issue was taken on all the pleas. The trial came on before me and a special jury at the Guildhall, where a very great deal of evidence was produced on both sides, the trial occupying seven days.

The outline of the case, as far as is necessary to make the points of law intelligible, was as follows:—The ship at the time of the insurance called the *Frances* was an iron steam ship. She was originally built at Amsterdam in 1858, and launched in 1859, for Spanish owners. She was not classed in this country, but there was evidence from which the jury might fairly conclude she was then properly built of good iron. There was no direct evidence as to how the Spanish owners employed her. The defendants gave evidence that in 1868 the ship which was then called the *Paris* was lying at anchor in the harbour at Cadiz, and lay

Q. B.]

DUDGEON v. PEMROKE.

[Q. B.]

unemployed there for about eighteen months. In Sept. 1871, the *Paris* was lying at Birkenhead afloat, and offered for sale. Two witnesses were called by the defendants, who inspected her with a view of purchasing her. Neither made a regular survey, but both came to the conclusion that she was very dirty and had been much neglected, and was probably corroded, and they did not purchase. In that month of Sept. 1871, the plaintiffs, who are iron shipbuilders at Millwall, contracted with the Spanish owners to build them a new ship and to take the *Paris*, then lying at Birkenhead, in part payment, at about 4000*l*. She was then brought round to Millwall from Birkenhead with her original boilers on board. They were not fit for use, and she was consequently towed round. The senior member of the plaintiffs' firm gave evidence that the original boilers being still on board, led him to conclude that she could not have been much used, and that led him to think well of her. The boilers were taken out, and the vessel was offered for sale to the agent of a firm at Hull, who after examining her afloat, but not making a regular survey, advised his principals not to buy her. He was called as one of the witnesses for the defendants. Messrs. Dudgeon were owners of two steamers running between London and Gottenburgh for goods and also carrying passengers. They were called the *Mary*, and the *Louisa* and *Fanny*. One of them, the *Louisa* and *Fanny*, met with a collision, and Messrs. Dudgeon resolved to repair the *Paris* and run her on this line, and to change her name to the *Frances*, in compliment to the daughter of one of the partners. She was put in the dry dock and scraped perfectly clean. Messrs. Dudgeon, who were called as witnesses on their own behalf, swore distinctly that they believed her to be quite capable of being made fit for the service; that orders were given to Mr. Harrington, a marine surveyor and engineer, to see that she was properly repaired; and that their people at Millwall were instructed to execute whatever repairs were required, and that there was no stint whatever as to the amount of the repairs, and that they fully and still believed she was made seaworthy. Mr. Harrington confirmed this; and gave positive testimony that everything was done that was required, and that in his opinion she was made a thoroughly good strong ship. The old boilers being taken out, the boiler space was all open to view, but the ceiling was only partly removed, and the cement was not removed at all, so that the whole of the inside was not visible. There was contradictory evidence amongst the skilled witnesses as to whether the removal of the ceiling and the cement was necessary or not. Mr. Harrington swore positively that it was not at all required. There was strong evidence on the part of the plaintiffs' shipwrights and the dock people that everything was done that was requisite. It was difficult to dissect the accounts so as to say how much was due to the putting in of new boilers and how much to the repairs of the hull, the work being done by the plaintiffs' own workmen. It was difficult to ascertain the money value of what was done, but there was evidence that a great deal had been done and much expense incurred. It appeared, however, clearly as a fact that the screw tunnel was left untouched and was in a decayed state. The surveyor of the Board of Trade surveyed the outside of the hull, but, owing

it was said to want of time, she was not surveyed inside, and consequently did not obtain a passengers' certificate, and ultimately sailed for Gottenburgh on the 3rd Feb. 1872 without one. In the mean time the *Frances* had been insured. There was a little, but very little discrepancy between the witnesses as to what was said at the time of making the insurance. The clerk to the broker said that the burthen of what he said to the defendants' representative was that the *Frances* was a steamer which Dudgeon had taken in exchange; that he had thoroughly repaired her—was going to put her into his Gottenburgh trade similar to the *Louisa* and *Fanny* and the *Mary*. On cross-examination he stated that he did say she was "thoroughly repaired," but did not, he thought, say "practically rebuilt," and that if he said she was "new," he must have said it in the sense "new to that trade." The underwriters' representative said that several ships were laid before him for time policies on steamships, that he wrote without remark those which he had previously known, and amongst others the *Louisa* and *Fanny*, which he knew as a first-class steamer engaged in the Gottenburgh trade, but that he did not know whether those steamers carried passengers or not. When he came to the *Frances* he asked what she was, and as nearly as he could recollect the answer was, "She is a new Gottenburgh steamer like the *Louisa* and *Fanny*. I do not mean to say she is a new vessel. She is an old boat bought by Dudgeon, who has spent a lot of money on her, and she has been thoroughly repaired and virtually rebuilt." On the 3rd Feb. 1872, as already stated, the *Frances* sailed for Gottenburgh with some machinery on deck, but no other cargo, so that she was somewhat crank. As soon as she got out to sea she began to make water. There was no weather to justify this; and though there was some discrepancy between the witnesses as to the quantity of water she made, it was certainly more than could be accounted for by any weather she met. She arrived safe at Gottenburgh. When she got into smooth water she ceased to leak, and though she was examined, the cause of the making water could not be discovered. She took on board a cargo of oats and iron, and a deck cargo of wood, and sailed on the 11th Feb. at 7 a.m. for London. All went well till the morning of the 12th Feb. when she had got out of Vigo Sound into the open sea, then it began to blow. There was contradictory evidence as to the weather; but the evidence most favourable for the defendant admitted that it blew, that there was a heavy rolling sea, and that it was necessary to put a sail over the stoke-hole to prevent the sea from getting in. The evidence most favourable for the plaintiffs made the wind a gale, but not such as would make a good ship behave as the *Frances* did. All agreed that she began to labour and to make water so that the fires were put out. Part of the deck cargo was thrown overboard and the fires relighted with the rest. After twelve hours of pumping the pumps got choked with the oats. There was evidence that if the screw tunnel had been in proper order this would not have happened. All hands were engaged in baling to save the ship. On the night of the 14th Feb., having ascertained whereabouts they were by the Spinn Light, they endeavoured to get to Hull. The ship being waterlogged did not readily answer her helm. Partly

Q. B.]

DUDGEON v. PEMROKE.

[Q. B.]

from this and partly from the thickness of the weather the ship went ashore on the morning of the 15th Feb., about 5 a.m., having been in this state of distress since the morning of the 12th Feb. One of the boats was swamped, hot the crew were all saved by a fishing smack. Part of the cargo was afterwards saved, but the vessel could not be got off, and broke in two, and finally, after some months, went completely to pieces. There was very contradictory evidence from surveyors who had seen the wreck as to the state and condition of the plates, &c.

When the evidence was completed I stated to the counsel that I proposed to ask the jury on the merits seven questions, which I reduced to writing. These were, first, was the representation made by the broker at the time of the making of the insurance as to the condition of the vessel, and as to the extent of examination, substantially correct?; secondly, did that representation involve in it a statement that the vessel was to carry passengers, and consequently had been surveyed by the Board of Trade? thirdly, was there a concealment from the underwriters of anything materially affecting the insurance which the plaintiffs knew, and the underwriters did not? fourthly, was the fact that the ship had not been surveyed and certified for passengers, under the circumstances, one which was material? fifthly, was the vessel seaworthy when she started? if not, sixthly, was this known to the plaintiffs? seventhly, was that unseaworthiness the cause of the loss? Neither side suggested any other question, and the counsel addressed the jury. In summing up, I explained to the jury that though in a time policy there is no implied warranty of seaworthiness, yet that any representation made to the underwriters is treated as the basis of the contract; and if (whether innocently or knowingly) there is a substantial difference between the representation and the fact, making the risk materially greater than represented, the policy is not binding; and that a concealment of something known to the assured and not known to the underwriters, which would materially make the risk greater, has the same effect. I pointed out to them that there were two questions of fact for them as to the representation; first, what was the effect of the representation; secondly, was it substantially true? I assumed, if I did not in express terms say, that the loss on this evidence was a loss by the perils of the sea, but that the question whether the assured could recover for such a loss might depend upon the answers to the fifth, sixth, and seventh questions; telling them that in asking the seventh question I did not mean to ask them whether it was the sole or immediate cause of the loss, but whether the making water was occasioned by unseaworthiness, and the loss arose from her being water-logged in consequence of that unseaworthiness, so that it would not have happened but for the unseaworthiness.

The jury, after being out some hours, could not agree on their answers to the first, fifth, and seventh questions. They were desired to endeavour to agree. After I had left the court they agreed on their answer to the first question, but were finally discharged without agreeing on the fifth and seventh. Their written answers finally taken were, to the first question, Yes; to the second, third, and fourth, No; to the fifth, The jury cannot agree; to the sixth, No; to the seventh, The

jury cannot agree. On these findings I directed the verdict to be entered for the plaintiffs on the third and sixth issues.

In the ensuing term a rule for a new trial was obtained by Sir John Karslake generally. It was agreed that if the plaintiffs were entitled to retain the verdict, it should be ascertained by an average adjuster what deduction, if any, should be made for salvage. Cause was shown during the last term before the Lord Chief Justice, my brother Quain, and myself, but my Lord having been absent from court, on account of indisposition, during a considerable part of the argument, takes no part in the judgment, which is that of my brother Quain and myself alone.

We think that the defendant is entitled to treat the case as if the jury had answered the two questions on which they were unable to agree, in his favour; and that if, on that supposition, the plaintiffs would not be entitled to retain their verdict, then there should be a new trial to ascertain the facts.

The points made in the argument were—first, that the verdict that the representation was substantially correct was not consistent with the actual finding, that the jury could not agree as to whether the ship was in fact seaworthy, or (as we think that the defendant is entitled to treat the case for the purpose of the argument) a finding that she was not seaworthy, or at least that this finding was against the weight of the evidence. No complaint was made of the direction in point of law as to this question. We think, however, that it was a question for the jury what the effect of the representation was, and that they might properly think it did not involve a representation that the vessel was actually made seaworthy, but only that the plaintiffs had *bonâ fide* done, without stint or scamping, all that competent advisers thought necessary to put the vessel in thorough repair, and reasonably believed that their outlay had been sufficient to make her fit for the service. If the jury took this view of the representation we think they might reasonably find on this evidence that it was substantially true, even though the vessel, owing to some oversight or neglect on the part of those superintending the repairs, was not in fact made seaworthy.

The other points made were that if the vessel was not seaworthy, and the loss was caused by the unseaworthiness, the vessel was not lost by the perils insured against, and that the verdict on the third issue should not therefore have been entered for the plaintiff. And that though the jury found that the plaintiffs did not know of the unseaworthiness, that did not disprove the substance of the sixth issue. We think, however, that even if the jury had expressly found that the vessel was not seaworthy, and that the loss was occasioned by that unseaworthiness it would have afforded no answer to the action, and that the substance of the sixth plea would not have been proved. The judgment of this court on the demurrers in *Thompson v. Hopper* (6 El. & Bl. 172) has never been reversed, and is binding on us. In the case of *Thompson v. Hopper*, on appeal (1 E. Bl. & E.), there was much discussion and difference of opinion as to what was the proper guide to be given to a jury on the question whether the unseaworthiness caused the loss. Had the finding of the jury

Q. B.]

DUDON v. PENBROKE.

[Q. B.]

been in favour of the defendants on the sixth question, I intended to endeavor to raise the precise point for a court of appeal. As it is that point does not arise. *Thompson v. Hopper* (*ubi sup.*), on demurrer, decides that there is, in such a case as the present, no warranty of seaworthiness at all; and that even if the assured knowingly send a vessel to sea in an unseaworthy state, it affords no answer to an action on a time policy for a loss not shown to have been produced by that unseaworthiness. But in the same case it was decided that if the assured sent her out in a state not fit to go to sea, knowing it, and the loss was produced by that unseaworthiness it does afford an answer. Lord Campbell says, at p. 191, "But it is a maxim of our insurance law and of the insurance law of all commercial nations, that the assured cannot seek an indemnity for a loss produced by their own wrongful act. The plaintiffs' counsel said truly that the perils of the sea must still be considered the proximate cause of the loss, but so it would have been if the ship had been scuttled or sunk by being wilfully run upon a rock. According to the statement in this plea, the plaintiffs effectually caused the loss by their wrongful act." This judgment proceeds on the same principle as that of *Bell v. Carstairs* (14 East, 374), where it was held that a ship having been captured and condemned for want of proper documents the shipowners could not recover for the loss, though the owner of goods, if not one of the shipowners, might recover on a policy on goods. The reason of the distinction is pointed out by Lord Ellenborough: "The owner of goods was not liable to suffer in respect of his insurance on account of any defect in the documents belonging to the ship, with the procurement or existence of which he has no concern. . . . In the present case, on the ground that the three subjects of insurance were condemned on account of the common default of all the proprietors in their joint character of shipowners . . . we are of opinion that the assured cannot claim from the underwriters an indemnity for a loss thus occasioned by themselves." At the time when *Bell v. Carstairs* was decided, there were no special pleas, everything being open under the general issue; but it is clear, we think, that the effect of this judgment would have been (after the new rules) to support a plea in confession and avoidance to this effect. "True it is that the ship was lost by a peril insured against, to wit, capture, but the loss was occasioned by the fault of the plaintiffs themselves, and therefore the underwriters are not bound to indemnify them against it." We are bound by authority to hold that there is no warranty of seaworthiness in this policy, and the jury have negatived knowledge on the part of the plaintiffs. We think, therefore, that we cannot hold that the remaining averments in the sixth plea, even if proved, would show that the loss was occasioned by a wrongful act on the part of the plaintiffs, and consequently that the substance of the plea was not proved.

But a further question is raised on the third issue. It is said, and we agree, that the underwriters are not bound to indemnify the assured against every loss that occurs during the period insured, but only against those occasioned by perils insured against. And if the damage or loss arises from no unusual cause, though the winds and the waves may be concerned

in it, the loss is wear and tear, for which the underwriters are not responsible. If there has been an unusual cause, it is perils of the sea, for which they are responsible: (*Magnus v. Buttermer*, 11 C. B. 876; *Paterson v. Harris*, 1 B. & S. 336; and *The Merchants Trading Company v. The Universal Marine Company*, not reported.) But in all cases the law regards the proximate cause of the loss. And it would be difficult to find a better example of what Lord Bacon calls the infinites of the "Causes of causes, and their impulsion one on the other" than is afforded by this case. The ship perished because she went ashore on the coast of Yorkshire. The cause of her going ashore was partly that it was thick weather and she was making for Hull in distress, and partly that she was unmanageable because full of water. The cause of that cause, viz., her being in distress and full of water, was that when she laboured in the rolling sea she made water, and the cause of her making water was that when she left London she was not in so strong and staunch a state as she ought to have been. And this last is said to be the proximate cause of the loss, though since she left London she had crossed the North Sea twice. We think it would have been a misdirection to tell the jury that this was not a loss by perils of the sea, even if so connected with the state of unseaworthiness as that it would prevent anyone who knowingly sent her out in that state from recovering indemnity for this loss.

Two cases were on the argument relied on, viz., *Faucus v. Sarsfield* (6 E. & B. 192) and *The Merchants' Trading Company v. Universal Marine Company* (not reported, but of the judgment in which we have been furnished with a copy). We think neither case conflicts with our decision. In *Faucus v. Sarsfield* the plaintiff claimed on a time policy on ship for the loss sustained by putting into a port of distress and there unloading and repairing the vessel, which had become leaky, as the declaration alleged, by the perils of the sea. The plea which the arbitrator found to be true in fact was that the ship was unseaworthy and met with no extraordinary peril, and that the leakiness arose "by and from the said bad and defective condition of the vessel and the exposure of the vessel to the usual and ordinary force and violence of the wind and waves on that voyage." This seems to be an allegation that the loss was from wear and tear, aggravated by the original bad state of the vessel, and if so the plea was no doubt good. In *The Merchants Trading Company v. The Universal Marine Company*, it appears that the action was on a voyage policy on the ship *Golden Fleece* from the Mersey to Cardiff, whilst there and thence to Alexandria. On the trial before my brother Lush it was proved that the *Golden Fleece* being to all appearance seaworthy, left the Mersey with a few tons of coal on board, and therefore substantially in ballast, and arrived safe at Cardiff, where she went into the docks and there loaded a full cargo consisting of 2000 tons of coals. She left the docks and anchored in the Penarth Roads, outside Cardiff, in the morning, and on that same night, whilst riding at anchor, suddenly filled with water and foundered, there being neither wind nor sea, or anything to account for the going down. The evidence of those on board when she sank seems to make it probable that one of the coal ports had

EX. CH.

THE LIVER ALKALI WORKS COMPANY (LIMITED) v. JOHNSON.

[EX. CH.]

given way. On this my brother Lush appears to have correctly explained to the jury that if when she started on the voyage from the Mersey she was not seaworthy, it was a defence; and he further told the jury that the underwriters were answerable for casualties arising from the violent action of the elements as distinguished from the silent, natural, gradual action of the elements upon the vessel itself, which latter properly belonged to wear and tear; that what the underwriters insured against were casualties that might happen and not consequences which must happen. He told the jury that under the circumstances proved in the case before them, the one question which would solve it all was this: Was the leak from which the vessel foundered attributable to injury and violence from without, or from weakness from within? For, that if it was not attributable to perils of the sea, that is, as he explained it, the violent action of the elements from without, or any other casualty involved in perils of the sea, the jury could come to no other conclusion than that it was due to an inherent infirmity in the ship itself. On this direction the jury found for the defendant. The verdict was entered for the defendant, both on the plea denying seaworthiness and on that denying that the loss was by perils of the sea, and the Court of Common Pleas refused a rule for a new trial holding the direction unexceptionable. And we quite agree that the direction was unexceptionable; for if the vessel was so weak as to give way from the mere pressure of the water on her coal port, without anything more, the proximate cause of the loss was that weakness. But it scarcely needs pointing out how very different the facts proved as regards the loss of the *Golden Fleece* were from those proved in the present case as to the loss of the *Francis*, which, however unseaworthy she may have originally been when leaving London, had crossed the North Sea twice, and was finally lost because she went ashore, after contending with the wind and waves during some days.

We have, therefore, come to the conclusion that the rule should be discharged. No point was reserved at the trial, but we give the defendant leave to appeal on all questions arising on the findings of the jury and the direction as to the first six pleas. We give no leave to appeal on the issue on the seventh as to the supposed illegality.

Rule discharged.

Attorneys for plaintiff, *Cattarns, Jelu, and Cattarns.*

Attorneys for plaintiff, *Hollams, Son, and Coward.*

EXCHEQUER CHAMBER.

APPEAL FROM THE COURT OF EXCHEQUER.

Reported by H. LUSH, Esq., Barrister-at-Law.

June 20 and 26, 1874.

(Before BLACKBURN, MELLOR, BRETT, GROVE, and ARCHIBALD, JJ.)

THE LIVER ALKALI WORKS COMPANY (LIMITED) v. JOHNSON.

Common carrier—Carrier by water—Inland navigation—Barge owner letting his barges to anyone for particular voyages—Carrying one person's goods only at a time—Liability of such barge owner—Custom of England as to carriers by land

and by water—Distinction between—Limiting the liability by special exceptions.

Where a barge owner made it his business to let out his barges on hire, under the care of his own servants, to any persons applying for them, from time to time, to carry cargoes, not between any fixed termini, but to and from different points or places on the river Mersey, as each customer required, each voyage being made under a separate agreement, and each barge being let to and carrying the cargo of one customer only at a time, it was

Held by the Court of Exchequer (Kelly, C. B., and Martin, Bramwell, and Cleasby, BB.), in an action against the barge owner for not safely and securely carrying certain goods of the plaintiffs, that he was liable, as a "common carrier" for the loss of the goods, although it had occurred without any negligence on his part. And, on an appeal to the Court of Exchequer Chamber, it was

Held (per totam curiam), affirming the judgment of the court below, that the defendant was liable.

By Blackburn, Mellor, Grove, and Archibald, JJ., on the ground that a person so exercising the business of a barge owner does, in the absence of something to limit his liability, incur the liability of a "common carrier," in respect of the goods he carries, and that it was not necessary to inquire whether he was a carrier so as to be liable to an action for not taking goods tendered to him.

By Brett, J.—That the defendant was not a "common carrier," and was in no way liable as such, because he did not undertake to carry goods for or to charter his ship to, the first owner; but that he was liable as a shipowner, by a recognised custom of England, whereby a shipowner carrying goods for hire, whether by inland navigation, or coastwise, or abroad, undertakes to carry them at his own absolute risk, the act of God or of the Queen's enemies alone excepted, unless by special agreement, on a particular voyage, he limits his liability by further exceptions; but was not liable as a "common carrier" upon the custom applicable to that business or employment.

THIS is a case on appeal from the decision of the Court of Exchequer of Pleas in a cause instituted in the Common Pleas at Lancaster. The action was brought to recover 179*l.*, being the value of sixty-two and a half tons of salt cake, the property of the plaintiffs, which were lost while being carried in a lighter or flat of the defendant, in the river Mersey, under the circumstances hereunder mentioned. The cause was tried before Martin, B., at the Liverpool summer assizes, 1871, when that learned judge directed the verdict to be entered for the plaintiffs, reserving leave to the defendant to move to enter the verdict for him as hereinafter explained. Afterwards, in Michaelmas Term, 1871, the Court of Exchequer of Pleas granted a rule nisi to enter the verdict for the defendant. This rule came on to be argued before the Court of Exchequer of Pleas sitting in banc, when that court discharged the rule. Notice of appeal against the decision having been duly given, the following

SPECIAL CASE

is stated for the purpose of the said appeal to the Exchequer Chamber.

1. The declaration contained three counts. The first count stated that the salt cake was shipped by the plaintiffs on board the defendant's flat for carriage from Widnes, in the river Mersey,

[Ex. Ch.]

THE LIVER ALKALI WORKS COMPANY (LIMITED) v. JOHNSON.

[Ex. Ch.]

to Liverpool, and the breach complained of was that, although not prevented by certain excepted perils and casualties, the defendant had failed to carry and deliver the salt cake. The second count complained that the salt cake was so negligently carried that the same was lost to the plaintiffs; and the third count complained that, by reason of the defendant's careless and improper conduct whilst the salt cake was in his custody, and by reason of his not taking the necessary steps to preserve the same, such salt cake was lost.

To this declaration the defendant pleaded four pleas. The first traversed the delivery of the said salt cake to the defendant on the alleged terms. The second plea (limited to the first count) denied the breaches there alleged. The third plea (limited to the second and third counts) was not guilty; the fourth plea (limited to the first and third counts) stated that the defendant was prevented carrying and delivering the salt cake by certain excepted perils, namely, by the dangers and accidents of the sea, river, and navigation. Upon these pleas issue was joined. A copy of the pleadings accompanies, and may be read as part of this case.

2. The plaintiffs carry on their alkali works at Liverpool, and the defendant is the owner of several flats or lighters which are employed in the carriage, as from time to time engaged by different persons, of goods to and from various points along the river Mersey as occasion may require.

3. On the 16th Jan. 1871 the plaintiffs' manager asked the master of one of the defendant's flats, called "Eliza," then lying empty in the Stanley Dock, Liverpool, if the said flat could be sent to Widnes, for the purpose of carrying the salt cake in question from Widnes to the plaintiffs' alkali works at Liverpool, and, such flat being disengaged, the master caused it to be taken to Widnes for the purpose of carrying the plaintiffs' salt cake, and he there received from the plaintiffs' servants the salt cake in question. There were on such flat the goods of no other person save those of the plaintiffs. With such cargo the flat, duly manned, proceeded down the river towards Liverpool, on the 16th Jan. 1871. A fog having come on the flat dropped anchor two or three times on its passage down the river, and finally, between three and four o'clock p.m., on the 20th Jan. 1871, being then abreast of the north end of the Clarence Graving Dock, the flat struck on the ground, and, as the tide was falling, she remained there. At the ebb the flat was left nearly dry, and when the tide rose again it was found that she was considerably strained and filled with water. Ultimately the master and crew, finding that they could not keep down the water by pumping, proceeded to secure the flat by her anchor, and by ropes made fast to the pier head, until prevented by the pier master. Several attempts were made to remove her, but without success, and in the result the flat and her cargo were carried off by the tide and were wholly lost.

4. On behalf of the defendant a witness was called, who stated as follows: "I went to the plaintiffs' manager to draw some freight. He said that he had taken the freight on account of damage. I told him we could not be answerable for damage to cargo; it must be entirely at his own risk when he put goods on board the flats. I told him that it was quite possible that one of the flats might go down any day, and he might lose

the whole cargo. He said the best way would be to insure. I said, 'Yes, it would.' I said it was not reasonable that we should be called upon to insure the cargo at the low rate of freight of 7d. per ton."

5. The plaintiffs' manager said that such conversation had taken place, but stated that it took place after the voyage in question, during which the loss had occurred, and did not refer to the loss in respect of which this action is brought; he said that after such loss he stated that he would insure, and thereafter he did in fact insure.

6. The questions of fact contested at the trial were, first, as to whether or not the defendant had been guilty of any want of care in or about the carriage or safeguard of the plaintiffs' goods, or in or about the navigation of the defendant's flat on the voyage in question; and, secondly, whether the said conversation took place before or after the voyage in question; and these facts having been left by the learned judge to the jury, the latter found that the defendant had been guilty of no want of care in the premises, and that the said conversation took place after the voyage in question.

7. On the part of the plaintiffs, evidence was given that they had employed the defendant to carry goods for them for several years, and at a uniform rate of freight. On the part of the defendant two witnesses were called. The first witness, Richard Gregson, stated that he was the master of the flat *Eliza*; that he carried goods for different people; and that that flat was engaged from time to time, as required, for special cargoes of different persons. He said an engagement was made for each voyage, and to carry the goods of one person only on each voyage. He said the defendant's flats did not carry the goods of several people on board at one time, and that they were engaged from time to time to carry from different points up the river, to different places and docks lower down the river, at Liverpool and Birkenhead. The second witness called for the defendant, and who managed his business, stated that the defendant's flats were employed in carrying the goods of the persons who from time to time employed them, each cargo only consisting of the goods of the particular person employing the flat on each occasion. He said that they carried for anyone who chose to employ them, but that an express agreement was always made as to each voyage or employment of the defendant's flats. There was no cross-examination on the part of the learned counsel for the plaintiffs as to the evidence of the defendant's witnesses.

8. Upon this part of the case no question of fact was submitted to the jury.

9. There was no evidence that particular flats were, as a rule, selected by customers; nor was there any evidence that they were not, as a rule, so selected.

10. The plaintiffs' counsel then contended that the defendant was a common carrier, and that the defendant was liable, assuming the loss of the salt cake to have been caused by perils of the sea, river, and navigation. The learned judge, for the purposes of the day, directed the verdict to be entered for the plaintiffs, and reserved leave to the defendant to move to enter the verdict for him, if the court should be of opinion, on the facts herein appearing, that the plaintiffs had failed to establish the fact that the defendant was a common carrier,

EX. CH.]

THE LIVER ALKALI WORKS COMPANY (LIMITED) v. JOHNSON.

[EX. CH.]

and that the defendant, on the facts stated, was not liable for the loss of the salt cake.

11. The Court of Exchequer having, in Michaelmas Term 1871, granted a rule *nisi* to enter a verdict for the defendant; the court afterwards, in Easter Term 1872, discharged the rule, as already mentioned. A copy of the rule *nisi*, and of the rule discharging the rule *nisi*, accompany, and may be referred to as part of this case. The case will be found reported below: *ante*, vol. 1, p. 380.

The question for the opinion of this court is, whether the decision of the court below in discharging the rule is right. If the Court of Exchequer Chamber should be of opinion in the affirmative, then the said rule and the verdict for the plaintiffs are to stand, and judgment is to be entered for them for the amount, together with their costs of suit. But if in the negative, then the said rule is to be made absolute, and the said verdict for the plaintiffs is to be set aside, and a verdict entered for the defendant, with judgment for his costs of defence.

The defendant's (appellant's) points for argument: First, that the facts stated in the special case do not show that the defendant was or held himself out to be a common carrier; secondly, that the description of the general business carried on by the defendant given in the special case shows that he let out the flats to specific persons for specific cargoes for specific voyages (see pars. 1, 2, and 7); thirdly, that the defendant's flat, the *Eliza*, was specifically hired or chartered by the plaintiffs to carry the specific cargo in question from Widnes to Liverpool; fourthly, that by so letting or chartering the *Eliza* the defendant did not incur the liabilities of a common carrier; fifthly, that the legal effect of this contract of letting or chartering was that the flat *Eliza* should be fit for the purpose for which she was let or chartered, that the defendant should exercise reasonable care and skill in the carriage and delivering of the cargo loaded in such flat, and that the defendant should not be liable for inevitable accident or the perils of the navigation from Widnes to Liverpool; sixthly, that the special case showed that the flat *Eliza* was fit for the purpose for which she was chartered; that due care and skill were exercised by the defendant, and that the goods in question were lost through inevitable accident and the perils of the navigation, and that consequently the defendant is not liable (see pars. 3 and 6).

Points of argument on the part of the plaintiffs (respondents): First, that upon the facts stated in the case the defendant is liable as a common carrier in respect of the cargo in question; secondly, that he exercised a public employment and carried goods for anyone who chose to employ him; thirdly, that it is no matter whether he carried the goods of different people in his flats at the same time, or the goods of one person only; fourthly, that it is not necessary to constitute a common carrier that he should ply between fixed termini; fifthly, that there was no evidence to show that the defendant ever refused to carry goods for anyone applying to him, or that particular flats were selected by his customers; sixthly, that there was no evidence to show that the defendant before the voyage in question entered into any special agreement relating to the carriage of goods, except such as any common carrier may enter into and still remain liable as a common carrier; seventhly, that the fact that the plaintiffs insured their cargo after

the loss in question cannot affect the defendant's liability in respect of such loss; eighthly, that the defendant's liability cannot be affected by the amount of freight paid by the plaintiffs; ninthly, that upon the facts stated in the case the defendant is liable as an insurer of the cargo in question, having held himself out to the plaintiffs as a common carrier.

C. Russell, Q.C. (with him was Butt, Q.C.), for the appellant, contended that the judgment of the court below was wrong, and that upon the facts it was clear that the defendant was not, and did not hold himself out as, a "common carrier." No doubt it is laid down in the books, and may be stated to be the law, that a "common carrier" is "a person who undertakes to transport from place to place, for hire, the goods of such persons as think fit to employ him; and such," it is said, "is a proprietor of waggons, barges, lighters, merchant ships, or other instruments for the public conveyance of goods." (See notes to *Coggs v. Bernard* (Lord Raymond 909), 1 Sm. L. Cas., 2nd edit., p. 101; 5th edit., p. 198; 6th edit., p. 206.) The case of *Morav v. Sine* (1 Vent. 193; 238; T. Raymond 220; 1 Mod. 85; 2 Lev. 69; 2 Keb. 866; 3 Ill. 72) will be relied on by the plaintiffs as an authority for the owner of "flats," such as the defendant in this case, being liable; but it is submitted as most probable that the ship in that case was put up as a "general ship," and that the goods were put on board her in that character. Again, the present was a case of a particular hiring for a particular job, and the agreement was really similar to a charter-party. The defendant did not carry for the public generally, but the goods only of the one person who hired him for the particular voyage. A "common carrier" is "bound to convey the goods of any person offering to pay his hire, unless his carriage is already full, or the risk sought to be imposed upon him extraordinary, or unless the goods be of a sort which he cannot convey or is not in the habit of conveying" (1 Sm. L. Cas. *ubi sup.*). But how can it be said that the defendant here would be liable to an action for refusing to carry? [BLACKBURN, J.—Have you any authority that a person putting up a ship as a "general ship" is liable for refusing to carry particular goods? BRETT, J.—What is the definition of a "general ship?" I thought it was advertising that a ship would take any goods brought to it. If that be so, how can it be said that he would not be liable for refusing to carry goods brought?] In *Abbott on Shipping* (10th edit. p. 233; 11th edit., part 4, c. 4, p. 277) it is said that "when a ship is intended to be employed for the conveyance of merchandise as a 'general ship,' it is usual to give notice of the intention by printed papers and cards mentioning the name and destination of the ship, her burthen, and sometimes her force; sometimes expressing also that the ship is to sail with convoy, or with the first convoy for the voyage, or other matters relating thereto"—in fact, holding out that she is ready to take the goods of any and every body who may send them. The law is similarly laid down in *Story on Bailments*, beginning at sect. 405, Sect. 501, p. 440, 8th edit., is important: "When it is said that the owners and masters of ships are deemed common carriers, it is to be understood of such ships as are employed as general ships, or for the transportation of mor-

[EX. CH.]

THE LIVER ALKALI WORKS COMPANY (LIMITED) v. JOHNSON.

[EX. CH.]

obandise for persons in general; such as vessels employed in the coasting trade, or in foreign trade, or on general freighting business, for all persons offering goods at freight for the port of destination;" and Story, J., goes on to say that in such cases it makes no difference whether the whole cargo belongs to one or to many shippers, "so always that the ship retains her character and employment of a general ship or common carrier;" citing *Shelden v. Robinson* (7 New Hamp. 159, American). "But," he adds "if the owner of a ship employs it on his own account generally, or if he lets the tonnage, with a small exception, to a single person, and then, for the accommodation of a party or individual, he takes goods on board for freight, not receiving them for persons in general, he will not be deemed a "common carrier," but a mere private carrier, for he does not, under such circumstances, hold himself out as engaged in a public business or employment." Now that is an *a fortiori* case, for there the whole space would not be let out. I concede that, a ship being held out as a general ship, it is immaterial that the whole space is occupied by the goods of one person. [MELLOR, J., referred to Angell on Carriers (American) (4th edit., p. 73), commenting on Lord Holt's remarks on *Morse v. Slue* (*ubi sup.*).] BRETT, J.—Is the man who keeps and lets out for hire furniture vans for removing goods from one part of London, or one part of the country, to another, a common carrier? I should say he was not. What is at the bottom of the term "common carrier" is the plying between certain definite and fixed termini; and that is the definition given in Parsons on Shipping, vol. 1, pp. 245, 246. [BLACKBURN, J.—What do you say to the case of *Dale v. Hall* (1 Wils. 281)? That seems to me to be the strongest case against you.] There, no doubt, it was held that a "boyman" who undertakes to carry goods must deliver them safe, at all events, except damaged by the act of God or by the king's enemies; but the word "common" carrier must be imported there. The decision goes no further than that in that particular case the keelman was a "common" carrier; and, looking at the small value of the plaintiff's goods there, 24*l.*, it may be fairly assumed that it was a small part only of the keel's cargo. [BRETT, J.—What is the meaning of the old term "boyman"? I think it doubtful whether it is equivalent to a flat or barge owner of the present day.] See Richardson's Dictionary. "Hoyman;" and as to their liability, Jones on Bailments, pp. 106, *et seq.* Then, lastly, this was an excepted case, as occurring by the act of God. In Angell on Carriers (4th edit., p. 133, sect. 155), it is said: "In all the cases the term 'act of God' was applied to a sudden failure of the wind, whereby the vessel tacking was unable to change her tack, and so went ashore." It is equivalent to the term—*vis major* of the civil law.

The "fog" named in par. 3 of the case, which was the cause of the accident, was an occurrence over which the defendant had no control, and for which he was not answerable. By putting him into the category of a "common carrier," the court will be fixing him with a liability which he never had in his mind, and which the plaintiffs themselves never contemplated at the time of the original hiring. (He referred also to 26 Geo. 3, c. 86, s. 1, and cited and relied on the ruling of Lord Abinger, C.B., in *Brisd v. Dale*, 8 Car. & P.

207; 2 Moo. & Rob. 80, as strongly in the defendants' favour.)

T. H. James (with him was Aspinall, Q.C.), for the plaintiffs (respondents), *contra*.—It is not necessary for the plaintiffs to go so far as to say that every ship or barge owner who lets out his ship or barge, &c., is a "common carrier," but here the defendant held himself out as ready to let out his "flats" to the public indifferently; and if that be so, then it is immaterial whether or not there was a contract for any particular flat. The defendant is not shown to have had any other employment. [*Per curiam*.—It is not material, if he carried on this particular business, that he might have carried on some other.] The fact of its being his only employment, as far as appears from the case, shows at least that it was not a casual hiring. It is not the case of a shipowner who can and does refuse his ship at his pleasure. Here the defendant regularly let out his flats to any and every one; he never refused anyone, and he carried as a common carrier. [BRETT, J.—The burden of proof is on you to show that he was a "common carrier," and that he never refused to carry the goods of anyone coming to hire his flats. BLACKBURN, J.—It will be better than saying he is a "common carrier," to say that he carried goods with the liability of a "common carrier."] The distinction between a "common carrier" and a shipowner is, that the former holds himself out as ready to carry for anyone; the latter merely as ready to treat with anyone. The first never refuses. [BLACKBURN, J.—Do you say that if the defendant refused anyone coming and saying "I want a flat for such and such a purpose," he would be liable to an action? I do. [BLACKBURN, J.—What is your authority for that? I rely on the latter part of paragraph 7, which is equivalent to an admission to that effect, and the onus, I contend, is on the defendant to rebut the assumption of his liability. Nothing has been shown here of any express agreement altering his general liability as a carrier. [MELLOR, J.—Paragraph 2 states a distinct fact. The other paragraphs are recapitulations of the evidence. BRETT, J.—Would not the statement in paragraph 2 apply equally to any shipowner in Liverpool? It may be somewhat vague, but the distinction is between a carrier who holds himself out as ready to carry for all, and a shipowner who is willing to treat and may decline. As Kolly, C.B. said in his judgment in this case below, "If the hiring of the vessel were in the nature of a charter-party, the liability would not arise, but, looking at the nature of the employment, we do not see that there is any single matter which can be assimilated to a charter-party. When the plaintiffs engaged the defendant to bring down the salt cake there was nothing to specify what vessel was to be employed, and in fact the cargo may have been put upon any one of the vessels belonging to the defendant. Taking, therefore, all the facts into consideration, we are of opinion that the defendant was in this instance a common carrier." (*ante*, vol. i., pp. 380, 381.) In all the cases and authorities the definition of a "common carrier" is "one who undertakes to carry for hire the goods of all persons indifferently." *Gibbourn v. Huret* (1 Salk. 249); again, the cases of *Cogge v. Bernard* (*ubi sup.*), and *Morse v. Slue* (*ubi sup.*), referred to by the other side, are distinct authorities that hoymen, ferrymen, barge-men, and masters of ships, who carry goods for hire, are, in the absence of

a special contract to the contrary, "common carriers." In *Liverpool v. Drury and another* (8 Ex. 166; 22 L. J. 2, Ex.), the damage done to goods on board ship by rats was held not within the excepted perils in an ordinary bill of lading, and the shipowner was held liable, although there were rats on board; and Pollock, C.B., in his judgment, there referred (at p. 173 of 8 Ex.; p. 4 of 22 L. J. Ex.) to the principle laid down in *Dale v. Hall* (*ubi sup.*), as affording the only true rule of ascertaining with accuracy and certainty the liability of the master and owner of a general ship, viz., "that *prima facie* he is a 'common carrier,' but that his responsibility may be either enlarged or qualified by the terms of the bill of lading." Bacon's Abridgment, Carriers A. and B. (citing *Jackson v. Rogers* (2 Show. 327), and *Rick v. Kneeland* (Cro. Jac. 330), Smith's Mercantile Law (4th edit. p. 262; 8th edit. p. 267), and Jones on Bailments (3rd edit., pp. 106 *et seq.*), are to the same effect, and show that the rule applies equally to bergemen, lightermen, and boatmen on navigable rivers. The defendant here, too, comes within Story's definition in his work on Bailments (8th edit., par. 495, p. 440), that is, he exercised his business "as a public employment," undertook to carry goods for persons generally, and held himself out as ready to engage in the transport of goods for hire as a business, not as a casual occupation *pro hac vice*. The test, as Story puts it, is that the carrying shall be a public employment, and the business habitual and not casual; and in enumerating "common carriers" by water, he classes amongst them "masters of steamboats engaged in the transportation of goods for persons generally, for hire;" and also "lightermen, boymen, bergemen, ferry-men, canal boatmen, and others employed in the like manner" (*Ibid.*, par. 496, p. 444); and then, in a note, discussing the case of *Brind v. Dale* (8 Car. & P. 207; 2 Moo. & Roh. 80) cited by his friend on the defendant's behalf, he says, "Is a ship engaged in general freighting business, or let out generally for hire for any voyage which the freighter may require, less a 'common carrier' than a regular packet ship which plies between different ports?" In *Riley v. Horne and others* (5 Bing. 217), Best, C.J., says that from his liability as an insurer the carrier is only to be relieved by two things, viz., the act of God and the king's enemies. *Lyon and another v. Mills* (5 East 428) is a strong authority for the plaintiffs, and it is clear that, in the absence of the notice in that case, the lighterman there would have been fixed with the liability of a "common carrier." The use of the lighters there was similar to that of the flats here. *Ingate v. Christie* also (3 Car. & Kir. 61), and particularly what was said by Alderson, B., there, shows what is the true criterion of liability in such a case (see also Kent's Commentaries, 12th edit., par. 602). On both principle and authority the judgment of the court below is right, and should be affirmed.

C. Russell, Q.C., in reply, distinguished some of the cases cited, and quoted Kent (Comm. 10th edit., p. 228), as treating the question of liability to an action for refusing to carry, as the strongest test of whether or not the individual is a common carrier.

Cur. ad. vult.

June 26.—Their Lordships having taken time to consider, BLACKBURN, J., now delivered his written judgment as follows, in which Mellor, Grove, and

Archibald, J.J., concurred, and then read the judgment of Brett, J., who concurred in the decision, but not on precisely the same ground as the rest of the court.

BLACKBURN, J.—It appears by the case stated for this court on appeal, that the defendant was engaged in carrying from Widnes to Liverpool some salt cake of the plaintiffs in a flat on the river Mersey. The goods were injured by reason of the flat getting on a shoal in consequence of a fog. This was a peril of navigation, but could in no sense be called "the act of God or of the Queen's enemies." The jury found that there was no negligence on the part of the defendant. The question therefore raised is, whether the defendant was under the liability of a bailee for hire, viz., to take proper care of the goods, in which case he is not responsible for their loss; or whether he had the more extended liability of a common carrier, viz., to carry the goods safe against all events but acts of God and the enemies of the Queen.

We have purposely confined our expressions to the question "whether the defendant has the liability of a common carrier," for we do not think it necessary to inquire whether the defendant is a carrier so as to be liable to an action for not taking goods tendered to him. The rule imposing this extended liability on common carriers was originally established, as Lord Mansfield, C.J. states in *Forreard v. Pittard* (1 T. R. 27), on the ground of public policy; "to prevent litigation, collusion, and the necessity of going into circumstances impossible to be unravelled, the law presumes against the carrier, unless he shows it was done by the king's enemies or by such act as could not happen by the intervention of man, as storms, lightnings, and tempests." And as Lord Holt explains it in the celebrated judgment in *Cogge v. Bernard* (*ubi sup.*), as existing in the case of one that exercises a public employment, "and this is the case of the common carrier, common hoyman, master of a ship, &c., which case of a master of a ship was first adjudged, 26 Car. 2, in the case of *Morse v. Slue* (Raymond. 220, 221; Ventris, 130, 238) . . . And this is a politic establishment, contrived by the policy of the law, for the safety of all persons the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing." It is too late now to speculate on the propriety of this rule. We must treat it as firmly established that, in the absence of some contract, express or implied, introducing further exceptions, those who exercise a public employment of carrying goods do incur this liability.

It appears from the evidence stated that the defendant was the owner of several flats, and that he made it his business to lend out his flats, under the care of his own servants, to different persons, as required from time to time, to carry cargoes to and from places in the Mersey, but that it always was to carry goods for one person at a time, and that "they" (the flats) "carried for any one who chose to employ them, but that an express agreement was always made as to each voyage or employment of the defendant's flats," which means, as we understand the evidence, that the flats did not go about plying for hire, but were waiting for hire by any one. We think that this describes the ordinary employment of a lighterman, and that, both on authority and principle, a person who

EX. CH.]

THE LIVER ALKALI WORKS COMPANY (LIMITED) v. JOHNSON.

[EX. CH.]

exercises this business or employment does, in the absence of something to limit his liability, incur the liability of a "common carrier" in respect of the goods he carries.

It was argued before us that the defendant could not have this liability unless he held himself out as plying between two particular places, or had put up his flag, like a general ship, to go to some particular place, and to take all goods brought to him for that voyage. It was urged that in *Morse v. Slus* (1 Ventris, 190, 238), the goods were probably put on board a ship put up as a general ship. It certainly may have been so; but the count is set out in 1 Ventris, p. 190, and is general, that by the law and custom of England masters and governors of ships which go from London beyond sea, are bound to keep safely, &c., the same goods, &c., and the ultimate decision was that this count was proved. Hale, C.J., had, a difficulty (see the report in 1 Mod. 85) from the fact that the ship was bound to foreign parts, and that the shipowner would not, by the civil law or the maritime law, be chargeable for piracy or *damnum fatale* (a difficulty, it may be remarked, which does not apply to the present case, where the whole transaction is in England), but nothing is, in any report, said as to the ship being a "general ship," and on that count no judgment could have been given on that ground. And the ultimate decision and the special verdict has always been understood to apply equally to all ships employed in commerce and sailing from England, as is shown by the forms of charter party and bill of lading in ordinary use in England, which always contain an engagement to deliver the goods in the same condition in which they were received aboard, and, when Lord Tenterden first wrote, contained only an exception of the dangers of the seas.

Now the exceptions in such class of instrument are made more extensive; and certainly it is difficult to see why the liability of a shipowner who engages to carry the whole lading of his ship for one person should be less than the liability of one who carries the lading in different parcels for different people. And to come nearer to the present case, we find that "lightermen" are specially named in Bacon's Abridgment, Carrier A., and in the notes to *Cogge v. Bernard* 1 Sm. L. C. (ubi sup.). And in *Lyon and another v. Mells* (5 East 428) the course of business of the defendant in that case is thus described: "The defendant kept sloops for carrying other persons' goods for hire, and also lighters for the purpose of carrying those goods to and from his sloops; and when he had not employment for his lighters for his own business, he let them for hire to such persons as wanted to carry goods to other sloops." If there be any difference between the employment of the now defendant, as described in this case, and the employment of the defendant in *Lyon and another v. Mells*, it would seem that the latter was less clearly a public employment. The great point discussed was whether a notice limiting the liability of the defendant was, as Lord Ellenborough, C.J., states it, "illegal" as "being to exempt him from a responsibility cast upon him by law, as a carrier of goods by water for hire;" a proposition which could not well have been discussed by anyone who did not think that the defendant had, but for the notice, incurred that responsibility. The

point actually decided was that the terms of the notice did not relieve the defendant from liability for furnishing an unseaworthy lighter. As to this Lord Ellenborough says: "Every agreement must be construed with reference to the subject matter; and looking at the parties to this agreement (for so I denominate the notice), and the situation in which they stood in point of law to each other, it is clear, beyond a doubt, that the only object of the owners of lighters was to limit their responsibility in those cases only where the law would otherwise have made them answer for the neglect of others, and for accidents which it might not be within the scope of ordinary care and caution to provide against."

We think that Mr. James, in arguing for the plaintiffs in this case, was right when he relied on the case of *Lyon and another v. Mells* as an important authority in favour of his clients. It is true that the point was not precisely decided in that case; and, if it had been, it would not have been binding upon us in a court of error. But the opinion of Lord Ellenborough, and (as far as we can judge from the report) of everyone concerned in that case, was, that it was too clear for argument that, but for the notice, the lighterman, acting as the defendant did in that case, would have been liable to the same extent as a "common carrier." Lord Abinger, C.B., in *Brind v. Dale* (2 M. & Rob. 80; 8 Car. & P. 207), expressed a strong opinion that a town carman would not be considered a "common carrier;" but he reserved the point, and, as the jury found in favour of the defendant on the question whether the goods were received by him as a common carrier, it never was reviewed in banco. The ruling of Alderson, B., in *Ingate v. Christie* (3 Car. & Kir. 61), is in express conformity with what appears to have been Lord Ellenborough's view in *Lyon and another v. Mells*; and no English authority has been cited in conflict with this doctrine.

We think, therefore, that the judgment of the court below was right, and that it should be affirmed.

MELLOR, GROVE, and ARCHIBALD, JJ., concurred.

BRETT, J.—I cannot come to the conclusion that the defendant in this case was liable whether he was a common carrier or not, because I conclude that he was liable, notwithstanding that I am clearly of opinion that he was not a "common carrier."

It seems to me that it is of the very essence of the definition of a "common carrier" that he should be one who undertakes to carry the goods (not being dangerous or of unreasonable weight or bulk) which are first offered to him. He who does not so undertake is not a "common carrier." The force of the word "common" is, not that the carrier's business is a public one, or in common with others but, that he undertakes to carry for all indifferently, in the sense of for the first comer—that is, "for all in common." It is clear to my mind that a shipowner, who publicly professes to own ships and to charter them to anyone who will agree with him on terms of charter, is not a "common carrier," because he does not undertake to carry goods for or to charter his ship to the first comer. He wants, therefore, the essential characteristic of a "common carrier," and he is not therefore a "common carrier;" and therefore does not incur at any time any responsibility

PRIV. CO.]

THE PROVINCIAL INSURANCE COMPANY OF CANADA v. LEDUC.

[PRIV. CO.]

on the ground of his being a "common carrier." The defendant in the present case, in my opinion, carried on business like any other owner of ships or vessels, and was not a "common carrier," and was in no way liable as such.

But I think that, by a recognised custom of England—a custom adopted and recognised by the courts in precisely the same manner as the custom of England with regard to "common carriers" has been adopted and recognised by them—every shipowner who carries goods for hire in his ship, whether by inland navigation or coastways or abroad, undertakes to carry them at his own absolute risk, the act of God or of the Queen's enemies alone excepted, and unless by agreement between himself and a particular freighter, on a particular voyage or on particular voyages, he limits his liability by further exceptions. I think that this liability attaches to shipowners carrying goods, by reason of a recognised custom which may be pleaded as the custom of England, just as the custom of England as to common carriers may be pleaded. But it is a custom wholly independent of the similar custom with regard to "common carriers." The similarity of the two customs has occasioned phraseology to be used in some cases which has raised an inaccurate idea that shipowners are "common carriers," but I am of opinion that they are not. They are not bound to carry for the first comer.

I therefore hold that the defendant is liable as a shipowner upon the custom applicable to him as such, but is not liable as a "common carrier" upon the custom applicable to that business or employment.

Judgment of the court below affirmed.

Attorneys for the plaintiffs (respondents), F. Venn and Son, agents for J. Quinn and Son, Liverpool.

Attorneys for the defendant, Field, Roques, Field, Francis, and Osbaldiston, agents for Boteson and Co., Liverpool.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH
OF THE PROVINCE OF QUEBEC, CANADA.

Reported by J. P. AARHALL, Esq., Barrister-at-Law.

JUNE 2, 3, 4, and 26, 1874.

(Present, the Right Hon. Sir JAMES W. COLVILLE,
Sir BARNES PEACOCK, Sir MONTAGUE SMITH, and
Sir R. P. COLLIER.)

THE PROVINCIAL INSURANCE COMPANY OF CANADA
v. LEDUC.

Marine insurance—Policy—Warranty—Construction of—Abandonment—Acceptance—Silence of underwriters—Dealing with ship—Constructive total loss—Partial loss—Estoppel—Insurable interest—Evidence—Canadian Civil Code.

Where a warranty or condition in a policy of marine insurance is expressed in clear terms, evidence will not be admitted to show that it is to be construed contrary to the apparent meaning of those terms, although the desired construction may be that which has ordinarily been put upon it by persons making use of that form of policy. Where a ship is insured on a time policy at and from Montreal, to trade between the Island of

Newfoundland, Nova Scotia, Cuba, &c., and Quebec and Montreal, and the policy contains a stipulation in the following words: "Not allowed under this policy to enter the Gulf of St. Lawrence before the 25th April, nor to be in the said Gulf after the 15th Nov.; nor to proceed to Newfoundland after the 1st Dec., or before the 15th March, without payment of additional premium, and leave first obtained, war, risk, and sailing voyages excepted;" the policy is not to be construed as declaring that the vessel may proceed from any of the ports named in the policy to Newfoundland on or before the 1st Dec., notwithstanding it might have to pass through the Gulf after 15th Nov.; but under that clause the vessel is neither to be in the Gulf after the 15th Nov., nor to proceed to Newfoundland from any port after the 1st Dec.; and if the ship enters the Gulf after the 15th Nov., she commits a breach of warranty within the words of the policy, and the underwriters are not liable for any loss occurring in consequence of that breach, unless they accept abandonment with a knowledge of the breach.

When notice of abandonment of a ship is given to underwriters, mere silence on their part will not operate as an acceptance of abandonment; but if the underwriters, on a loss occurring, and after notice of abandonment duly given, take possession of a ship by their agent, take her to a place of safety, repair her, and detain her in their custody for an unreasonable time without giving notice to the assured that they are acting on his behalf and that they do not accept the abandonment, their acts will amount to a constructive acceptance of abandonment; nor will the fact that the insurers think fit to libel the ship in the Admiralty Court for salvage reward affect their liability, if the assured has not interfered in the salvage suit nor taken any steps to assert his continued ownership.

Acceptance of abandonment by underwriters is irrevocable, and makes a partial loss tantamount to a total loss, and the insurers are precluded from relying upon a subsequent recovery of the property because they are estopped from saying that the loss is not total; and, although by the Canadian Civil Code, art. 2545, abandonment cannot be made of a stranded ship if she can be raised so as to be sent forward to her destination, this article does not apply to cases where abandonment of a stranded ship has been accepted by underwriters, but must be read in conjunction with other articles (2547, 2549), by which abandonment and acceptance vest the property in the insurer, and cannot be defeated by subsequent events, as in English law.

A warranty in a time policy upon a ship for certain voyages, that the ship shall not proceed to or be at certain places after given dates, has not the effect of leaving the ship totally uninsured by the policy if, in breach of the warranty, she proceeds to, or is at those places after those dates, so as to preclude recovery in all cases; and if the underwriters, after a loss occurs whilst the ship is upon a voyage in breach of the warranty, duly accept abandonment, they will be estopped from setting up that there was no loss within the policy or the breach of warranty.

Where a ship is purchased in the name of two persons, A. and B., but the purchase money is by arrangement between them paid by A. only; and B., in order to give some security to A. for the

[Priv. Co.]

THE PROVINCIAL INSURANCE COMPANY OF CANADA v. LEDUC.

[Priv. Co.]

payment of his share, authorises A. to insure the ship in his (A.'s) name alone, and in case of the loss of the ship, to receive the whole insurance money, and so pay himself the amount due to him from B.; A. has an insurable interest in the whole ship, and may, in an action on a valued policy, recover in his own name the full amount insured. A statement by B. to a third person of this arrangement with A., being a declaration against his (B.'s) interest, is evidence against the insurers to show A.'s insurable interest.

A shipowner whose ship is mortgaged may, if he remains in possession, insure his ship to the full amount of her value.

THIS was an appeal from two concurrent judgments of the Court of Queen's Bench for the Province of Quebec, Canada, bearing date the 22nd March 1872, one of which modified on appeal a judgment of the Superior Court for the Province of Quebec, Canada, bearing date the 31st March 1870, in favour of the respondent by increasing the sum for which judgment was given for the respondent, and condemned the appellants to pay the plaintiff the full amount claimed by him, and costs, and the other of which dismissed with costs the appeal of the insurance company.

This was an action brought by the respondent, Joel Leduc, against the appellants upon a valued time policy of insurance for 5000 dols. on a ship called the *Babineau* and *Gaudry*.

The facts, which, except as hereinafter stated, were not disputed, were as follows:

On the 3rd Jan. 1867, Joel Leduc, the present respondent, insured with the appellants (who are an insurance company carrying on business at Toronto and having agents at Montreal and other places in Canada) a ship named the *Babineau* and *Gaudry* for 5000 dols. The policy was, as far as is material for the present appeal, in the following terms:

J. Leduc, of Montreal, Province of Quebec, as well in his own name as for and in the name and names of all and every other person and persons to whom the same doth may or shall appertain in part or in all, doth make insurance and cause to be insured, lost or not lost, the sum of 5000 dols. upon the body, tackle, apparel, and other furniture of the good schooner *Babineau* and *Gaudry*, whereof is master for the present voyage Benjamin Vigneau, or whoever else shall go for master in the said vessel, or by whatever other name or names the said vessel or the master thereof is or shall be called.

Beginning the adventure upon the said vessel, tackle, apparel, &c., at and from Montreal to trade between the island of Newfoundland, Nova Scotia, West India Islands, Cuba, safe ports in the United States and Quebec and Montreal, to and from ports in the Lower Provinces, risk commencing at noon of 15th Dec. 1866, and ending at noon of 15th Dec. 1867.

And it shall and may be lawful for the said vessel in her voyage to proceed and sail to, touch, and stay at any port or places if thereunto obliged by stress of weather or other unavoidable accident, without prejudice to this insurance. The said vessel, tackle, &c., hereby insured are valued at 7000 dols.

And it is agreed that in case a total loss shall be claimed for or on account of any damage or charge to the said vessel, the only basis of ascertaining the value shall be her valuation in this policy, and if not valued herein, then her actual value at the time of the inception of this risk at the port to which she then belonged.

Not allowed under this policy to enter the Gulf of St. Lawrence before the 25th April, nor to be in the said Gulf after the 15th Nov. Nor to proceed to Newfoundland after the 1st Dec. or before the 15th March, without payment of additional premium, and leave first obtained, war risk and sealing voyages excepted.

The evidence as to the interest possessed by the respondent in the *Babineau* and *Gaudry* was as follows:—

By a notarial contract, dated the 7th March 1866, the vessel was sold to the respondent and one Benjamin Vigneau for 1400*l*. which the respondent and the said Vigneau bound themselves jointly and severally to pay, by the instalments mentioned in the contract, so as to cover both the price of the vessel and certain moneys due upon mortgage upon the vessel, and the vessel was then registered in their joint names; there was evidence that Vigneau, who was captain of the vessel, being unable to provide the instalments, the respondent in fact paid the whole of the instalments as they became due, but there was no evidence that Vigneau had ever given up to the respondent his interest in the vessel, or in any way rendered his interest in it a security for the sum so advanced to him by the respondent, and the vessel continued registered in their joint names till the date of the loss hereinafter mentioned. The mortgage debts and the full price of the vessel were not fully paid until 15th Nov. 1869.

There was no evidence that the respondent intended to insure the vessel for the benefit of anyone but himself, nor was there any evidence that Vigneau had authorised him to insure his share of the vessel, except a statement by the witness Jean Vigneau, that his brother, Benjamin Vigneau, had told him that he was indebted to the respondent, and that, to give him security for what he owed him, he had authorised the respondent to insure the vessel *Babineau* and *Gaudry* in his own name; that if the vessel perished, the respondent might receive the amount insured, and so pay himself his debt.

At the time the insurance was made the vessel was at the port of St. John, Newfoundland, preparing for a voyage to the West Indies, which she subsequently completed. On the 16th Nov. 1867, the day after the date fixed by the policy as the last day on which the vessel was to be in the Gulf of St. Lawrence, the *Babineau* and *Gaudry* sailed from Montreal on a voyage to the port of St. John, Newfoundland; and on or about the 1st Dec. while still in the Gulf of St. Lawrence, she was overtaken by a violent storm and totally lost upon the island of Anticosti.

The whole of the crew were drowned, and news of the wreck did not reach the respondent till the 18th May 1868. On the 19th May the respondent served upon the appellants' agent at Montreal, Mr. McCaig, a notarial protest which contained a claim for payment of the full sum insured, 5000 dols., and a formal abandonment to the insurance company of the wreck. The protest stated all the facts then known to the respondent respecting the voyage and wreck of the vessel, and, *inter alia*, that the ship had left Montreal for St. John's on the preceding 16th Nov. Mr. McCaig's answer to this claim was that he would forward it to the head office; and he did so forward it, although the manager of the company said that he did not see the protest till 18th June, when a copy was sent from another source. The company returned no answer to the notice of abandonment and ultimately refused to pay the claim.

About the end of May Mr. Croker, the manager and secretary of the appellants, having seen a

[Priv. Co.]

THE PROVINCIAL INSURANCE COMPANY OF CANADA v. LEDUC.

[Priv. Co.]

notice in the newspapers that the wreck had been discovered upon the island of Anticosti, instructed Mr. McGregor, the company's marine inspector, to proceed there to look after the interests of the company. The appellants' manager denied having seen the protest at this time, or that they knew that the schooner had been in the Gulf of St. Lawrence after the 15th Nov., but could not explain how the protest had not come to hand.

Mr. McGregor proceeded to Anticosti, and found the vessel lying bottom upwards on the shore. After taking measures for the sale of the remains of the cargo, he proceeded to raise the vessel, and succeeded, at an expense of 3000 dols., in bringing it to Montreal.

The appellants subsequently proceeded against the ship in the Court of Vice-Admiralty at Quebec for the salvage expenses, which exceeded the value of the vessel, and she was sold, after the commencement of this action, by order of the said Court of Vice-Admiralty for the benefit of the salvors and fetched only 350 dols., which was paid to the appellants. There is no evidence when the proceedings in the Court of Vice-Admiralty were commenced, but Mr. McGregor stated that he took steps for obtaining repayment of the salvage expenses before the vessel reached Montreal. There was no evidence of the acceptance of the respondent's notice of abandonment by the appellants other than the facts above stated; and it was proved by Mr. Croker that Mr. McGregor had no authority to accept a notice of abandonment, and that the head office had no opportunity of communicating with him after his visit to Anticosti till his return.

The present action was commenced on the 14th Nov. 1868, and the declaration filed the same day set out the policy of insurance, and stated that the vessel left Montreal on the 16th Nov. 1867, bound to St. John's, and that she was lost on the island of Anticosti between the 1st and 5th Dec. next following, and that the respondent gave notice of abandonment of the vessel, which the appellant accepted; the declaration concluded for payment of 5000 dols. and interest.

The declaration as originally filed, contained also an averment that respondent was the sole owner of the ship; but it was subsequently amended by leave of the court, and a statement inserted of the purchase of the ship by the respondent and Vigneau, and the payment of the price by the respondent only, and an allegation that Vigneau authorised the respondent to insure the whole ship in his own name and at the same time gave up to him all claim on the ship.

The respondent, on the 3rd Dec. 1868, demurred to the declaration on the grounds that the policy contained a warranty that the ship should not be in the Gulf of St. Lawrence after the 15th Nov. and should not proceed to Newfoundland after the 1st Dec., while the declaration also showed that the vessel was lost while in the Gulf of St. Lawrence, after the 15th Nov., and while proceeding to Newfoundland after 1st Dec.

They also filed two special pleas, embodying the same defences and the general issue, and, after the declaration had been amended, they filed a supplemental plea, alleging that by law no person could be interested in a vessel such as the *Babineau* and *Gaudry*, unless registered as owner, and that according to the register, and in fact the respon-

dent was only part owner of the ship, and had no other insurable interest in it.

The respondent, on 4th Dec., 1868, joined issue on the defendant's demurrer and pleas, and filed special rejoinders which, in effect alleged: first, that the true interpretation of the warranty in the policy was that the ship should not be in the Gulf of St. Lawrence when entering the river after the 15th Nov., but might leave Montreal for Newfoundland any time up to 1st Dec.; secondly, that the appellants, having accepted the notice of abandonment after notice that the ship left Montreal on the 16th Nov., were thereby estopped from setting up any breach of the warranty.

The evidence given at the hearing has in substance been already stated.

The plaintiff tendered evidence to prove that it was the custom or usage of trade and navigation, for vessels going east to leave the port of Montreal at any time during the month of November, though not after the 1st Dec.; and that in going west it was not usual for vessels to enter the Gulf of St. Lawrence later than the 15th Nov. because the ice then began to come down the stream, and rendered it dangerous to ascend the river. Evidence was also tendered to show that the commercial import of the concluding clause of the policy was that in going east the vessel was not to proceed to Newfoundland after the 1st Dec. or before the 15th March; nor in going west, to enter the Gulf of St. Lawrence before the 25th April, or to be in the said Gulf after the 15th Nov., without payment of additional premium, and leave first obtained. This evidence was objected to by the defendants, and admitted subject to the opinion of the full court.

On the 31st March 1870 Mackay, J., delivered the judgment of the Superior Court in favour of the respondent, on the ground that the appellants were estopped—by their acceptance of the abandonment, and their appropriation of the vessel—from urging objections founded on the alleged breaches of condition. The judgment overruled the demurrer, and condemned the appellant to pay to the plaintiff the sum of 3500 dols. (half the amount at which the vessel was valued) with interest thereon from the 16th Nov. 1868 (the date of the service of the writ), and costs.

The respondent, and also the appellants, appealed from the said judgment to the Court of Queen's Bench for the province of Quebec.

The Court of Queen's Bench, on the 22nd March 1872, gave judgment in the appeals, and thereby annulled the said judgment of the Superior Court of the 31st March 1870, and condemned the appellants to pay to the respondent the sum of 5000 dols., with interest thereon from the said 16th Nov. 1868, and costs, on the ground that the allegations in the declaration were fully established by the evidence; and that by reason thereof, and of the abandonment made by the plaintiff, and the total loss of the vessel, and of the acceptance of such abandonment by the defendants, the plaintiff was entitled to claim the full amount for which the vessel was insured. Duval, C.J., Caron and Drummond, JJ., concurred in this judgment, Badgley, J., dissented therefrom altogether, and Monk, J., dissented as to the amount recoverable, holding that the plaintiff could only recover half the amount insured, 2500.

The judgments of the judges of the Queen's Bench at Quebec were destroyed by fire (which

[Priv. Co.]

THE PROVINCIAL INSURANCE COMPANY OF CANADA v. LEDUC.

[Priv. Co.]

burnt down the court house) except that of Badgley, J., which was, after setting out the facts given above, as follows:—

Badgley, J.—Before proceeding to notice the grounds of contention offered by the parties, some points of difficulty resting upon the alleged facts of the case will be removed and put aside. As matter of fact and as admitted by Leduc's amendment, his title of ownership of the vessel was for hut one-half, and his claim to the sole interest in the insurance money rests upon his alleged advances for Vigneau of the latter's share of their joint purchase money stated in the deed of sale to them jointly of the vessel. The proof of the fact was upon Leduc, and it is elementary to say that the evidence adduced by him is insufficient both in law and fact, that the objection taken by the insurers against its admission was well founded, in the face of the deed of their joint purchase and of their registered rights under the vessel's registry, and that his interest in the insurance money does not exceed one-half share thereof. As matter of fact, it is admitted by the declaration that the vessel was in the Gulf of St. Lawrence after the 1st Dec. 1867, the time prohibited; therefore by that breach of one of the express warranties above referred to, the breach of the warranty in that respect from that moment avoided the contract of insurance *ab initio* and as the contract cannot co-exist with its breach, therefore under the circumstances, there was no existing binding contract upon the insurers when the alleged abandonment was made. As matter of fact Leduc's averment in his declaration, that the insurers dispatched a duly authorized agent to recover and raise the vessel on their own account in without proof; and, on the contrary, the witness Crocker says, that McGregor was sent as was customary in such cases to look after the interests the company might have in the cargo or the vessel; that it was always the custom with the insurers to send a marine inspector, that is himself, to a wreck where a loss occurred, in order to save anything in case the company might have an interest in doing so, if not for the benefit of the parties concerned, the object in doing so being to keep the expenses as low as possible. This custom of the insurers is corroborated by the evidence of their witness Davidson, as being general amongst insurance companies. Finally the decree of the Vice-Admiralty Court in their favour proving them to be mere salvors of the vessel. As matter of fact, no express acceptance of the abandonment by the insurers has been proved by Leduc. Mr. Crocker says that McGregor had left for Gaspé before the company at Toronto had received the copy served in Montreal, and that he was never instructed to accept an abandonment. That could only be accepted at the head office, in Toronto, and that only in writing; that the company had never accepted them otherwise, and that they were not aware of the position of the vessel or any circumstance of the wreck at the time McGregor went down there. It is also proved McCuaig was their special agent at Montreal, only to receive applications for insurances and premiums and to transmit them to the head office for determination there, issuing *interim* receipts, but not authorized to issue policies. In fact that the alleged acceptance was only implied from the circumstances of the insurers having saved the

vessel, and taking her in charge, to prevent her destruction. No question has been raised in the case, that the repairs to the vessel were not necessary nor done in reasonable time, nor that their cost as decreed by the Vice-Admiralty Court was unreasonable. The remaining contentions questions raised by the parties are as to the legal nature of the loss suffered by the vessel, Leduc's right to abandon her for total loss, and the effect of the insurers' salvage of the vessel assumed to be a legal acceptance of Leduc's alleged abandonment. In the elucidation of these points recourse must be had to our provincial law as enacted in our Civil Code. By the Art. 2521 of the Code, losses for which insurers are liable are either total or partial. By the Art. 2522 the former are where the thing insured is wholly destroyed or lost; the latter when by reason of any event insured against, the thing though not wholly lost or destroyed, becomes of little or no value to the insured, &c., &c., or as more forcibly expressed by the French version, when it is *sans valeur ou d'une valeur minime à l'assuré* &c., &c. Now the only loss alleged in the declaration is that "*le dit navire aurait péri corps et biens dans le Golfe Saint Laurent, faisant un naufrage entier et complet*," which is the absolute total loss of the Code article, where the thing insured is wholly destroyed and lost, in other words submerged in the Gulf of St. Lawrence. As matter of fact the alleged total loss is not true, and has been disproved, but it is the only one alleged, and the insurers cannot be made to suffer from any other description of loss or cause of action than that charged; and in strict justice the appellant's action should be dismissed, unless under the rule of practice, he should elect to amend his declaration to meet the proof of the case, which as it admits of no effective abandonment with its alleged acceptance as set out in the declaration. But assuming the appellant's position of a constructive total loss in this case, in which he may claim as for a total loss upon abandonment made, "The notice must be explicit and must contain a statement of the grounds of abandonment, and these grounds must exist, and be sufficient at the time of the notice" (Art. 2544). But by the next following Art. 2545, abandonment on the ground of the vessel being disabled by stranding cannot be made, if she can be raised and put in a condition to continue her voyage. And in such case the recourse of the insured against the insurer is for the expense and loss occasioned by the stranding. Now in this case, the grounds for the abandonment given in the notice are that the vessel had become a constructive total wreck, whereas the vessel was stranded only; she was got off, repaired and restored to condition to continue her voyage, had it been required, and was navigated from Anticosti to Gaspé, and from Gaspé to her home-port Montreal. The restored vessel plainly falls within the operative effect of the exception of the Art. 2545 and was not subject to or effected by abandonment. The grounds stated in the notice showed that the vessel was not totally lost; that even her constructive total loss did not exist, and that the facts stated were not sufficient at the time of the notice to constitute a total loss, and were worthless and ineffective to support Leduc's claim for a total loss of the restored vessel; which, by his declaration, he admits, had been restored to con-

[Priv. Co.]

THE PROVINCIAL INSURANCE COMPANY OF CANADA v. LEDUC.

[Priv. Co.]

dition, and had reached Montreal before the institution of this action. Now by Leduc's factum before this court, the abandonment is assumed to be absolute and effective, and the action is in effect mainly upon the alleged acceptance by the insurers, not upon their expressed acceptance, but upon alleged facts of the insurers in connection with the vessel, which at best could constitute an implied acceptance only. The acts alleged are, that the insurers sent a special agent to the place of the wreck, that they took possession of the vessel, raised and repaired her, and afterwards sold her for their own profit and advantage. It is scarcely necessary to repeat that the vessel was derelict and abandoned by her owner, that the insurers took charge of her to prevent her utter destruction and repaired her as salvors, for which they obtained the Vice-Admiralty Court decree, which has not been contradicted nor denied by Leduc; and that finally the vessel was sold under admiralty process issued against the vessel for the payment of the salvage expenses incurred by the salvors, the insurers. It is manifest that the alleged acceptance is merely an implied acceptance, depending upon the effectiveness of the abandonment upon sufficient grounds existing at the time of the notice by Leduc, and accepted as such at the time by the insurers. Now, apart from the palpable fact of the restoration and recovery of the stranded vessel which prevented abandonment at all, it may be observed upon this point of "acceptance," that according to 2 Arnould, p. 992, "If the underwriter on receipt of the notice, either in reply by his word or writing, or implied by his acts, shows his willingness to adopt the abandonment in the terms proposed by the insured, he is technically said to accept the notice of abandonment, which he cannot afterwards dispute, unless the notice be false and therefore a mere nullity;" *aliter* he is bound to pay the sum insured without reference to the subsequent restoration of the property. Arnould adds, at the same time, that the universal principle is, that unless he has precluded himself from objecting against the validity of the abandonment, no abandonment can have any effective operation unless the state of things was such as to justify it at the time it was made. Hence, the term valid abandonment means one warranted by the state of things when the notice was given. And by the principles of English jurisprudence, it is established that the facts were such as to justify the assured in giving the notice when he did so, yet he cannot insist on it as for a total loss, if before he commences his action the thing insured be restored to him, or in the words of Lord Ellenborough, "the nature of the damnification at the time when the action is brought is the criterion of the rights to recover as for a total loss; and if at the time what had antecedently been a total loss, has by subsequent events ceased to be so, and become an average loss only, a compensation for that alone can be recovered": (4 M. & S. 884.) And as observed by Le Blanc, J. (10 East, 846): "It does not follow that a man has a right to abandon, because he has a right to give notice of abandonment on the faith of the intelligence received." And Arnould maintains this rule to be in the true principles of indemnity in marine insurance. The operative effect of the exception of the Art. 2545, brings the restored vessel within the principle of the rule stated by Lord Ellenborough, as to a demand for total loss of

a restored vessel at the time of the demand. The plain rule of law being that when a vessel is in existence, the insurer is only held to make good loss sustained as measured by restoring it to its original condition: (5 B. & C. 561; 2 M. & G. 593; 6 ib. 792; 3 Bing. N. C. 286; 1 Com. Bench Rep. 168; 3 ib. 781; 6 ib. 391; 4 ib. 343.) The English rule has been also settled of late years, and adopted in the great commercial states of New York and Massachusetts, and by the courts there held, that the success of the insurer in getting the ship afloat and repairing her, defeated an abandonment which had been made while she was on the rocks and in such condition as to render it probable that she was irretrievably wrecked: (*Wood v. Lincoln Insurance Company*, 4 Mass. Rep. 479; so in *Peole v. Suffolk Insurance Company*, 7 Pick. 254.) The Supreme Court of Massachusetts overruled the opinion of Story, J., in a previous case in the distinction taken by him between the actual and the presumptive state of the vessel, and decided that the successful efforts of the insurers to save her would invalidate an abandonment without regard to the probability of success at the time when the abandonment was made. So in *De Blois v. Ocean Insurance Company* (16 Pick. 303, 310) and in *Chase v. Commonwealth Insurance Company*, it held "that the successful result of efforts made by underwriters to get a stranded vessel afloat invalidated an abandonment whilst she was still on the beach; the validity of the abandonment was not to be determined by the supposed damages, and the insurers were under no legal obligation to allow the vessel to lie on the beach and be there destroyed, but might lawfully by their own act relieve and repair the said vessel, and demonstrate that such a claim was unfounded." This principle was also adopted by the New York Courts, and harmonizes with the construction given to the general principles of insurance laws which are universally "to have the indemnity and not the profit of the insured for its object; and that the actual and not the supposed loss should be the measure of the rights of the parties": (See *Emerigon*, ch. 17, sects. 1 and 6.) The Massachusetts rule approximates in effect to that of the English law, of the state of the loss at action brought; and is in accordance too with 2545 Article of our Code, that there can be no abandonment for constructive total loss where the vessel is recovered. Moreover, it will be observed that these rulings were upon recoveries of the stranded vessels by their insurers, no law preventing their taking such protective measures and in so acting in the interest of all concerned; on the contrary, it is a known principle of insurance law, and proved to be one customary and usual by the evidence adduced in this case, that insurers not only may, but customarily do so. The Code has no restriction or provision contrary to insurers, or excluding them from so acting, but is content to provide for the legal effect and result of the recovered vessel upon the rights of the parties. The power and ability of insurers to act for the present benefit of those interested are distinctly recognized by *Wesketts on Insurance*, tit. Abandonment, No. 7, who cites from Valin 183: "The insurers may take such measures for recovery as to them may seem good." This course is very frequently adopted by insurers in fire policies, and no conceivable good ground can exist against it in marine insurance, especially, as

PRIV. CO.]

THE PROVINCIAL INSURANCE COMPANY OF CANADA v. LEDUC.

[PRIV. CO.]

here, where the vessel was derelict, abandoned in fact and in law by the insured himself, although contrary to the requirements of Art. 2537, which held him bound to do in good faith all in his power, between the time of the loss and abandonment, to save the effects insured, yet instead of which, or instead of acting at all, he forthwith abandoned as appears upon insufficient grounds, although the Art. 2541 allowed him reasonable delay to inquire into and investigate the sufficiency of the facts and information communicated to him, and left the saving of the derelict vessel to the efforts of the insurers. That the acts of the insurers were of common usage and custom are proved in evidence, and supported by Valin, lib. 3, art. 46, and by Emerigon, sects. 12, 13, ch. 17, who protect the insurers in such cases of stranding as this. Implications of acceptance of abandonment for constructive total loss are not favoured, and can have no effect or validity in contravention of the positive fact upheld by the Art. 2545, of the actual recovery of the stranded vessel. Besides 2 Phillips, No. 1692, says, "There is no established mode of accepting any more than of making an abandonment, whether the insurer accepts or not is a matter of construction of his words and conduct, any act done for the purpose of making the most of the property to whomsoever it may prove to belong ought not to be construed against the party who thus consults the common interest." And he cites cases, amongst others, an agent of the insurers on freight taking charge and superintending and saving cargo &c.: (1 Johns, 205, and others; see also case 1 Esp. Rep. 73.) The circumstances of the case are of course to be considered, but the mere fact of taking possession of the ship, and keeping her in possession to repair, in themselves therefore are no implied acceptance under any circumstance, unless it be for a greatly unreasonable time, in which the circumstances of the case necessarily enter for consideration, but that unreasonableness must be affirmatively established by evidence by the insured, who would take advantage of it. By 7 Pick. 254, "The reasonableness of the time must depend upon the circumstances of the case, and in order to form a right opinion of such a case the vessel must be considered alone and separately." Now what were the circumstances in this case? She was stranded, say 2nd Dec. 1867, derelicted, visited first by McGregor, 15th June, who returned to Gaspé for materials and men to raise her, his return probably early in July, getting her in order to cross to Gaspé, putting her in condition there, and navigating her to Montreal early in September. These circumstances do not show unreasonableness of time for repairs, the previous interval, from time of stranding to taking possession, not counting from the known unapproachableness of the locality where the stranding took place, and Phillips, No. 1526, holds "in case of shipwreck or stranding without such injury to the ship as to prevent it from being got afloat and repaired within reasonable time and at reasonable expense, the assured has no right to make abandonment of the ship." The case of *Turner v. Bradley* (Park on Ins. 8th edit. p. 365, cited 2 Arnold, p. 1085) has reference to this, "A ship insured for six months from July 1777, from Cork to Quebec, was on arrival at Quebec removed into the basin for the winter, but before expiry of six months was

driven thence by force of drift ice, and run upon the rocks. This was in November, and the condition of the ship could not be ascertained till the next spring, when on survey she was found to be hulged and much injured, but not irreparably so. In consequence of the alleged difficulty of obtaining repairing materials, the master sold her where she lay," and in action by insured against the insurer, the court unanimously held against the claim, and refused recovery as for total loss, not by reason of the enforced delay from November to the spring, which was allowed *ex necessitate*, but on the other alleged ground of want of material, which was not established. Again, in all cases of implied acceptance, apart of course from the recovery of the vessel, as by 2245 Article C. O., the first question is to ascertain with what intent the insurer's acts were undertaken because the implication is made to rest upon the efforts of the insurers, for common interest, to save and repair a stranded vessel from total destruction on the beach, where she would otherwise lie, possibly in the special interest of the would-be abandoning insured. In this case no intent has been shown to accept abandonment, on the contrary a *diversus intuitus* to the abandonment and acceptance is proved by both Crocker and McGregor; the former swears that the notice was not received at Toronto by the company previous to their having despatched their salvage agent McGregor to examine into the state of the matter; he had left and was in Montreal on the 24th May, and this was done by the company upon previous information from Scott, their agent at Quebec. Mr. Crocker proves the actual receipt of the notice on the 15th June, McGregor being told by the insured on 24th May of the notice having been left at McCuaig's office, and McGregor being told of it, were in themselves, as to both McGregor and McCuaig, of no moment, as neither of these persons was an agent for the company to act upon an abandonment, neither having power from the company to accept or refuse abandonment for them. It is plain that the act of the company as to Mr. McGregor's proceedings throughout, were altogether *diversus intuitus* from the abandonment or its acceptance; and hence being unconnected with this form, and for the purpose of salvage only for the common interest, a perfectly legal act in itself, their act through him was not an implied acceptance of the abandonment. The legal effect of the abandonment moreover, if possibly valid to notify it, consists in the right to abandon according to the terms of the notice. Leduc, claiming to be sole owner, professes to abandon, and transfer the whole vessel, and all his rights as such sole owner. But he was only half owner, and had no right to transfer more than his own proprietary right and title in the subject vessel. The transfer by abandonment is an entirely different thing and right, from rights belonging to the assured under insurable interest. Arnold says, "The power to abandon is only a criterion of insurable interest in those cases where the subject is capable of abandonment." Here, by the 2545 Article, the recovered vessel was not capable of it; Leduc could only transfer his own half, because abandonment is a transfer and substitution of the insurers in the proprietary rights of the abandoner in the thing insured, whatever may be the extent of his insurable interest in it. The vessel having been recovered, there could have been no effective aban-

donment when the action was instituted, and therefore no acceptance of abandonment by the defendants either formally or impliedly; the loss therefore could only have been partial, and the action being as for a total loss, which could have no existence, should have been dismissed. Under the circumstances of the case, I think the judgment appealed from is incorrect, and I would maintain the appeal of the appellants, and dismiss that of Leduc.

The Court of Queen's Bench dismissed the appeal of the insurance company, and pronounced the plaintiff entitled to recover the whole sum insured, \$5000, and from this judgment the insurance company appealed to the Judicial Committee for the following amongst other reasons: First, because the respondent broke the express warranties in the policy that the ship should not be in the Gulf of St. Lawrence after the 15th Nov., or proceed to Newfoundland after the 1st Dec., and has therefore no legal claim against the appellants. Secondly, because a breach of an express warranty is not waived by an acceptance by an insurer of the notice of abandonment given to him by the insured. Thirdly, because there was an actual total loss of the ship, and the respondent's notice of abandonment was therefore invalid and had no effect. Fourthly, because the appellants never accepted the abandonment of the ship by the respondent, and were not estopped by their conduct from setting up the breaches by the respondent of the express warranties in the policy. Fifthly, because the respondent was only owner of a moiety of the ship and could not therefore recover more than half the amount insured, or give a valid notice of abandonment at all events except in respect of his interest in the ship. Sixthly, because the respondent only intended to insure his own interest in the ship and had only an insurable interest in one-half of it. Seventhly, because the declaration was bad in law for the reasons stated in the appellants' demurrer, and the respondent has failed to prove any liability on the part of the appellants to pay to him the whole or any part of the sum insured. Eighthly, because the judgment was erroneous both upon the facts and the law of the case.

The Articles of the Canadian Civil Code, cited in argument and in the judgment, are as follows:—

2490. Warranties and conditions are a part of the contract, and must be true if affirmative, and if promissory must be complied with, otherwise the contract may be annulled, notwithstanding the good faith of the insured. They are either express or implied.

2491. An express warranty is a stipulation or condition expressed in the policy, or so referred to in it as to make part of the policy. Implied warranties will be designated in the following chapters relating to different kinds of insurance.

2497.—Marine policies in cases of doubtful meaning are construed by the established and known usage of the trade to which the policy relates; such usage is held to be a part of the policy when it is not otherwise expressly provided.

2521. Loss for which the insurer is liable is either total or partial.

2522. Total loss may be either absolute or constructive. It is absolute when the thing insured is wholly destroyed or lost. It is constructive when by reason of any event insured against the thing, though not wholly destroyed or lost, becomes of little or no value to the insured, or the voyage and adventure are lost or rendered not worth pursuing. Before the insured can claim for a constructive total loss, he must make an abandonment as declared in the following section.

2523. The insured may make an abandonment to the

insurer of the thing insured in all cases of its constructive total loss, and may, thereupon, recover as for a total loss. Without abandonment he is entitled in such cases to recover as for a partial loss only.

2543. The abandonment is made by a notice given by the insured to the insurer of the loss, and that he abandons to the latter all his interest in the thing insured.

2544. The notice of abandonment must be explicit, and must contain a statement of the grounds of abandonment. These grounds must exist, and be sufficient at the time of the notice.

2545. Abandonment on the ground of the ship being disabled by stranding cannot be made if she can be raised and put in a condition to continue her voyage to the place of destination. In such case the insured has his recourse against the insurer for the expense and loss occasioned by the stranding.

2547. Abandonment made and accepted is equivalent to transfer, and the thing abandoned, with the rights pertaining to it, becomes from the time of abandonment the property of the insurer. The acceptance may be either express or implied.

2548. Abandonment made upon sufficient ground, and accepted, is binding on both parties. It cannot be defeated by any subsequent event, or revoked otherwise than by mutual consent.

June 2, 3, and 4.—Sir John Karslake, Q.C., and *Bompas*, for the appellant.—By the express terms of the policy the ship was not allowed to be in the Gulf of St. Lawrence after the 15th Nov., nor to proceed to Newfoundland after the 1st Dec. She was in the Gulf after that date, and there was a breach of an express warranty. Hence the ship was upon a voyage not covered by the policy, and so if there was a total loss the appellants were not liable for it. The plaintiff must allege that the voyage was within the policy, but this he cannot do, because the appellants specially exempt themselves from covering any risk in the Gulf of St. Lawrence after the 15th Nov. But even if this be a constructive total loss, the same rule applies, because it is not covered by the policy. Even if we accepted the abandonment under a mistaken view of the facts we should not be estopped from denying our liability. [Sir R. P. COLLIER.—If you might give leave beforehand to proceed upon the voyage at this time, why could you not sanction the proceeding afterwards? Sir BARNES PEACOCK.—The condition might be waived.] The assured, in order to give a valid notice of abandonment, must have sustained a loss within the policy. [Sir M. SMITH.—Suppose you had sold the ship? They might have used us for the proceeds. It is alleged that taking possession of her was an admission that she was lost within the meaning of the policy. It is true that the appellants' agent went down to the place of the wreck, but he went there to do his best for all concerned, and not to act for the company alone; this was shown by the fact that he instituted a salvage suit against the ship and cargo to recover reward for the services rendered. This would have been unnecessary if the appellants had been owners of the ship. A warranty in a policy of insurance is a condition or contingency, and unless that be performed there is no contract: (*De Hahn v. Hartley* 1 T. R. 343.) If there is no contract there can be no waiver, and hence there was never a valid abandonment so as to create a constructive total loss, for which the appellants are liable. Sect. 2549 of the Code does not apply to a case where there has been no loss under the policy, but only to cases where there has been a loss, but a question may arise as to whether that loss is total or partial; it is only applicable to cases where there has been

[Priv. Co.]

THE PROVINCIAL INSURANCE COMPANY OF CANADA v. LEDDUE.

[Priv. Co.]

a valid abandonment: (See Civil Code of Canada, Arts. 2521, 2522.) There was an actual recovery of the stranded vessel, and hence there could be no abandonment (Art. 2545); this was a case of staving within that Article.

Secondly, even if the respondent were entitled to recover on a proper form of pleading, he cannot recover here as he claims only for a total loss occurring in the Gulf of St. Lawrence, whereas this is at most a partial loss made constructively total by abandonment.

Thirdly, the respondent can only recover in proportion to his own interest in the ship. The evidence clearly shows that he was joint owner with Vigneau, and as he insured only in his own name and not as Vigneau's agent and does not claim in Vigneau's interest, he can only recover the amount of his own interest. The allegation is that the respondent is interested in the whole amount. The question is, did he intend to insure the whole value? and if so had he any insurable interest in that value? Vigneau owed him money, but this could give no interest in the ship without some form of mortgage or other security. The property in the ship remained in Vigneau, and the respondent could not insert it for his own benefit: (*Irving v. Richardson*, 2 B. & Ad. 193), and it is clear that he did not intend to insure for Vigneau's benefit. The interest covered by the insurance depends on the intention of the parties. The respondent says that he intended to insure his lien on one half the ship as well as his own property in the other half. He believed he had a right to such a lien, and, hence, an interest on the whole ship. He did not intend to insure more than his own interest and he now finds that he has only an interest in half. He cannot now claim to have insured Vigneau's interest as well as his own. Unless he had not only authority from Vigneau to insure, but intended to insure Vigneau's interest, the appellants can be liable only to the extent of the respondent's interest. This question of insurable interest is fully discussed in *Ebbeworth v. The Alliance Marine Insurance Company* (ante, p. 125; L. Rep. 8 C. P. 596; 29 L. T. Rep. N. S. 479).

Wills, Q.C. and *Pauli* for the respondent. — The real meaning of the conditions in the policy, stipulating that the ship shall not be in the Gulf of St. Lawrence after the 15th Nov., nor proceed to Newfoundland after the 1st Dec., is that the ship shall not come up the Gulf towards Montreal after 15th Nov., but may leave Montreal for another port after that date, provided she does not proceed "towards" Newfoundland after 1st Dec. The words "proceed to Newfoundland" must be construed as "proceed towards Newfoundland," or "set sail for" that place (*Colledge v. Hartly*, 6 Ex. 205), and if this construction is put upon them, the condition involves an absurdity if the ship may not be in the Gulf, going outward to another place after 15th Nov.; the ship within the policy may, on or before 1st Dec. proceed from any of the ports named in the policy to Newfoundland, and for that purpose pass through the Gulf after that date; hence, to make the condition as to the ship being in the Gulf after 15th Nov. reasonable and intelligible, it must apply only to a voyage in which the ship enters the Gulf going towards Montreal. At any rate the clause is ambiguous, and may be explained by parol evidence as to the usage of trade (Civil Code, Art. 2497); and by the

evidence given it is shown to be the custom for ships not to enter the Gulf later than 15th Nov., on account of the descending ice, and, moreover, the interpretation contended for is that which was put upon the clause by the appellants' own agent, who effected the policy.

Secondly, even supposing the condition in the policy is against the respondent, nevertheless the appellants have rendered themselves liable for the loss by accepting notice of abandonment. The acts of the appellants' agent amounted to an acceptance of abandonment. The respondent gave due notice, and to this notice the appellants sent no reply. Silence on the part of underwriters after notice of abandonment is in itself sufficient acceptance (*Hudson v. Harrison*, 3 Brod. and Bieg. 97); but in this case the underwriters dealt with the ship as their own property; they raised her and took her to Montreal, and for that purpose must have repaired her; at Montreal she was sold in a suit of salvage instituted by them. This was done after the notice of abandonment had been given, and must be construed as an acceptance of abandonment.

Phillips on Insurance, § 1693;

Peile v. The Merchants Insurance Company, 3

Mason's C. C. Rep. 37;

Peile v. The Suffolk Insurance Company, 7 *Pickering's (Massachusetts) Rep. 254;*

The Cincinnati Insurance Company v. Bakewell,

4 B. Moore's (Kentucky) Reports.

The mere fact that the ship was sold in a salvage suit instituted at the instance of the appellants or their agent will not free them of their responsibility if they have acted unreasonably in not giving notice to the owner of the meaning and intention of their acts. If then they have constructively accepted abandonment they are now estopped from denying a loss within the policy. They cannot now set up that there has not been a total loss, even if there has been none in law, nor can they contend that they are liable only for a partial loss; they are estopped by their own acts. The very nature of an estoppel is that something done by a person or allowed by him to be done prevents that person from setting up the truth. It does not matter if the true state of things is known to one only or to both of the parties. For instance, in the case of lessor and lessee, where the lease has been avoided by the breaking of a covenant by the lessee, the subsequent receipt of rent by the lessor estops him from setting up the breach, whether the breach is known to both parties or not; where an arbitrator omits to make his award in due time, he is both sides go on with the reference, both are estopped from setting up the lapse of time; where a bill is drawn by a person under disability, even if known, that person is estopped from setting up his disability; but estoppel does not depend upon the knowledge of the parties. In this case both parties had perfect knowledge of the true state of facts, and yet long after acquiescing that knowledge act as though the true state of facts would not be raised. Once abandonment has been accepted the insurers cannot be allowed to say that the loss is not total. They have admitted the loss to be of that description, and have agreed to take possession of the property, and by the abandonment, the whole interest of the respondent has passed to the appellants.

Smith v. Robertson, 2 Dow's Parl. Cas. 474;

Canadian Civil Code, Art. 2547;

PRIV. CO.]

THE PROVINCIAL INSURANCE COMPANY OF CANADA v. LEDUC.

[PRIV. CO.]

The Cincinnati Insurance Company v. Bakewell (ubi sup.).

Admitting for argument that the condition is against the respondent, the contention that the ship was upon a voyage for which she was not insured is untenable; she was insured upon a voyage from Montreal to Newfoundland, subject to a warranty that she should not go on that voyage at a particular time; having gone on that voyage at that time she committed a breach of warranty. But that breach the appellants have waived by accepting abandonment with knowledge of the facts: (See *Arnould on Insurance*, 4th edit., p. 850, note.)

Thirdly, what was the insurable interest of the respondent, and what amount is he entitled to recover? The respondent had an insurable interest in the ship, and this was a valued policy. It is the rule that where there is an insurable interest and a valued policy the amount recoverable is according to the valuation, and the parties are bound by that valuation: (*Arnould on Insurance*, 4th edit., pp. 284, 301). [Sir BARNES PEACOCK.—If a ship is valued at 7000*l.*, and the plaintiff has only an insurable interest in half, can he recover under a valued policy for 7000*l.*, the full amount? Yes, unless there has been a fraudulent over-valuation. The valuation is conclusive of the interest of the assured unless there is fraud. It is laid down in *Arnould* p. 284: "The difference in point of effect between a valued and an open policy is, that under an open policy in case of loss the assured must prove the actual value of the subject of insurance; under a valued policy he need never do so, the valuation in the policy being conclusive between the parties except in the case of fraud." [Sir BARNES PEACOCK.—The assured need not prove the value of the thing insured, but must he not prove the extent of his own interest?] It has been distinctly held that where an assured is interested in any part of the thing he may recover on a valued policy in his own name to the amount of the valuation; it must be taken that the value insured is the value of the plaintiff's interest:

Feres v. Aguilar, 3 Taunt. 506;

Ebbesworth v. The Alliance Marine Insurance Company (ubi sup.);

Robertson v. Hamilton, 14 East, 322.

Moreover, the plaintiff had an insurable interest in the whole of the ship. He had advanced money to pay the purchase money to Vigneau the co-owner and had such control over the share of the letter as entitled him to insure it in his own name: (See *Phillips on Insurance*, §§ 180, 208, and the cases there quoted.) The evidence establishes that the plaintiff had authority from Vigneau to insure Vigneau's interest in the ship and to receive the amount of any losses paid. But even without any express authority to receive the amount of losses the respondent being authorised to insure was Vigneau's agent and can sue in his own name to recover Vigneau's loss: (See *Phillips on Insurance*, §§ 383, 1965.)

Bompas in reply.

Cur. adv. vult.

June 26, 1874. — Judgment was delivered by Sir BARNES PEACOCK.—The respondent, Joel Leduc, is the plaintiff, and the appellants, the Provincial Insurance Company of Canada, are the defendants in a suit brought in the Superior Court for Lower Canada, district of Montreal, upon a policy of in-

surance upon the body, tackle, apparel, and other furniture of the schooner *Babincaud Gaudry*.

The policy was effected by the plaintiff as well in his own name as for and in the name and names of all and every other person and persons to whom the same did, might, or should appertain, in part or in all, for 5000*doles*, upon the said ship, &c., beginning the adventures at and from Montreal to trade between the Island of Newfoundland, Nova Scotia, West India Islands, Cuba, safe ports in the United States, and Quebec and Montreal, to and from ports in the Lower Provinces, the risk commencing at noon of the 15th Dec. 1866, and ending at noon of the 15th Dec. 1867. The vessel, &c., were valued at 7000*doles*, and it was agreed that, in case a total loss should be claimed for or on account of any damage or charge to the said vessel, the only basis of ascertaining the value should be her valuation in the said policy. The vessel was warranted free of war risk. The policy contained a stipulation in the following words: "Not allowed under this policy to enter the Gulf of St. Lawrence before the 25th April, nor to be in the said Gulf after the 15th Nov. Nor to proceed to Newfoundland after the 1st Dec., or before the 15th March, without payment of additional premium and leave first obtained, war risk and sealing voyages excepted."

It may be taken as against the plaintiff that the vessel left the port of Montreal on 16th Nov. 1867, for the port of St. John Newfoundland, and that she was wrecked between the 1st and 5th Dec. 1867, about twenty miles below the West Point of the Island of Anticosti, in the Gulf of St. Lawrence. (See the plaintiff's declaration, Record, p. 14; and his protest, Record, pp. 19 and 20, para. 5, 7, 8, and 9.)

It was contended on the part of the plaintiff that notwithstanding the vessel was lost in the Gulf of St. Lawrence after the 15th Nov. 1867, the case did not fall within that part of the warranty or condition by which it was declared that she was not to be in the said Gulf after 15th Nov. The argument in support of that contention was that the words, "to proceed to Newfoundland," meant, according to the decision of *Colledge v. Harty* (6 Ex. Rep. 205) be read in the sense of "to proceed towards," or "to set sail for" Newfoundland, and that if read in that sense, it would be inconsistent to allow a vessel to set sail from Montreal to Newfoundland on or before the 1st Dec., and not to allow her to enter the Gulf of St. Lawrence after 15th Nov. It was, therefore, urged that the first part of the condition by which it was declared that the vessel was not allowed to enter the Gulf of St. Lawrence after the 15th Nov., applied only to the case of entering the Gulf for the purpose of proceeding upwards; and in support of that argument the evidence of Bazil de Roy was referred to, in which he stated that it was the custom of navigators to leave the port of Montreal at any time in the month of November, for the purpose of going down the Gulf, but that for the purpose of going up the river, they did not generally enter the Gulf later than the 15th Nov., and that the reason was that the ice then began to descend, and the navigation became dangerous (Record, p. 77).

Mr. Routh, a commission merchant, who was the agent of the defendants at Montreal, through whom the policy was effected, stated that he understood by the clause that the vessel was

[Priv. Co.]

THE PROVINCIAL INSURANCE COMPANY OF CANADA v. LEBUC.

[Priv. Co.]

not to be in the Gulf after the 15th Nov., that is to say, coming west; and going east not to proceed to Newfoundland after the 1st Dec., &c. On cross-examination, he stated he did not undertake to do anything beyond giving his opinion of the reading of the clause.

Their Lordships are of opinion that the clause is very clear, that the opinion of Mr. Routh is not admissible, and that to put upon the clause such a construction as that contended for would be to make a new agreement for the parties, instead of construing that which they made for themselves.

The only way in which a doubt is created as to the construction of the clause, is by reading the latter part of it, as declaring that the vessel might proceed from any of the ports mentioned in the policy to Newfoundland on or before the 1st Dec., notwithstanding they might have to pass through the Gulf after the 15th Nov. That, however, is not the true construction of the clause. As their Lordships read it, the vessel was neither to be in the Gulf of St. Lawrence after the 15th Nov., nor to proceed to Newfoundland from any port after the 1st Dec. There is nothing inconsistent or unreasonable in giving effect to the words used, and in holding that the vessel, whether proceeding from Montreal or from any other port, was not to be in the Gulf of St. Lawrence after the 15th Nov.

Their Lordships are, therefore, of opinion that the appellants are not liable for the loss unless they have rendered themselves liable by accepting the notice of abandonment.

As regards that question, it may be taken as proved that, within a reasonable time after the plaintiff first heard of the loss of the vessel, he gave notice of abandonment to the company's agent at Montreal. (See Appellant's case, in the appeal to the Court of Queen's Bench, Record, p. 60.) It is there said, "The respondent heard of the loss of the vessel on the 19th May 1868, and thereupon left the notification and protest with the company's agent at Montreal. This document does not appear to have reached the company's head office at Toronto until the 19th June following."

Mr. McCuaig, the agent, however, gave evidence to the effect that the notice of abandonment was, to the best of his knowledge, served upon him on the 19th May 1868, and that the said paper was sent by him to the head office of the company at Toronto on the same day or the next day (Record, p. 62).

Their Lordships see no reason to doubt the truth of that statement. Mr. Crocker, who was a director and the manager and agent of the company up to the month of Aug. 1870, when examined as a witness for the defendants, declared that the copy of the notice of abandonment was received at the office of the defendants in Toronto on the 18th June 1868 (Record, p. 64, line 20). On cross-examination, however, he stated that he did not receive a copy of the notice through Mr. McCuaig, that he received it from Mr. McGregor, who sent it to him from Quebec. That copy, if sent by Mr. McGregor from Quebec, must have been a different copy from that sent by Mr. McCuaig. Indeed, one of the learned counsel for the respondents was forced to admit upon the argument that the copy notice sent by Mr. McGregor and the notice of which Mr. McCuaig spoke, must

have been different copies. The protest and notice of abandonment is set out at p. 19 of the Record. It gave notice of the time and place of the wreck, demanded payment of the 5000 dollars for which the vessel was insured, and relinquished and abandoned to the defendants all the rights, claims, title, and interest of the plaintiff in the said vessel.

Both the Superior Court and the Court of Queen's Bench on appeal, found that the abandonment was accepted by the defendants. Two of the learned judges of the Court of Queen's Bench dissented from the judgment of that court; Mr. Justice Monk, however, dissented only on the question of damages: Mr. Justice Badgley alone dissented as to the acceptance by the defendants of the abandonment. It was proved by McGregor that on the 24th May he was instructed by the manager of the insurance company to proceed to Gaspé, in the Gulf of St. Lawrence, to look after any interest company might have in the cargo or in the vessel. He also stated that the defendants had constantly acted as salvors and saved vessels, and been allowed salvage for such service. But, whether the defendants had acted as salvors on other occasions or not, the instructions which Mr. McGregor received, and upon which he acted, were to look after any interest the company might have in the cargo or in the vessel. He stated that he went to Anticosti, and was there on the 15th June; that he went to the vessel, which he found about twenty miles from the lighthouse, near the centre of the island, on the south-west side; that she was lying bottom up, with her bow out in the Gulf, and her rigging, anchor, and chains lying just at her bow; that a hole had been cut in her side for the purpose of taking out her cargo. He further stated, that after disposing of her cargo, he got material and men, and went back to the island and took the vessel off, and brought her to Gaspé, where he left her and went home. He said, "After I got to Toronto I endeavoured to get the salvage," but he was wholly silent as to the person from whom, and the manner in which, he endeavoured to get it. He proceeded: "When I found I could not get it, I went down in September and brought the vessel up to Montreal, where she has since been proved." It was proved that the sale was made after a decree of the Vice-Admiralty Court, in a proceeding in rem for salvage (p. 54), and it is stated by Mr. Justice Badgley that she was sold under Admiralty process: (Supp. Record, p. 6).

The case of *Hudson v. Harrison* (3 Brod. & Bing. 97) was cited as an authority to show that the silence of an insurer has been construed to be an acceptance of an abandonment. It is not necessary to go to that length in this case. Their Lordships consider that Mr. Justice Story was correct in stating that an insurer is not bound to signify his acceptance of an abandonment. If he says nothing and does nothing, the proper conclusion is that he does not mean to accept. In the case of *Peels v. The Merchants' Insurance Company* (3 Mason's C. C. Reps. 27; Phillips on Insurance, 3rd edit., 391), it was held by Mr. Justice Story that the floating and repairing of a stranded ship by the underwriters, though it was done with the intention of surrendering to the assured, was a constructive acceptance of an abandonment. In the case of *Peels v. The Suffolk Insurance Company* (7 Pickering's Reps. 254; Phillips, 390), the Supreme Court of Massachusetts held that though the under-

[Priv. Co.]

THE PROVINCIAL INSURANCE COMPANY OF CANADA v. LEDUC.

[Priv. Co.]

writers had a right to keep possession of a ship for a reasonable time to repair it, yet that their keeping it for an unreasonable time for that purpose was a constructive acceptance of the abandonment. It has also been held that, if the underwriters take possession of a vessel after an abandonment, and proceed to repair without giving notice of their object, it is an acceptance: (*The Cincinnati Insurance Company v. Bakewell*, 4 B. Monroe's Rep., Kentucky, 541.)

In the present case the defendants were not merely silent, but they were active, and by their agent, Mr. McGregor, took possession of the vessel after notice of abandonment had been sent to the head office at Toronto; and the vessel was kept in the possession of the defendants from the time it was raised and taken into Gaspé until it was arrested at the instance of the defendants by the Vice-Admiralty Court, and it must have been repaired before it was taken to Montreal.

Mr. McGregor stated, in his evidence, that he left the vessel at Gaspé when he returned to Toronto; but there can be no doubt that it was left in the charge of some person on behalf of the company from that time until the month of September following, when he returned to Gaspé, and took the vessel up to Montreal; and, at all events, the vessel having been raised and taken into Gaspé by the agent of the defendants, must be assumed to have remained in their possession until proved to have been delivered over. There is no evidence that the plaintiff, at any time during that period, had notice of the object with which the defendants took and retained possession of the vessel, or that they disputed their liability for the loss upon the ground of a breach of warranty, or that they repudiated the notice of abandonment. There was nothing to lead the plaintiff to suppose that the defendants repudiated altogether their liability under the policy and the notice of abandonment, and that they were acting, not as insurers, but as mere ordinary salvors, who had no interest whatever in the vessel, and their Lordships cannot believe that they acted merely in that capacity. The remarks of the court in the case above cited of the *Cincinnati Insurance Company v. Bakewell*, are very applicable to the present as regards that suggestion.

Mr. Justice Badgley considered that the decree of the Vice-Admiralty Court in favour of the defendants proved them to be mere salvors of the vessel: (Supp. Record, p. 6, line 43.) But their Lordships do not concur in that view. That decree is dated the 23rd April 1899. It does not appear, nor is it very material, at what time the suit in the Vice-Admiralty Court was commenced. It is, however, stated by Mr. Justice Badgley (Supp. Record, p. 5), and the fact is probably so, that the vessel was libelled, pending the present action in the Superior Court. It was, however, a proceeding *in rem*, and not against the plaintiff personally. It would have been no answer in that proceeding for the plaintiff to have alleged that he had no interest in the vessel; that by virtue of the insurance, the loss, the abandonment, and the acceptance thereof, the vessel had become the property of the defendants. If the defendants thought fit to libel their own vessel for salvage, it was no concern of the plaintiff's, nor was he bound to appear. He could not have defended that suit without alleging that he had an interest in the vessel, and thereby prejudicing his

own action on the policy and his contention that the defendants had accepted the abandonment.

Mr. Croker stated that McGregor was never instructed to accept an abandonment, and that abandonments could be accepted only at the head office and by writing; but McGregor was instructed to look after the interests of the company, and if his acts in pursuance of those instructions, coupled with the nonrepudiation of the notice of abandonment, amounted to an acceptance, or were evidence from which an acceptance might be inferred, the defendants are bound by those acts. The question as to whether the abandonment has been constructively accepted is a mixed question of law and fact. Unfortunately, we have not the reasons of the majority of the judges. Their Lordships are of opinion that the acts of the defendants, by their agent, McGregor, in regard to the vessel after notice of abandonment, and especially their repairing the vessel and retaining it in their possession from the time when it was raised up to the time of their libelling it in the Vice-Admiralty Court, without repudiating that notice or informing the plaintiff as to the character in which they were acting, were evidence of an acceptance of the abandonment. They would not reverse the concurrent decisions of two courts upon a question of fact, except upon the clearest conviction that they were wrong. In the present case, they are of opinion that the courts were correct in finding that the abandonment was accepted. Their Lordships' view upon this part of the case would be the same even if Mr. McLaughlin had not forwarded the notice of abandonment to the head office before the 18th June.

Then, as to the effect of that acceptance, it was contended that, as there was no loss for which the defendants were liable, the notice of abandonment was inoperative, and that the acceptance of it could not convert a partial loss for which the defendants were not liable into a total loss for which they were liable. Articles 2521 and 2522 of the Civil Code were referred to, and it was urged that there could be no loss within the meaning of the Code unless it was caused by an event insured against. Mr. Justice Badgley was of that opinion, and he considered that at most there was only a partial loss, which could not, under Articles 2544 and 2545, be converted into a total loss by notice of abandonment. That learned judge said, "implications of acceptance are not favoured, and can have no effect or validity in contravention of the positive fact upheld by Article 2545 of the actual recovery of the stranded vessel." (Supp. Record, p. 10, line 6.) He was also of opinion that the fact of the restoration and recovery of the stranded vessel prevented abandonment at all.

It appears to their Lordships that the learned judge did not sufficiently advert to the distinction between a mere notice of abandonment and a valid abandonment, or a notice of abandonment which has been accepted.

Their Lordships are of opinion that the present case did not fall within Article 2545, upon which Mr. Justice Badgley so much relied. It was not a case of mere stranding. The vessel could not have been raised and put into a condition to continue her voyage to the place of destination. Further, it appears to their Lordships that Article 2545 must be read in conjunction with Articles 2538, 2543, and 2544, and that it does not apply to the case of an abandonment

[Priv. Co.]

THE PROVINCIAL INSURANCE COMPANY OF CANADA v. LEDUC.

[Priv. Co.]

which has been accepted. It puts the case of stranding very much upon the same footing as that upon which it stands under the law of this country. Abandonments made and accepted are treated of in Article 2547. It is there said: "Abandonment made and accepted is equivalent to transfer, and the thing abandoned, with the rights pertaining to it, becomes from the time of abandonment the property of the insurer. The acceptance may be either express or implied.

Article 2549 of the Code was intended to prevent a notice of abandonment when accepted from being defeated by any subsequent event.

The Superior Court held that the plaintiff was estopped, by the acceptance, from urging against the plaintiff objections founded upon the breaches of condition, and awarded the plaintiff half the amount, viz., 3500 dollars, of the declared value of the vessel. The Court of Queen's Bench, Mr. Justice Badgley dissenting, held that the allegations set forth by the plaintiff in his declaration, which included an allegation of acceptance, were fully proved; and that by reason thereof and of the abandonment accepted by the company, the plaintiff was entitled to recover the full amount insured, viz., 5000 dollars. Mr. Justice Monk dissented on the question of amount only. He considered that the plaintiff was entitled to recover but only one-half of the amount insured.

Their Lordships are of opinion that by the acceptance of the abandonment, the defendants became liable as for a total loss. In *Smith v. Robertson* (2 Dow's Parl. Cas. 474), it was held that the insurers could not be allowed to say that the loss was not total after they had acquiesced in the abandonment as for a total loss, and had thereby admitted that the loss was a loss of that description. In that case the insurer had no right to abandon, but merely a right to give notice of abandonment. But the moment the notice was accepted, the abandonment took effect; the loss immediately became tantamount to a total loss; and the insurers were precluded from relying upon the subsequent recovery of the property because they were not allowed to say that the loss was not total. This case, as it appears to their Lordships, gets rid of the objection of Mr. Justice Badgley to the form of the plaintiff's declaration at page 7, line 25, Supplemental Record. He there says: "Now the only loss alleged in the declaration is, that *le dit navire aurait péri corps et biens dans le Golfe Saint Laurent, faisant un naufrage entier et complet*, which is the absolute total loss of the Code article, where the thing insured is wholly destroyed and lost, in other words, submerged in the Gulf of St. Lawrence. As matter of fact, the alleged total loss is not true, and has been disproved, but it is the only one alleged, and the insurers cannot be made to suffer from any other description of loss or cause of action than that charged; and in strict justice the appellant's action should be dismissed, unless, under the rule of practice, he should elect to amend his declaration to meet the proof of the case, which as it is, admits of no effective abandonment with its alleged acceptance, as set out in the declaration."

Their Lordships would deeply regret if an objection to the mere form of the declaration, which does not affect the merits of the case, should compel them to decide against the plaintiff, but they are relieved from that difficulty by the above-mentioned case in the House of Lords, in which it was held

that the insurers after acceptance could not be allowed to say that the loss was not total.

It was contended that the vessel was not insured at the time when she was lost, as the insurance did not extend to a loss in the Gulf of St. Lawrence after the 15th Nov., and that an abandonment can be of no avail when there is no insurance. But the vessel was in fact insured: the loss occurred during the time and upon a voyage described in the policy, but there was a breach of one of the warranties or conditions expressed. In the case of *The Cincinnati Insurance Company v. Bakswell*, the insurance was merely against a total loss. But it was held that the insurers could not, after acceptance of an abandonment, rely upon the fact that the loss was not total, and, consequently, that it was a loss within the terms of the policy.

There is no distinction in principle between an express and a constructive acceptance of an abandonment. The effect produced upon the rights of the parties is the same in both cases. Suppose the defendants, upon the receipt of the notice, had written to the plaintiff and said that, as the loss took place in the Gulf of St. Lawrence after the 15th Nov., they did not consider themselves in strictness liable to make good the loss; that they found upon inquiry that Mr. Routh, their agent at Montreal, through whom the insurance was effected, was under the impression that that part of the warranty which declared that the vessel was not to be in the Gulf of St. Lawrence after the 15th Nov. applied merely to the case of its going west, and that, under those circumstances, they did not consider it right to avail themselves of the breach of warranty; that they accepted the abandonment, and would make the best they could for themselves of the salvage, and would settle as for a total loss. Or suppose they had gone further, and stated that they concurred with Mr. Routh in his construction of the policy, and that they accepted the abandonment. Suppose that, after they had raised the vessel they had sold her for 10,000 dollars in excess of the salvage expenses, it is clear that the plaintiff could not have turned round and claimed the full amount of the proceeds of the vessel upon the ground that the loss was not caused by a risk insured against, and that he had, consequently, no right to give notice of the abandonment. If the plaintiff could not have treated the abandonment as a nullity, surely the defendants cannot be allowed, after acceptance, to rely upon a breach of the warranty or condition of which they had full notice at the time of their acceptance of the abandonment. Estoppels are mutual. If the mouth of one party is closed, so also is that of the other. By the abandonment and the acceptance of the abandonment the matter was closed. The whole interest of the plaintiff in the thing abandoned was transferred to the defendants and became their property: (*Art. 2547*).

There are many cases in which it may be very doubtful whether, in point of law, the particular facts amount to a breach of warranty. But if, after a constructive total loss and notice of abandonment, the insurer, with full knowledge of all the facts, accepts the notice of abandonment, he cannot, when called upon to pay the amount insured, resist and rely upon a breach of warranty.

The effect of acceptance is, as remarked by Mr. Arnould, well expressed by Bonlay Paty—*Cours de Droit, Comm.*, tit. xi, sec. 7, vol. 4, p. 380:—"Par leur acceptation volontaire il s'est fait un pacte

[PRIV. CO.]

THE AMERICAN AND THE SYRIA.

[PRIV. CO.]

entre les parties qui a tout terminé." (Arnould, p. 1173, note x.)

The only remaining question is as to the amount to which the plaintiff is entitled. Jean Baptiste Vigneau proved that his brother, Benjamin Vigneau, who was the captain of the vessel and was lost in her, told him that he was in debt to the plaintiff, that, in order to give him a guarantee for the debt, he had authorized him to insure the vessel *Babineau et Gaudry* in his own name alone, to the end that if the vessel should be lost the plaintiff might receive the whole of the insurance money, and pay himself the amount which Benjamin Vigneau owed him.

Their Lordships consider that this declaration of the deceased against his own interest was evidence sufficient to prove that the plaintiff was authorized by Benjamin Vigneau to insure the half of the vessel which belonged to him, and to receive the amount insured. This, coupled with the interest which the plaintiff had in the other half of the vessel, entitled him to insure the whole vessel, and to recover the full amount insured.

Mr. Justice Badgley appears to have overlooked the evidence of Jean Baptiste Vigneau, when the learned judge stated that the plaintiff's interest in the insurance money did not exceed one-half share thereof. It is clear that an agent who insures for another with his authority may sue in his own name: (Phillips on Insurance, par. 1965). The mortgage did not affect the plaintiff's right, to insure for the full amount of the value of the vessel. The vessel, or the value of it may be the only means which he has of paying the mortgage debt.

Their Lordships are of opinion that the judgment of the Court of Queen's Bench was correct, and they will humbly advise Her Majesty to affirm it, with the costs of this appeal.

Judgment affirmed and appeal dismissed.

Solicitors for the appellants, *Biehoff, Bompas, and Biehoff*.

Solicitors for the respondents, *Ashurst, Morris and Co.*

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY OF ENGLAND.

Reported by JAMES F. ASHURST, Esq., Barrister-at-Law.

July 10, 11, 14, and 24, 1874.

(Present the Right Hons. Sir JAMES W. COLVILLE, Sir MONTAGUE SMITH, and Sir R. P. COLLIER.)

THE AMERICAN AND THE SYRIA.

Collision—Steamship towing—Duty to keep out of way of sailing ship—Duty of sailing ship to keep her course—Responsibility of tow for negligence of tug—Governing power—Disabled ship—Salvors' negligence—Tug and tow belonging to same owners.

A steamship towing another ship is within the meaning of the Regulations for Preventing Collisions at Sea relating to steamships, and is not by reason of her incumbered condition altogether absolved from the duty of keeping out of the way of a sailing vessel; still allowances should be made, under the circumstances of each case, for the comparatively disabled condition of the incumbered steamer, and the duty of additional precaution is imposed upon a sailing ship approaching a steamer so incumbered.

Where a ship is ordered by the regulations to pursue a certain course in relation to another vessel, she has a right to presume that that other vessel will do her duty, and also observe the regulations; hence a sailing ship, approaching a steamship towing another ship, has a right to hold on her course until there is immediate danger of collision, in the expectation that the steamship will observe the regulations and keep out of her way.

Where a collision takes place between a tug towing a ship and another ship, the question whether the tow is liable to make good damage done by the negligence of the tug, depends upon the determination of the question whether the "governing power" is in the tug or in the tow. If the tug is in the service of and under the orders of the tow, the tow is answerable for the negligence of the tug as for the negligence of a servant; but if the tug is, although rendering service to the tow, not under the control of the latter, but is itself the governing power, then the tow is not liable for the negligence of the tug.

Where the master of a steamship, finding another steamship belonging to the same owners with her engines disabled, undertakes, not in pursuance of any specific contract made with the master of the disabled ship, but out of his sense of duty to his employers and in the hope of obtaining salvage reward, to tow the ship home, the towing ship is not under the control of the tow, nor is the governing power in the tow, so as to render the tow responsible for the negligent acts of the tug. Nor does the fact that both ships belong to the same owners render the towed ship responsible for the acts of the tug.

This was a consolidated cause of damage instituted on behalf of the owners of the late ship *Aracon*, and of her master and crew, against the steamship *American*, and against the steamship *Syria*, and against the Union Steamship Company (Limited), of Southampton, the owners of those steamships intervening. There was also a cross cause instituted by the defendants against the owners of the *Aracon*, which was heard at the same time and on the same evidence. The allegations of fact on behalf of both plaintiffs and defendants appear sufficiently from the pleadings in the High Court of Admiralty. The plaintiff's petition was as follows:

1. Between 10 p.m. and 11 p.m. on the 8th March 1874, the ship *Aracon*, of 738 tons register, manned by a crew of twenty-four hands all told, whilst on a voyage from London to Hong Kong with a general cargo, was in the English Channel off Portland.

2. The wind at such time was about west-south-west, a moderate breeze, the tide was about two hours flood, and of the force of about a knot or a knot and a half per hour, and the weather was fine, and there was moonlight, and the *Aracon* was close hauled by the wind on the starboard tack, and sailing at the rate of about five or six knots per hour, and heading about south. Her proper regulation side-lights were duly exhibited and burning brightly, and a good look-out was being kept.

3. At such time a bright light, which proved to be a masthead light of the above named steam vessel *American* was seen at the distance of several miles from the *Aracon*, and bearing about four or five points on her starboard bow, and some time afterwards the red light of the *American*, and the red light of the above named steam vessel *Syria*, which proved to be in tow of the *American*, were also seen. The *Aracon* was kept close hauled by the wind on the starboard tack, in the expectation that the *American* and *Syria* would take proper measures for keeping out of the way of the *Aracon*, but, instead of so doing, the *American*, with the *Syria* in tow, came on and caused immediate danger of collision; and although the

[Priv. Co.]

THE AMERICAN AND THE SYRIA.

[Priv. Co.]

helm of the *Aracan* was put hard aport, the *American* with her port side came into collision with the stem and port bow of the *Aracan*, and slewed the *Aracan* round with her head towards the eastward, and the *Syria* struck the *Aracan* on her port side, and so much damage was done to the *Aracan* that she foundered with her cargo and certain private effects of her master and crew. Her master and crew were saved by getting on board the *Syria*.

4. The said collisions and the losses of the plaintiffs consequent thereon were occasioned by the negligent and improper navigation of the *American* and *Syria*, or by the negligent and improper navigation of the *American*.

5. The said collisions were not in any way occasioned by any negligence on the part of those on board the *Aracan*.

The defendants' answer was:

1. Shortly before 10.30 p.m. of the 8th March 1874, the screw steamer *American*, of 1354 tons nett register tonnage, propelled by engines of 320 horse power, and navigated by Edward George Baynton, her master, and a crew of sixty-eight hands, was in the English Channel, off Portland, which bore north by west, and was distant about sixteen miles, proceeding on a voyage from the Cape of Good Hope to Southampton, laden with a general cargo of merchandise, and having in tow the screw steamer *Syria*, of the burthen of 1939 tons gross register, which was disabled in her machinery.

2. The wind at this time was about west, the weather was fine but dark, and there was a light haze on the water. The tide was flood, of the force of between one and two knots an hour, and the *American* was proceeding under steam only, steering east by north half north, and making about five knots an hour, with the Admiralty regulation lights, to wit, two bright white masthead lights placed vertically, about nine feet apart, upon the fore topgallant stay (to indicate that she was towing another vessel), a green light on the starboard side, and a red light on the port side, all of which were duly exhibited and burning well and brightly. The *Syria* also had a green light on her starboard side, and a red light on her port side, both also duly exhibited, and burning well and brightly. A good look-out was being kept on board both the above named vessels.

3. In these circumstances, and whilst the *American* was thus proceeding, the green starboard light of a vessel (which afterwards proved to be the *Aracan*) was seen bearing about four and a-half points on the port bow of the *American*, and at the distance of about three-quarters of a mile off. The helm of the *American* was then ported and put hard aport, but the *American* having the *Syria* in tow, only a slight alteration could be made in her course.

4. The *Aracan* was on the starboard tack, and as she approached the *American*, she improperly deviated from her course, and ran into and struck her upon the port side, just before the main rigging, and did her considerable damage. The *Aracan* then fell to starboard of the *American*, and the *Syria* ranged ahead, and shortly afterwards the *Aracan*, with her port side, came into contact with the stern of the *Syria*.

5. The master and crew of the *Aracan* were, by means of the boats of the *Syria*, safely got on board the latter vessel, and conveyed to Southampton.

6. The *Aracan*, whilst approaching the *American*, before the collision, improperly starboarded her helm.

7. The *Aracan*, prior to the occurrence of the said collision, did not duly and properly port her helm.

8. The said collision, and the losses and damages consequent thereon, were caused by the negligence of those on board the *Aracan*, and by their improper navigation of that vessel.

9. No blame in regard to the said collision is attributable to those in charge of the *American* or *Syria*, and the said collisions are, so far as they are concerned, the result of inevitable accident.

10. Save as herein appears, the defendants deny the truth of the statements contained in the plaintiffs' petition.

The pleadings were thereupon concluded.

April 15 and 16.—The cause came on for hearing before Sir R. Phillimore, assisted by Trinity Masters. The allegations of fact in the plaintiffs' petition were substantially proved by the plaintiffs' wit-

nesses. It was shown that the *Aracan* was close hauled on the starboard tack, and that she was kept on her course, her officers believing that they were bound so to keep her and that it was the duty of the steamer to have kept out of the way, and that her helm was put hard aport only when there was immediate danger of collision. The plaintiffs' witnesses alleged that if the *American* and the *Syria* had, instead of holding on as they did, starboarded on sighting the *Aracan*, they would have gone under the *Aracan*'s stern.

On behalf of the defendants it was shown that the facts stated in the first two paragraphs of their answer were true. It was further shown that the green light of the *Aracan* was sighted by the look-out of the *American* at the distance of about three-quarters of a mile, and bearing about four and a-half points on the port bow of the *American*. This light was at once reported by the look-out; at first the look-out got no answer from the officer of the watch; the look-out again reported the light, and then got an answer. The officer of the watch thereupon ordered the helm of the *American* to be put a-port and then hard-a-port, and the order was obeyed, but the *American* having the *Syria* in tow, answered her helm very slightly. The defendants' witnesses alleged that it would not have been possible, by reason of the difficulty of managing the two vessels together, to have kept out of the way of the *Aracan* by starboarded and going under her stern. It was also alleged by them that the *Aracan* did not continue her course, but starboarded her helm instead of porting and going up into the wind as she ought to have done under the circumstances. It was further alleged that the *Aracan* showed only her green light to the *American*, and that the blow which the *Aracan* struck the *American* was a blow leading forward towards the *American*'s bow. This last allegation was contradicted by the plaintiffs, who called two passengers from the *American* (soldiers returning from Ashantee), who swore that they both saw the red light of the *Aracan* shortly before the collision. The length of the *American* was 325ft., the length of the *Syria* 317ft., and the scope of hawser between them 540ft., making a total length of 1182ft.

April 17 and 18.—Butt, Q.C. (R. O. Clarkson with him), for the plaintiffs.—First, on the question of law, I submit that it was the duty of the *American*, as a steamer, to keep out of the way of the *Aracan*. By the Regulations for Preventing Collisions at Sea, Art. 15, it is the duty of a steamer to keep out of the way of a sailing ship, and by art. 18, a sailing ship meeting a steamer must keep her course. If, then, the *Aracan* kept her course, the *American* was bound to keep out of her way, unless there were circumstances within art. 19 taking her out of the rules. The question then will be, is a steamer towing another to be considered as within the scope of the regulations, or is a steamer towing another to be taken as incumbered, and, therefore, an exception to these regulations? [SIR R. PHILLIMORE.—Is there any authority for the position that a steamer towing can, by reason of such towing, avoid her obligation to keep out of the way of a steamer? I should be inclined to hold, until given some good reason to the contrary, that such a steamer is no exception to the general rule.] It has been so decided in several cases since the regulations became law:

[Priv. Co.]

THE AMERICAN AND THE SYRIA.

[Priv. Co.]

The Warrior, 27 L. T. Rep. N. S. 101; L. Rep. 3 Adm. & Fos. 583; 1 Asp. Mar. Law Cas. 400;
The Emperor, *The Zephyr* (a);
The Galea, *The Zenobia* (a).

Before the passing of those rules, certain cases decided that a steamer was to be treated as a vessel with

(a) ADMIRALTY COURT.

June 1, 1864.

THE ZEPHYR.

THIS was a case of damage instituted by the owners of the steam tug *Emperor* against the brig *Zephyr*. The *Emperor* was towing a laden brig from Yarmouth to Lowestoft. The *Zephyr* was bound in ballast from Ipswich to Blyth, and the collision took place off Corton, at about 5 p.m., on the 22nd Jan. 1864. The case of the tug was that she was steering about S. and by W., when the *Zephyr* was seen about three-quarters of a mile off, bearing S. 1 W., and steering N. by E., with her red light only visible; the tug kept her course, when the red light of the *Zephyr* suddenly disappeared, and the latter crossed the tug's bows, showing her green light; she continued her course, when her green light disappeared, and she bore about S.W. by W. on the tug's starboard beam, when she bore down right before the wind and ran into the tug, striking the tug on her starboard fore spar; as soon as it was seen that she was so bearing down the tug's engines were stopped, and her helm ported, but there was no time to alter her course. The defence of the *Zephyr* was that whilst she was under all plain sail, carrying her proper lights, and heading N.E. by E., the tug was made out at some distance, about two points on her port bow; neither the tug nor the tow had any lights exhibited; the *Zephyr*'s helm was ported, but the tug did not port, but starboarded, and so brought about the collision.

Dr. Deane, Q.C. and Dr. Womley appeared for the plaintiffs, Q.C. and E. C. Clarkson for the defendants.

Dr. LUSHINGTON, addressing the Elder Brethren after reading the rules as to lights, said:—Now, gentlemen, if you think that in any degree the absence of lights on board this tug contributed to this collision, there is no doubt in point of law, whatever other findings or conclusions we may come to, that the tug was to blame. Having disposed of that part of the case, I must next request your attention to another part of these Parliamentary regulations—for such they are—as to what are the rules applicable to these two ships, and respecting that there is no doubt also. It is the 18th article of the Steering and Sailing Rules: "If two ships, one of which is a sailing vessel and the other a steamship, are proceeding in such directions as to involve risk of collision, the steamship shall keep out of the way of the sailing ship." That brings me at once to the consideration of this question. No doubt these two vessels were approaching each other; but were they approaching each other in such directions as to involve risk of collision? [The learned judge then examined the evidence on this point and continued.] It will be entirely for you, and not for me, to say whether, the tug being two points on the *Zephyr*'s port bow, there was really any risk of collision if these vessels had kept their courses, because it is risk of collision alone which renders it peremptory for the tug to give way. This statement as to the position of the two vessels is not contradicted. I know not, as far as relates to the tug, I need say more, because, according to her own account, she intended to do nothing, and all she represents herself to have done here, was almost at the moment of collision she stopped her engines, and her master put his hand upon the tiller but had produced no effect, and no measures were adopted by her in order to avoid the collision if it was incumbent upon her to adopt them. There is a part of these rules which applies to the *Zephyr*, that is Art. 18: "When by the above rules, one of two ships is to keep out of the way, the other shall keep her course, subject to the qualifications contained in the following article." You see, gentlemen, to a certain extent, at least, as far as my knowledge and experience goes, this is a new direction, because it is not that two vessels shall, if there is risk of collision, both put their helms to port, but that if one of two ships is to keep out of the way, the other shall keep her course; therefore it is a

the wind free, but that when she had another ship in tow, she was not free, and that there were sometimes occasions when a sailing vessel was bound to give way to a steamer towing. But in those cases the steamer was the port tack vessel and the sail-

peremptory direction for the *Zephyr* to have kept her course unless she falls within the following rule: "In obeying and constructing these rules, due regard must be had to all dangers of navigation, and due regard must also be had to any special circumstances which may exist in any particular case rendering a departure from the above rules necessary in order to avoid immediate danger." I take it that the meaning of that rule is to impose the obligation as strictly as possible of obeying the 18th rule, as far as is consistent with not incurring immediate danger. You will have to consider in this case whether the *Zephyr* did or did not comply with the 18th rule. The charge made by the *Zephyr* as to the tug, is that she starboarded her helm. If there be any improbability in the story that the tug starboarded as alleged, there appears to me to be an equal improbability in the other story that the brig first starboarded and then ported. The point is for you to determine.

The learned judge and the Elder Brethren having retired for consultation, upon their return.

Dr. LUSHINGTON said: We are all of opinion that the tug was solely to blame for this collision.

ADMIRALTY COURT.

July 27, 1865.

THE ZENOBIA.

THIS was a case instituted by the owners of the ship *Galea* against the barque *Zenobia*. The *Galea*, a ship of 815 tons, was bound from Dunedin, New Zealand, to London, and the *Zenobia*, a barque of 415 tons, was bound from Waterford to Shields. The collision occurred off the South Foreland about 9 p.m. on the 11th June 1865. The case of the *Galea* was that she was proceeding in tow of the steam tug *Warrior* about E.N.E. with both wind and tide strongly against her, at the rate of about a knot and a half through the water; that she was in charge of a duly licensed pilot; that there were several vessels in sight, some beating and others running; that the *Zenobia*, which was heading up channel, was seen standing towards the *Galea* on the starboard tack; that when the *Zenobia* had approached the *Galea* within two or three cables' length, she was about five or six points on the *Galea*'s starboard bow; that if she had continued her course the *Zenobia* would have passed well astern of the *Galea*, but that instead of doing so, the *Zenobia*, when she was within about a cable's length of the *Galea*, luffed up as if for the purpose of going about on the other tack, and then filled again and ran stem on into the starboard quarter of the *Galea*, and did her considerable damage. The defence of the *Zenobia* was that whilst proceeding under topsails, courses, staysails, and jib close-hauled on the starboard tack, heading north, and making about five knots an hour, the tide being flood and of the force of about three knots, the *Galea* was seen in tow of a steam tug at the distance of between one and two miles, bearing about W. by N. coming up channel, and the *Zenobia* was kept on her course close-bowed to the wind, in the expectation that the steam tug and ship would pass clear under her stern; that the steaming and *Galea* approached the *Zenobia* and instead of passing under her stern, they proceeded to pass ahead of that vessel, and thereby rendered a collision with the *Zenobia* imminent, whereupon the helm of the *Zenobia* was put hard-a-starboard and her port main braces were let go, and an attempt was made to square the main yard of the *Zenobia*, but before this could be done the vessels came into contact.

Dr. Deane, Q.C. and Murphy for the plaintiffs.
 Brett, Q.C. and E. C. Clarkson for the defendants.
 Dr. LUSHINGTON addressed the Elder Brethren as follows: Gentlemen,—It appears that the steam tug was going up channel with this large ship in tow, and the barque was close-hauled on the starboard tack, with her head to the north, and the wind was E.N.E. Regarding the tug, I apprehend there is no case which relieves her from the duty of getting out of the way of the barque under those circumstances. There is no case that I am

PRIV. CO.]

THE AMERICAN AND THE STRIA.

[PRIV. CO.]

ing vessel the starboard tack vessel, and hence, under the old rule, it was the duty of the steamer to keep out of the way. The master of the *Araucan* performed his duty by keeping his course. If he

had done otherwise, he would have been to blame in case of collision. Secondly, on the facts it is established that the *Araucan* did not starboard into the *American*. The *American* did hold on her

aware of, and certainly neither the case of *The Cleonard* (Lush 158; 1 Mar. Law Cas. O. S. 41), which has been adverted to, nor that of *The Arthur Gordon* (Lush 279; 1 Mar. Law Cas. O. S. 88), goes to that effect. It was the duty of the tug then, provided it was practicable, and could be done without danger, to get out of the way of the barque, which was close-hauled; and accordingly to my construction of the rules it was the duty of the barque to keep her course, unless there was an imperative necessity for her departing from them in order to avoid immediate danger. The first question is, did the tug do all she ought to do, and could do, to avoid the collision, and was she in point of fact prevented from taking more effectual measures to avoid collision from the state of the wind and tide and the smallness of her power, and has she any excuse to set up upon that ground? And, on the other hand, did she do anything which would accelerate the collision and produce greater mischief? As to the tug, I cannot understand anything but that she starboarded at a time which does not appear to me to be of importance in the case. The *Zenobia* states that she came under the starboard helm, and so continued, and did the utmost in her power to avoid the collision by going astern of the tug. The *Gala* asserts that she did not do so, but that when she came a certain way, approaching the *Gala*, she then ported, whereby she stopped her own way, and the consequence was she could not get ahead, and tried to go astern.

The learned judge and the Elder Brethren having retired for consultation, on their return

Dr. LUSHINGTON said: We are all of opinion that the sole blame is to attach upon the tug and the *Gala*, and none at all upon the other vessel; and I must, therefore, dismiss the suit with costs.

ADMIRALTY COURT.

March 10, 1865.

THE DAVID CANNON.

THIS was a case of collision instituted by the owners of the tug *Great Conquest* and of the ship *North East* against the American ship *David Cannon*. There was also a cross suit. The *North East* was proceeding in tow of the *Great Conquest* for Tanker, having left the Mersey the day before the collision. The wind was about N.W. and their speed about five knots; the tug and tow had their regulation lights burning, and the tug also carried a light on the after side of her funnel as a guide to the *North East* in steering. They sighted the *David Cannon* running, as they said, free. They first saw her boom about three points on the tug's port bow, distant about a mile; they then saw her green light and starboarded slightly; they then saw her red light, and they thereupon put their helm hard a port. The *David Cannon*, as the plaintiffs alleged, starboarded and ran into the tug. The tug was sunk, and the *North East*, coming into collision with the *David Cannon*, was damaged. The *David Cannon* was charged with a want of lookout, improperly starboarded, and not carrying proper lights. The *David Cannon* was proceeding to Liverpool. The wind was, according to her account, N.W., and she was close-hauled on the port tack, heading N.E., going five knots, her crew keeping a good lookout with her regular light burning, when the bright light of the *Great Conquest* was seen about three points on her lee bow, three or four miles distant; then a red light came in view, and when both lights had approached the *David Cannon* within half a mile the green light of the tug also became visible, bearing three points on the starboard bow of the *David Cannon*, and all three lights remained visible until they had approached to within a quarter of a mile and then the green light disappeared. Then for the first time it was ascertained that the tug was towing a ship. Until the green light was lost the *David Cannon* was kept close to the wind, but when the green light disappeared, it not being possible to avoid the collision by porting, the helm of the *David Cannon* was put hard down to lessen the blow, and the tug was hailed to put her helm hard down; but

that the collision immediately occurred, causing damage to the *David Cannon*; both tug and tow coming into collision. The tug and tow were charged with want of a good lookout, with improperly starboarded their helm, with not carrying their regulation lights duly placed and duly burning, with not casting off the towing hawser soon enough, and with not keeping out of the way of the *David Cannon*.

Dr. Deane, Q.C., appeared for the tug.

Milneard, Q.C., and Butt for the *North East*.

Brett, Q.C., and Cohen for the *David Cannon*.

Dr. LUSHINGTON, in addressing the Elder Brethren, said:—Gentlemen, We must first see by what rule this case is to be governed, and whether any exception is engrafted upon the generality of that rule, and whether this case falls within the exception. The 15th rule is this: "If two ships, one of which is a sailing ship and the other a steamship, are proceeding in such direction as to involve risk of collision, the steamship shall keep out of the way of the sailing ship." That rule throws upon the steamship the burden of keeping out of the way. You will observe here that in one respect the tug entirely answers the description, because she is a steam vessel; but you will also observe that there is nothing said about the steamer having any vessel in tow. As to the duty of the other vessel likely to be in contact the 18th rule says, "Where, by the shore rules, one of two ships is to keep out of the way, the other shall keep her course, subject to the qualifications contained in the following article." If we were to take these two clauses practically to operate together, we should say, of course, the tug was to keep out of the way, and that the *David Cannon* was to keep her course. But there are certain exceptions.

Article 19. "In obeying and construing these rules, due regard must be had to all dangers of navigation, and due regard must also be had to any special circumstances which may exist in any particular case, rendering a departure from the above rules necessary in order to avoid immediate danger." Undoubtedly exceptions might arise under this article, but it does not appear to me, I must candidly state to you, that any exception does arise in this individual case under this rule. It appears to me that this 19th rule was framed for the purpose of the protection of a vessel that was required to keep her course, and not for any other purpose. I am not clear in my own mind that the case of *The Arthur Gordon* and *The Independence*, decided by the Judicial Committee, is altogether overruled and got rid of by this rule, and I am also not clear in my own mind at all, whether an ancient rule and principle, much known and acted upon several times in this court, does not apply, viz., that whatever be the rules or regulations which govern ships generally, yet in cases of immediate danger, it is the duty of every ship to avoid a collision. The learned judge having adverted to the case of *The Arthur Gordon* and *The Independence*, said: It will be for you to consider whether, looking at the circumstances of this case, there is anything which would induce you to think that the steamer should not be so strictly confined to the words of these regulations; and also whether the *David Cannon* was not bound to take some steps other and different from what she did take. Now there is no doubt whatever that the *Great Conquest* did starboard her helm to a certain extent. To what extent she starboarded, and whether it was sufficient to bring about the present collision, you will consider, having regard to the pleadings and evidence. If you should come to the conclusion that that starboarded produced the collision, the case for the plaintiffs must fail. You will also consider whether the not happening to see the two masthead lights of the *Great Conquest* by those on board the *David Cannon* in any degree operated so as to cause this collision. According to the statement of the *David Cannon*, they saw, three or four miles off, a bright light, and they did nothing but follow their course. They saw the red light, then they saw the green light, then all three lights, and finally they lost the green light; and then they say at the last moment, in consequence of the other vessel porting, they, in order to lessen the blow,

PRIV. CO.]

THE AMERICAN AND THE SYRIA.

[PRIV. CO.]

course and ported, so as to bring about the collision. If she had starboarded instead of porting there would have been no collision. Thirdly, a great part of the damage done to the *Aracas* was occasioned by the *Syria* coming into collision with her. This collision might have been avoided by those on board the *Syria*, and those on board of her are to blame for that collision.

MILNARD, Q.C. (Gainsford Bruce with him), for the defendants.—The defendants do not contend that because a steamship is towing, that she is not a steamship within the meaning of the rules, but the plaintiffs' contention is, that by the regulations a steamer is under the same liability whether she is towing or not. No doubt it is the duty of a steamship to get out of the way of a sailing ship, but subject to articles 19 and 20 of the Regulations. Such an interpretation of the rules has the effect of making them accord with the practice of seamen before the rules came into operation, and does not alter the law, and it is clear that such a case as this ought to be governed by the practice of seamen. Before the passing of the rule, the law was laid down in *The Cleodon* (Lush, 158), where it appears that the rule as to a ship's keeping her course is the same as now, and that there were no means of knowing that a ship was in tow as there were no distinguishing lights, and yet the sailing ship was held to blame. [SIR R. PHILLIMORE.—In that case the sailing vessel executed a wrong manoeuvre, whilst here the plaintiffs allege that they did nothing. The defendants say the *Aracas* starboarded, and if they did they might come within the decision in the *Cleodon*. The plaintiffs do not deny that proposition. Hence the main question is, whether they starboarded?] There is this further question, whether the *Aracas*, seeing that the *America* took no steps to keep out of her way, ought not to have adopted some manoeuvre to have avoided the *America* and the *Syria*. In *The Arthur Gordon—The Independence* (Lush, 270, 277) it is strongly laid down that a tug and tow are exceptions to the rule that a steamship must keep out of the way of a sailing ship. [SIR R. PHILLIMORE.—Are there any cases showing that that principle applies to a steamship towing after the passing of the rules?] There are cases where it has been held to be a question of whether there are special circumstances arising in each case:

thinking a collision must actually take place, starboarded. It is said on the other side, that if the *David Cannon* had kept her course, there would have been no collision, that if she had ported there would have been a greater freedom from collision, but that starboarded as she did brought about that calamity which actually took place. Those are the matters for your consideration.

The Court and Elder Brethren then retired for consultation, and upon their return,

DR. LUSHINGTON said: We are of opinion that the *David Cannon* is solely to blame for this collision, on the ground that she did not keep her course, as she ought to have done. We do not find that any blame attaches to the tug, and, of course, not to the ship. I wish to add a suggestion of the Trinity Masters, though it is not any ground of our judgment, but that it should be known that they deprecate exceedingly the way in which the lamps were carried on board the *David Cannon*, as likely to lead to a great deal of mischief and confusion.

Decrease accordingly.

[The facts in these cases are taken from the printed pleadings and the judgments from the transcript of the shorthand writers' notes as given in the *Shipping Gazette*.—Ed.]

The Warrior, ubi sup.;
The Galia and The Zenobia, sup.;
The Empress and The Zephyr, sup.

[SIR R. PHILLIMORE.—It would be a most serious thing to lay down that a steamer towing a ship was exempt from the liability ordinarily attaching to a steamer. In giving my judgment I ought to be most careful to avoid laying down anything of that sort in general terms, unless I am convinced that such is the true construction of the sailing rules. Apart from that question, it might be a fair contention in this case, that there were special circumstances in this case requiring special action.] That is my submission. The plaintiffs saw that the *America* was towing up channel, must have judged of the enormous length of the tug and tow together, and of the difficulty of manoeuvring, and yet took no steps to avoid us. In *Huntley v. Palmer* (Mitchell's Maritime Register, Feb. 3, 1871), Blackburn, J., intimates an opinion that a steamer towing is not a steamer within the meaning of the Act, and is not even under as much control as a sailing vessel. The *Syria* was not sufficiently under control to enable her crew to prevent her coming into collision with the *Aracas*, but the damage done by that collision was so slight that it did not contribute in any way to the loss of the *Aracas*.

E. C. CLARKSON, in reply.—A steamship towing is within the rules, just as any other steamship, and the rules were passed so as to express this meaning. The first rule defines a steamship within the rules to be any ship under steam; Rule 4 defines what lights shall be carried by a tug towing; and Rules 15 and 16 define the duty of a steamship meeting a sailing vessel. Hence, it is clear that the Legislature had in contemplation vessels towing others, and they have made no distinction between tugs and other steamers as to their duties in relation to sailing ships, and their duty is, therefore, to keep out of the way of sailing ships. If it should be held that a steamer towing need not keep out of the way of a sailing ship close-hauled on the starboard tack, then such a steamer may force all other ships to give way, whatever the circumstances. The cases cited were decided before the rules, and hence if the rules are applicable the cases do not apply. Art. 15 applies, not only when a collision is imminent, but when there is risk of collision; whilst Art. 19 applies to cases of immediate danger, and a steamer towing cannot claim the protection of Art. 19 if it has wrongfully failed to obey Art. 15. There was a duty upon the *Aracas* to keep her course, and this she performed. The *America* ought to have slackened speed on perceiving danger.

SIR R. PHILLIMORE.—This is an important case of collision between two, if not three vessels, that is to say, between the ship *Aracas*, of 780 tons register, which came into collision with the screw steamship *America*, which screw steamship was towing a disabled screw steamship called the *Syria*, and the action is brought in this court by the *Aracas* against both vessels.

The collision took place between ten and eleven o'clock at night, on the 8th March in this year, off Portland, in the English Channel, and the direction of the wind is variously stated at from W. to W.S.W. All the vessels carried their proper lights, the *America* carrying two masthead lights, her own masthead lights and that of the *Syria*, according to the rule, which prescribes that a vessel in towing another shall carry such lights.

[Priv. Co.]

THE AMERICAN AND THE SYRIA.

[Priv. Co.]

The parts of the vessels which came into contact were the port side of the *American* and the stem and port bow of the *Aracas*, and the port side of the *Aracas* and the starboard side of the *Syria*, according to the statement on behalf of the *Aracas*. According to the statement on behalf of the *American*, the bowsprit of the *Aracas* came into contact with the engine room skylight of the *American*, and then the stem of the *Aracas* struck the *American* on the port side just before the main rigging, and no doubt that is the place where the main blow was struck, "the port side of the *Aracas* afterwards came into contact with the stern of the *Syria*."

Now the *Aracas* was close-hauled on the starboard tack, and she says that she saw the *American* four or five points on her starboard bow, that is to say, she saw first of all a masthead light, one only, that of the *American*, four or five miles off, if not more, and four or five points on her starboard bow, and afterwards she saw two red lights, that of the *American*, the towing vessel, and that of the *Syria*, the towed vessel; she says that, in expectation that the *American* and *Syria* would take the proper course in keeping out of her way, she, the *Aracas*, executed no manoeuvre at all until just before the collision, when she put her helm hard a-port in order to avoid the violence of the blow. Within a short time after the collision, forty minutes I think, according to the evidence, she foundered with her cargo.

The *American's* narrative is, that she being a very large steam vessel of nearly, I think, 1400 tons, and the other, the *Syria*, being nearly 2000, had towed the *Syria*, which was entirely disabled, owing to an accident which had happened to her screw, all the way from Ascension Island, that the towing was a work of considerable difficulty and anxiety, owing to the *Syria* being perfectly unmanageable, or at least answering her helm with very great difficulty. The *American* says that she saw the green light of the *Aracas* about four and a-half points on her port bow, and at the distance of three-quarters of a mile, and she ascribes the collision to two causes; first of all, that the *Aracas* improperly starboarded her helm and so caused the collision, and secondly, that she did not, prior to the collision, duly and properly port her helm, as it is suggested it was her duty to do.

Now I will take the last objection first, because it carries a question of law which has undergone some discussion in this case.

The question is, whether a steamer in tow of another is or is not subject to the Regulations for Preventing Collisions at Sea, which were passed and made binding by the Act of Parliament in 1862.

Now, the first article defines what a steamship shall be, and it says that, "in the following rules every steamship which is under sail and not under steam, is to be considered a sailing ship, and every steamship which is under steam, whether under sail or not, is to be considered a ship under steam;" and the 4th article, it is observed, provides for steamships towing other vessels, and says that "steamships when towing other ships shall carry two bright white masthead lights vertically in addition to their side lights, so as to distinguish them from other steamships. Each of these masthead lights

shall be of the same construction and character as the masthead lights which other steamships are required to carry." Therefore, a steam vessel towing another was in the contemplation of those who drew up these rules, and the 15th article says: "That if two ships, one of which is a sailing ship and the other a steamship, are proceeding in such directions as to involve risk of collision, the steamship shall keep out of the way of the sailing ship." The 19th article says that "in obeying and construing these rules, due regard must be had to all dangers of navigation, and due regard must also be had to any special circumstances which may exist in any particular case, rendering a departure from the above rules necessary in order to avoid immediate danger."

And the next article, the 20th, is "that nothing in these rules shall exonerate any ship or the owner, or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case."

Now, first of all, I am clearly of opinion that the effect of these rules is to place a steamship towing another vessel in the same category, speaking generally, as other steamships, that is to say, that the fact of her towing another vessel does not exempt her from the obligation otherwise imposed upon her by these rules. That I think was in substance my decision in the case of *The Warrior* (*ubi sup.*), which has been referred to, and to that decision I adhere, nor indeed was the argument put so high as to dispute that by the learned counsel for the *American* in this case. It was not contended that the mere fact of a steamship being in the act of towing another exempted her from the mere obligation of these rules, but it was said and contended with great force that the 19th and 20th articles taken together show that when there were special circumstances it was the duty of the vessel, which otherwise ought to keep her course, to execute a proper manoeuvre herself, and it was contended as a matter of fact that those special circumstances existed in the present case, and that is the first point to be determined, whether there were in this case such special circumstances as required the close-hauled starboard tack vessel not to keep her course, but to execute some other manoeuvre.

Now I have conferred with the Elder Brethren of the Trinity House upon this, as upon the other points of the case, and speaking now of the time when these vessels were first seen, that is to say, when the *American* was seen at a distance of from four to five miles, or from three to four miles off by those on board the *Aracas* (her mast light was seen, and afterwards her red light), speaking first of all of that state of things, I am of opinion that there were no special circumstances which rendered it the duty of the *Aracas* to port her helm or to starboard her helm, but that it was her duty, according to the provisions of the article, to keep her course. It is quite true that she must be taken, according to the evidence, to have been aware that at that distance these two vessels were going somewhere in the direction of E.N.E., while she was going in the direction of S.; she must be taken to have been aware of that fact, and that the one was in tow of the other at the distance, which I have mentioned, of from three to four miles; but it was,

in the judgment of the court, not incumbent on her upon that ground to do otherwise than obey the rule which required a close-hauled starboard tacked vessel to keep her course.

The question, therefore, which really remains to be considered in this case, and which is the one which has from the first appeared to me of principal importance is, whether the other averments or objections set up in the answer of the *American* be well founded in fact or not, namely, that the *Aracax* did not keep her course, but starboarded her helm.

Now that is the question upon which the evidence is, as we would expect it to be, extremely conflicting, though I do not think there is any reasonable doubt upon which side, when carefully examined, the evidence preponderates. There is very strong and positive evidence given on behalf of those who were on board the *Aracax* that almost at the very time of the collision her sails were shaking, and that she had continued on her starboard tack. There is very strong evidence also that her port side was stove in, though it is true that unfortunately, the *Aracax* herself having perished, the court is deprived of the information which a distinct inspection of the vessel would otherwise have given upon this point. On the other side it is contended generally that it was the starboard side that was stove in more than the port side, though the port side was also injured, and that from the first to the last the evidence produced on the part of the *American* is to the effect that her sails were "ramp full," as the expression is, and that in fact she had starboarded according to the averments in the answer, and thereby produced the collision.

Now there are two witnesses in this case on whom, in the conflict of evidence, the court thinks it is justified in placing considerable reliance. There were two invalided soldiers on board the *American*, from the Ashantee Coast, who were coming home, and who were on deck at the time of this collision; and, though it is perfectly true, as remarked by the counsel for the *American*, that if there were any question of navigation or nautical practice or science, their opinion might be very little worth having, that observation does not appear to me to have much weight in the present instance, when the question is, whether they did or did not see the red light of the *Aracax* before the collision. If they did see this red light of the *Aracax*, if it was visible to those on board the *American* before the collision, and they did see it, then it would be very strong evidence to show that the story told by the *Aracax* was true, and that she had not starboarded her helm at the time she was alleged by the *American* to have done so. And the court has considered this question of evidence in conference with the Elder Brethren, and has arrived at a very clear conviction that there is no reason whatever to distrust the statement made by those two soldiers. They gave their evidence with great clearness and great precision, and apparently have no interest whatever in the result of this case; and they appear to me, as indeed they did also to the Elder Brethren, to be the witnesses of truth in this case.

I have therefore arrived at the conclusion that the evidence preponderates in favour of the averment of the *Aracax*, that this collision was not produced by her starboarding her helm, but that she kept her course.

Now, I must observe also, that the *American*, according to her own statement, only saw the green light of the *Aracax* at a distance of three-quarters of a mile. The *Aracax*'s green light is proved to have been one of the best quality, and the night was one upon which it would be probable that this light would be seen at the distance required by the rules, namely, at two miles, certainly at a very considerable further distance than that of three-quarters of a mile.

I therefore arrive at this not unimportant conclusion, that if the look-out had been proper, the green light of the *Aracax* would have been seen at an earlier time, and it would have been competent to the *American* to have executed the proper manœuvre for getting out of her way; but, more than that, even at the time when the green light is said to have been seen the first time, namely, at three-quarters of a mile distance, it appears to me, on looking at the evidence, and remembering the manner in which it was given by the witnesses, that there was a delay between the report of the look-out on board the *American* and the execution of any manœuvre on the part of those who had command of the *American*, which contributed to this collision. I observe that Smith, who was stationed forward to look out, says he saw a ship's light, and he reported a light on the port bow, and it appears there was no answer to this first report, though, as he says, very soon afterwards he sung out a second time, "green light" on the port bow, and was answered "all right." I think, therefore, that not only was this green light not seen in proper time, and thereby the proper manœuvre not executed in proper time, but even when it was seen, there was a culpable delay between the report of it and the execution of a proper manœuvre.

Now, the Elder Brethren are of opinion, and this is a point upon which they are more competent to judge than I am, that the proper course for the *American* to have taken would have been to have slackened her speed and starboarded her helm, and so gone under the stern of the *Aracax*, and they are of opinion that she might very well have slackened her speed, going five knots, that there was no difficulty in her being still under control if she had slackened her speed, and that was the course she ought to have pursued.

The accident, therefore, was certainly not inevitable, and might have been avoided if the *American* had taken the proper steps at the proper time.

I have also considered whether there were any special circumstances which required the *Aracax*, on her part, to execute any manœuvre whereby this collision might have been avoided, and I take it to be a sound principle of law, which cannot be too carefully or uniformly applied to cases of this description, that the vessel which is ordered by the regulations to pursue a certain course, has a right to presume up to the last moment that the other vessel will do her duty, and also observe the regulations; and it is quite clear that if the *American* had done her duty on this occasion, the collision would not have happened.

I do not, therefore, think it necessary to inquire whether, by any possibility, something done on the part of the *Aracax* might or might not have avoided or lessened the evil of the collision, because I am satisfied that up to the last moment, in this case, she had a right to presume that the *American*

[Priv. Co.]

THE AMERICAN AND THE SYRIA.

[Priv. Co.]

would do her duty, and that if the *American* had done her duty there would have been no collision.

Therefore I pronounce the *American* alone to blame; I do not pronounce the *Syria*, but I pronounce the *American* to blame for the collision.

Butt, Q.C.—The question of how far the decree holding the *American* to blame throws liability upon the *Syria* will have to be considered. Unless the court is prepared to pronounce definitely that the *Syria* is also to blame, either for her own negligent acts or as responsible for the acts of her tug, I must ask that the question should be left open, and should not be mentioned in the decree, so that the plaintiffs may be enabled to enforce the decree against the *Syria*, if they are entitled by law so to do, or that we may have an opportunity of arguing the question.

Milward, Q.C., claimed that the decree should dismiss the *Syria* from the suit, as the court held that she was not to blame.

SIR R. PHILLIMORE.—I have pronounced the *American* alone to blame, and if the legal effect of the judgment is to create liability on the part of the *Syria*, I must condemn both ships, but that is a question which will have to be argued before I decide it.

May 5.—The question of the liability of the *Syria* to be condemned in the damage done to the *Aracon* came on for argument.

Butt, Q.C. and *E. C. Clarkson*, for the plaintiffs.—The collision having been occasioned by the default of those on board the *American*, the question for decision is, whether a decree is to be made against the owners of the *American* and their bail alone, or against the owners of that vessel and of the *Syria* and their bail. The only distinction that can be drawn between this case and that of a hired tug towing a ship is, that here both vessels belonged to the same owners, and we submit that such a distinction can have no effect in law upon the form of the decree. If the *Syria* had engaged a tug to tow her home, and the tug had damaged the *Aracon*, the *Syria* would have been liable for that damage. The employment of a ship belonging to the same owners can make no difference in principle. In *The Cleland* (Lush. 138), it was held that a tug and tow are, for the purpose of considering the manœuvres they are bound to execute, to be treated as one vessel, and this decision is confirmed in *The Arthur Gordon—The Independence* (Lush. 270, 278). If a tug and tow are to be treated as one vessel for one purpose, then they ought to be so treated for all. If this were a joint tort, both might be condemned, although belonging to the same owners. Even where the negligent act is that of one of several co-owners, the others are liable for the act of the one, who is to be treated as agent of the others: (*Morelos v. Harders* 4 B. & C. 23.) The crew of the *American* were engaged in the service of towing the *Syria*, and were for the performance of that service the servants of the owners of the *Syria*, and hence the *Syria* and her owners must be held liable for the negligent acts of the crew of the *American*. [SIR R. PHILLIMORE.—It is important to consider whether the *American* was employed for a towage service. If she was a salvor there may be a distinction.] There was an employment by which the crew of the *American* were engaged out of the scope of their contract to bring home the *Syria*. Whether

this employment was in the nature of salvage or towage can make no difference, because it is a contract the consideration for which could be recovered at common law in an action for work and labour, and hence the *American* became for the time the servant of the *Syria*. If the governing power was in the *American*, she was still the servant of the *Syria*, and if the governing power was in the *Syria*, the collision must be considered as having been occasioned by her direct default. Moreover, upon the facts, we submit that the negligence of the officers and crew of the *Syria* contributed to the collision. [SIR R. PHILLIMORE.—I found as a fact, with the assistance of the Trinity Masters, that there was no negligence on the part of the *Syria* herself, apart from the *American*.]

Milward, Q.C. (*Gainsford Bruce* with him).—The real principle underlying these cases is, that where a tug and tow come into collision with another ship, through the fault of the tug, the tow is liable for the collision only where the governing power is in the tow. Where the tow has on board a pilot or other person who directs the movements of both tug and tow, then the tow is liable for the acts of the tug. The duty of a tug towing a ship, in ordinary circumstances, is to obey the orders of the pilot on board the ship, save only where the tug sees that the pilot is taking both the tug and tow into obvious danger, and has the means, and can consistently with due observance of the law, avoid that danger:

The Duke of Manchester, 2 W. Rob. 477;

The Christina, 6 Notes of Cas. 9; 3 W. Rob. 27;

Moore P. C. 379.

The Julia, Lush. 224.

The tug is the servant of the tow, and is bound to obey the orders of those on board the tow in such circumstances. Here, however, there was no contract between the parties. This is shown by the fact that if the *American* had declined to complete her service, there would have been no remedy either against her or her crew. The *American* was a salvor, and was not only the motive but also the governing power.

Butt, Q.C., in reply.—The pilotage question does not affect this case. The only question here is, whether the *American* was the servant or the agent of the *Syria*. Even if the *American* was a salvor, which I cannot admit, it would make no difference. Salvors rendering assistance to a ship, and bringing her into collision, would render her liable, as they would be her agents to perform the salvage service.

Cur. adv. vult.

May 16.—SIR R. PHILLIMORE.—In this case I have already pronounced the steamship *American*, which was towing a disabled steamship the *Syria*, to blame for a collision with the *Aracon*. The question whether the *Syria*, the towed vessel, was also to blame, stood over for consideration. The exact point has, I think, not yet been decided; but the principle that two vessels in the relative positions of the *American* and *Syria* constitute in intentment of law, at least so far as cases of collision are concerned, one vessel, has been decided; and upon reflection, I think this principle carries me a great way to a conclusion that the *Syria* is also to blame.

I should observe also, that both the *American* and the *Syria* belonged to the same owners, and that both vessels came into collision with the *Aracon*, although the damage inflicted by the *Syria* was extremely trifling.

In the case of *The Cleodon* (*ubi sup.*), the Privy Council said, the *Cleodon* being in tow of the steam tug it is admitted in the case that she and the tow must be considered to be one vessel, "the motive power being in the tug, the governing power in the vessel that is towed."

In the subsequent case of *The Arthur Gordon* (*ubi sup.*), this judgment was referred to, and it was said: "Their Lordships never intended to lay down in the case of *The Cleodon*, that a steaming in charge of a ship must be considered as a free steamer," but the proposition as to the towing and towed vessels forming one vessel in a case of maritime tort, does not appear to have been questioned.

The decision in the present case is, I am aware, of great consequence to the parties, inasmuch as it is probable, so I am informed, that the defendants, as owners of the *American* alone, under the exemption of limited liability, will not be obliged to pay the full amount of the damage inflicted on the *Aracon*, and of course, their additional liability as owners of the *Syria*, will make a great difference in this respect. It appeared to me at first sight that the fact that the towing vessel was a sailor and not a hired tug, might make a difference in the application of the law, inasmuch as it was contended that the governing power was not in the towed but the towing vessel; but on reflection, I think this distinction does not affect the case, whether the governing power be in the towed vessel, as according to the judgment just referred to it would usually be, or whether it be in the vessel which was by towing performing an act of salvage, in either case I think the two vessels must be considered one in the present instance.

I therefore pronounce the *Syria* also to blame for this collision.

A decree having been made by the learned judge in accordance with the above judgments, the owners of the *American* and the *Syria* appealed therefrom, for the following amongst other reasons:

1. Because the evidence proved that the *Aracon* improperly deviated from her course under a starboard helm.

2. Because, even assuming that the *Aracon* kept her course until there was immediate danger of collision under the circumstances proved in evidence, the *Aracon* was to blame for neglecting to take measures to avoid the collision.

3. Because the 15th article of the Regulations for Preventing Collisions at Sea does not apply to the circumstances of this case.

4. Because the collision happened without any negligence on the part of the *American*, and without any negligence on the part of the *Syria*.

5. Because, under the circumstances proved in evidence, the *American* adopted the proper measures, and did all that could be done by her to avoid the collision, and the *Syria* did all that could be done by her to avoid the collision.

6. Because it would have been impossible for the *American* and *Syria* to have slackened speed so as to have gone under the stern of the *Aracon*.

7. Because it was not proved that those in charge of the *American*, or that those in charge of the *Syria*, had been guilty of any negligence.

The appellants further submitted that the decree appealed from ought to be reversed, so far as it relates to the *Syria*, for the following amongst other reasons:

1. Because the *Syria* being towed was under the direction of the *American*, and she ought not in law to be rendered liable for the default of those on board the *American*.

2. Because the *American* and the *Syria* were, law as well as in fact, two separate ships and not one ship.

3. Because the question whether or not the *Syria* is to blame, must be determined altogether without regard to the circumstance that the *American* and *Syria* belonged to the same owners.

4. Because the *Syria* did not contribute to the loss of the *Aracon*, and did not cause any damage to the respondents.

The reasons submitted by the respondents for supporting the decree were as follows:

1. Because it was the duty of the *Aracon*, being a sailing ship, to keep her course, and of the *American* and *Syria* to keep out of her way, and the evidence established that the *Aracon* did keep her course until the *American* and *Syria* had caused immediate danger of collision, when she ported, as she was entitled to do, and the evidence established that the collision was occasioned by the negligent navigation of the *American*.

2. Because the collisions were occasioned by the negligent navigation of the *Syria*.

3. Because the *American* having been engaged in the service of the *Syria* at the time of the collision, the *Syria*, and the appellants as her owners, were and are liable to the respondents in respect of the said collision, even if there was no actual negligence on the part of those on board the *Syria* occasioning or contributing to the collision.

4. Because the decree appealed from is in accordance with the evidence, and right in point of law.

July 10, 11, and 14.—*Milneard, Q.C.* and *Gainsford Bruce*, for the appellants.—First, upon the facts, the evidence establishes that the *Aracon* improperly starboarded, that she improperly kept her course until there was immediate danger of collision, although the circumstances required a deviation from it; that the *American* was guilty of no negligence, nor was the *Syria*, and porting was the right course to adopt under the circumstances, and that it was impossible for the *American* to have slackened speed, considering the necessity of keeping her position with regard to the *Syria*.

Secondly, Art. 15 of the Regulations does not apply to the circumstances of this case. In *The Independence* (4 L. T. Rep. N. S. 565; 14 Moore P.C.C. 103; Lush. 270; 1 Mar. Law Cas. O. S. 88) it is laid down that a steamer in tow is not mistress of her own motions; she is under the control of and has to consider the ship to which she is attached, of which it is for many purposes to be considered a part, the motive power being in the steamer, and the governing power in the ship towed. The *American* could not by starboarding have gone off in time to have avoided the *Aracon*, nor could she have slackened speed, as she would have brought the *Syria* down upon herself. It was the duty of the *Aracon*, seeing the immense length of the tug and tow, and the consequent difficulty of manoeuvring, to have assisted the *American* in avoiding collision by going up into the wind. These were special circumstances, taking the case out of the operation of Art. 15. Although the above case was decided before the Regulations became law, it applies equally, because they have not altered but only formulated the law as it stood before. A ship

PRIV. CO.]

THE AMERICAN AND THE SYRIA.

[PRIV. CO.]

has no right to carry on her course to the manifest danger of another: (*The Mary Bannatyne*, Stuart's Vice-Adm. Rep. 333.)

Thirdly, even supposing the *American* to blame for the collision, the *Syria* is not to blame, either in fact or law; in fact, there was no negligence, and the only ground upon which the *Syria* could be held liable, would be that she is legally responsible for the acts of the *American* as her agent or servant. But the *American* was not the agent or servant of the *Syria*. She was not employed by the master or crew of the *Syria*, nor was she under their control. In the United States the question has been much considered, and it has been there held that the responsibility of the tug or tow is to be determined by inquiring which vessel is the principal and which the servant; if the tug has the sole control of the movements of both, then she alone is responsible:

The Enerry, L. Rep. 3 Adm. & Eco. 48;
Kent's Commentaries, Vol. 3, part v., sect. 17, par. 8;
The Niagara and The Elizabeth, Stuart's Vice-Admiralty Rep. (Canada) 318;
Sprout v. Hemmingsway, 14 Pickering (Mass.), 1;
The Alabama, 1 Benedict, 476;
The Express, 1 Blatchford, 395;
The Hector, 4 Blatchford, 390, affirmed *Sturgis v. Boyer*, 24 Howard Sup. Ct. Rep. 110.

Here the *American* had the sole control, and received no orders from the *Syria*, but was both the motive and the governing power. *The Cleadon* (4 L. T. Rep. N. S. 157; 14 Moore P.C.C. 92; Lush, 160; 1 Mar. Law Cas. O. S. 41) does not apply to this case, because there it was shown that the tow had the control, and on that ground only were the tug and tow held to be one ship. The master of the *American*, in towing the *Syria* home, was acting partly from what he considered his duty to his owners, and partly in order to obtain salvage from the *Syria* and her cargo, but in no sense did he act as a servant of the *Syria*, having no contract and being under no obligation to render assistance to that particular ship.

Butt, Q.C. and *E. C. Clarke*, for the respondents.—First, there was negligence on the part of both the *American* and the *Syria*, causing the loss of the *Aracas*. There was no negligence on the part of the *Aracas*. She kept her course, in fulfilment of her duty as a sailing vessel. A sailing vessel meeting a steamer must hold on her course up to the last moment, and is only entitled to deviate from it to avoid immediate danger within Art. 19 of the regulations. The 18th article, compelling ships to keep their course when another is to be kept out of the way, is to be read in conjunction with the 19th article, and the meaning of the two together is to impose the obligation of obeying the 18th article as far as consistent with not incurring immediate danger. This has been decided in several cases:

The Warrior, 27 L. T. Rep. N. S. 101; L. Rep. 3 Adm. & Eco. 353; 1 Asp. Mar. Law Cas. 490;
The Emperor, *The Zephyr*, see note, ante p. 332;
The Gula, *The Zenobia*, see note, ante p. 332;
The David Cannon, see note, ante p. 333;
The Pennsylvania, 3 Benedict, 215.

The 19th article was framed for the protection of a vessel keeping her course, and not to compel her to deviate under any given set of circumstances. [Sir M. SMITH.—It is evident that, under these rules, special circumstances are only to come into play whilst the rules are being obeyed.] A sailing vessel is entitled to hold on till the last, in the expectation that the steamer will avoid her,

and special circumstances only arise when it is at the last moment discovered that there is immediate danger of collision; then the sailing ship is entitled to deviate, but not otherwise. If it was competent for the *American* and *Syria* to go under the stern of the *Aracas*, no special circumstances arose in this case. The steamships should have starboarded. They had to clear only the length of the *Aracas*, whereas she would have had to clear the length of the tug, towrope, and the tow, and this she could only have done by going up into the wind, being closehauled. The crew of the *American* ought to have seen the lights of the *Aracas* sooner, and then there would have been plenty of time to starboard. If they could not starboard, they might have slackened speed, and so kept out of the way. The *Aracas* had the right to expect them to keep out of the way. [Sir R. P. COLLIER.—*Prima facie*, no doubt; but supposing the *Aracas* saw that the steamer was not keeping out of the way.] She had the right to expect that some measure would be taken, up to the last moment.

Secondly, the evidence establishes that the *Aracas* did not, by starboarding or otherwise, deviate from her course, but that she only ported at the last moment to avoid immediate danger.

Thirdly, as to the liability of the *Syria* for the acts of the *American*. The *American* cases cited are reviewed in *Parsons on Shipping*, vol. 1, p. 634, and there shown to be irreconcilable. If the *Syria* is not herself to blame for the collision, she is responsible for the negligence of the *American*. Conceding that the *American* was a salvor, her services were rendered under an implied contract, and whilst performing that contract she was the servant of the *Syria*. It might be said that, in the case of a derelict ship, the salvor's act would not bind the owners of the derelict, but where a salvage service is rendered under an arrangement, whether express or implied, made with the master or owners of the salvaged ship, the latter are responsible for the acts of the salvors, just as if they had employed a steamtug to render ordinary towage service. In this case the liability is even more plain, because both the vessels belonged to the same owners, and the master and crew of the *American* were the servants of the owners of the *Syria*, and were acting in pursuance of their duty towards those owners. The master of the *American* having undertaken to tow the *Syria*, must necessarily have been under the control of the latter vessel as to speed, direction, and such orders as were necessary to regulate these, and hence the "governing power" within the meaning of *The Cleadon* (*ubi sup.*) was in the *Syria*. But even if the "governing power" was not in the *Syria*, the negligent act of the *American* was the act of a servant or agent acting within the scope of his employment, and the principal is responsible for that act. According to the English decisions, the tug, if in fault, is liable, but the ship is also liable as the principal. The tow is liable both for her own acts and for those of the tug: (*The Unity*, Swab, 102.) [Sir R. P. COLLIER.—The *Syria* was incapable of being navigated in this case, and was wholly under the control of the *American*. Does not this make a distinction between this case and the ordinary English cases of tug and tow?] The English law treats tug and tow as one vessel, and that creates liability in both. This liability must be decided now, as the Court of Chancery will not

[Priv. Co.]

THE AMERICAN AND THE SYRIA.

[Priv. Co.]

decide the collision clause in case of a claim for limited liability. The Merchant Shipping Act 1862, s. 54, gives the right to limitation where the injury has been caused by the improper navigation of the defendant's ship. It is necessary to decide the liability of the *Syria*, as the amount of liability in respect of the *American* is not enough to satisfy the plaintiffs' claim.

Milward, Q.C. in reply.

July 24.—The judgment of the court was delivered by Sir R. P. COLLIER.—The *American* and the *Syria* are two large steam vessels belonging to the Union Steam Navigation Company, plying between the Cape of Good Hope and London.

The *Syria*, on her voyage home, became disabled, through some damage to her machinery, and put in at Ascension Island. The captain of the *American*, also on his voyage home, calling at Ascension and finding the *Syria* disabled, determined to tow her home, and attached her to his ship by long hawsers. He entered the British Channel with the *Syria* thus in tow, and was at a distance of about sixteen miles off Portland, at 11 p.m. on the 8th March 1874, when the collision, the subject of the suit, occurred. The *American* had two white lights on her foremast, and both vessels had the usual red and green lights; the night was moderately clear, the wind west, or west-south-west. The *American*, with the *Syria* in tow, was steering east by north-half-north, and going at the rate of about five knots an hour.

The *Aracon* was a sailing ship of 788 tons register, and was going down the channel on a voyage from London to Hong Kong, and was beating against the wind.

There were cross suits in the Admiralty Court.

The account of the *Aracon* is substantially this: that she was close hauled by the wind on the starboard tack, heading about south, when she saw "the white light" (she never saw the two white lights) "of the *American*," at a distance of between four or five miles; that at a distance of two miles she made out the red lights of both vessels, and understood that one was towing the other; that, acting under the 15th and 18th Admiralty Rules, she kept her course, expecting the towing steamer to get out of her way by starboarding her helm and passing to the stern, until, finding a collision imminent, she ported her helm as the best mode of lessening its force.

The case of the *American* and *Syria* is, that the captain of the *American* saw the green light of the *Aracon* first at a distance of a mile or three-quarters of a mile, although a good lookout was kept. That impeded as he was by his "tow," he was unable to starboard his helm sufficiently to pass to the stern of the *Aracon*, that he could not slacken his pace, because he would not have had sufficient steering way, and might have run a risk of fouling his tow or the hawsers, and that nothing remained to him but to port his helm, thereby giving the *Aracon* "more room;" that he did this, and that his ship went off one point on the port helm; that the *Aracon* starboarded her helm and so caused the collision, whereas she ought to have ported it, and either turned round on the opposite tack or have passed under the stern of the *Syria*.

The learned judge of the Admiralty Court found that the *Aracon* was in no respect to blame, and that the collision was wholly caused by the negligent navigation of the *American*.

He appears to have found as a fact that there was no negligence on the part of the captain or crew of the *Syria* conducing to the accident; but after hearing further argument on this subject, he came to the conclusion that, in point of law, the *Syria* must be pronounced also to blame, on the ground that she must be taken to have been, in intentment of law, one vessel with the *American*.

The present appeal is from this judgment.

The appellants have much relied on the case of the *Independence*, decided by this Board, and reported in 14 Moore's P.C.C. p. 103, where a distinction is pointed out between the situation of a steamer unencumbered, and of a steamer with a ship in tow. Lord Kingsdown there observes: "A steamer unencumbered is nearly independent of the wind. She can turn out of her course, and turn into it again, with little difficulty or inconvenience. She can slacken or increase her speed, stop or reverse her engines, and can move in one direction or the other with the utmost facility. She is therefore, with reason, considered bound to give way to a sailing vessel close hauled, which is less subject to control and less manageable. But a steamer with a ship in tow is in a very different situation. She is not in anything like the same degree the mistress of her own motions; she is under the control of, and has to consider the ship to which she is attached, and of which, as their Lordships observed in the case of the *Cleaden*, she may for many purposes be considered as a part, the motive power being in the steamer, and the governing power in the ship towed. She cannot, by stopping or reversing her engines, at once stop or back the ship which is following her."

It is true that this case was decided before the promulgation of the present Regulations for Preventing Collisions at Sea, which in terms direct that, where the courses of two vessels involve risk of collision, the steamer shall keep out of the way of the sailing ship, and that the sailing ship shall keep her course, subject to due regard to dangers of navigation, and to special circumstances rendering a departure from the rule necessary in order to avoid immediate danger.

But the rule of navigation, though formulated, can scarcely be said to have been altered by the Regulations, and the distinction taken between the relations of an encumbered and an unencumbered steamer is manifestly a just one and still applicable. It does not go the length of absolving altogether the encumbered steamer from obedience to the rules which apply to all steamers, but it necessitates allowances being made under the circumstances of each case for the comparatively disabled condition of the encumbered steamer, and imposes upon the sailing ship approaching her the duty of additional caution. It may be observed that, in 1863, an additional article was promulgated, requiring the towing steamer to exhibit two white lights instead of one, doubtless for the purpose of warning all approaching vessels that she was encumbered, and not in all respects mistress of her movements.

Their Lordships have given the benefit of all these considerations to the *American*, but are unable to come to the conclusion that the judge of the Admiralty Court was wrong in pronouncing her to blame. They do not think (and in this they are confirmed by their assessors) that

PRIV. CO.]

MAYRO AND ANOTHER v. THE OCEAN MARINE INSURANCE COMPANY.

[O. P.]

her not seeing the green light of the ship until the vessels were within a mile or three-quarters of a mile of each other, is sufficient to convict her of negligence in not keeping a sufficient look-out. But they think that to attempt, with the long mass behind her, to cross the bows of the ship was an extremely hazardous, and not a necessary act. Their Lordships are of opinion that she might have slackened speed, as it was her duty to do, even if she could not have starboarded, and that the collision might then have been avoided.

The *American* charges the *Aracan* with starboarding; she denies it. There is much conflicting evidence on the subject, and the learned judge, who had the advantage of seeing and hearing the witnesses, believes the case of the *Aracan*. Their Lordships, though not quite satisfied on this subject, after consultation with their nautical assessors, are not prepared to reverse this finding.

She saw at a considerable distance, according to her account two miles, two large steamers, one towing the other, with a great length of hawser between them, and shew the red lights of both. It has been contended that, inasmuch as she mast or should have seen that the leading steamer was not starboarding but was porting, or, if not, keeping on her course, that she ought not to have persisted in her endeavour to pass before the bows of the steamer, but should have ported her helm, stopped her course, and turned round on the other tack. Considering, however, that the *Aracan* might reasonably have expected the *American* to keep out of her way, by either starboarding her helm and slackening her speed, and that if the *Aracan* had stopped with a view to tacking, this very manœuvre might have thrown her in the way of the *American* if the *American* had starboarded; their Lordships are unable to pronounce the *Aracan* to blame for keeping her course as it was her duty to do, unless departure from it was necessitated by special circumstances to avoid immediate danger.

For these reasons their Lordships are of opinion that the *American* was to blame for the collision.

The question remains whether the *Syria*, though free from blame in fact, must nevertheless be held to blame by intentment of law. The decision of the learned judge upon this point appears to be based upon the principle shortly stated by Lord Kingsdown, in the passage which has been before cited as that on which *The Cleodora* (14 Moore, 97) was decided, viz., that the motive power was in the tug, the governing power in the ship towed. The judge of the Admiralty Court applying this principle to the present case, held that the *American* and the *Syria* constituted one vessel in intentment of law. This is no doubt an accurate representation of the relations usually subsisting in this country between the tug and the tow. The tug is in the service of the tow, the tow is answerable for the negligence of her servant, and is for some purposes identified with her. Some *American* cases have been cited which, though differently decided, illustrate this principle.

It appears that, in the large *American* rivers and lakes, it is usual for a tug, which is spoken of as a public vessel, to take a number of small vessels in tow, some alongside of her, some astern. She assigns to each of these vessels its place, and they are under her direction. Under these circumstances, the *American* Courts have held that a vessel towed is not liable

for the negligence of the tug, because the "governing power" is in the tug, not in her. The master of the *American* appears to have undertaken to tow the *Syria*, under circumstances quite exceptional. Their Lordships collect that he determined to take home the *Syria*, partly because he thought it his duty to his employers, who owned both vessels, partly with a view to obtain salvage from his owners, and the owners of the *Syria's* cargo (which he succeeded in doing). There is no evidence of his having been hired by the captain of the *Syria*, or having acted in any way under the captain of the *Syria's* control. On the contrary, it would appear that the "governing power" was wholly with the *American*. Under these circumstances, their Lordships are of opinion that the principle on which *The Cleodora* was decided does not apply to this case; that the *Syria* cannot be deemed in intentment of law one vessel with the *American*, or liable for her negligence. Nor do they think that the fact of the *American* and *Syria* belonging to the same owners affects the question whether or not the *Syria* was to blame.

Their Lordships will, therefore, humbly advise her Majesty that, in the suit of the owners of the *Aracan* against the owners of the *American* and *Syria*, the judgment be varied by declaring that the *American* alone was to blame; that in the suit of the owners of the *American* and *Syria* against the *Aracan*, the judgment be affirmed. There will be no costs of these appeals.

Judgment varied accordingly.

Solicitor for the appellants, Thomas Cooper.

Solicitor for the respondents, Pritchard and Sons.

COURT OF COMMON PLEAS.

Reported by EYRENSBURGH SMITH and J. M. LELY Esqrs.,
Barristers-at-Law.

June 1, and July 8, 1874.

(Before Lord COLERIDGE, C.J., MELLOR and BRETT, JJ.)

MAYRO AND ANOTHER v. THE OCEAN MARINE INSURANCE COMPANY.

Marine insurance—General average as per foreign statement—Determination of voyage at an intermediate port—Jurisdiction of Consular Court at Constantinople to make order for adjustment of average.

A policy of insurance on wheat on board a certain vessel from Varna to Marseilles, contained the words "general average as per foreign statement." There was a suing and labouring clause, and among other things corn was declared to be warranted free from average unless general.

The ship was injured by straining in a storm, and was forced into Constantinople when some of the wheat was found to be damaged, and the ship herself unable to proceed without undergoing thorough repair.

The British Supreme Consular Court was applied to by petition, and surveyors were appointed, who recommended the sale of the damaged portion of the cargo, and the transshipment of the rest, and an order of the court was made in accordance with this recommendation. Subsequently the court duly appointed average adjusters, who investigated the various claims, and they, following the decision of the Judge of the Consular Court to whom the question was submitted, made up

C. P.]

MAYRO AND ANOTHER v. THE OCEAN MARINE INSURANCE COMPANY.

[C. P.]

the average adjustment according to the law of France, and the average adjustment was registered and homologated by a decree of the court.

The damage to the wheat was treated as general average, and properly so, according to the law of France. Upon action brought to recover a general average loss.

Held first, that the Consular Court at Constantinople, having made the orders, must be taken to have had the necessary jurisdiction. (a)

Secondly, that the voyage was necessarily broken up at Constantinople.

Thirdly, that upon the true construction of the policy, this was not a particular average loss, but in consequence of the voyage being properly broken up at Constantinople, brought within the words of the policy, a general average as per foreign statement.

Harris v. Scaramanga (ante, vol. 1, p. 339; 26 L. T. Rep. N. S. 697; L. Rep. 7 C. P. 481), and Hendricks v. The Australian Insurance Company (ante, p. 244; 30 L. T. Rep. N. S. 419) followed.

THIS was a special case stated by an arbitrator for the opinion of the court. The action was brought on a policy of insurance on wheat, and advances valued at 9200*l.* at and from Varna to Marseilles on board the vessel *General Chassé*.

In the declaration the plaintiffs sought to recover: first, a general average loss; secondly, a total loss; thirdly, a loss under the suing and labouring clause in the policy. The defendants paid into court the sum of 110*l.*, which the plaintiffs denied to be sufficient to satisfy their claim.

The policy contained the following provisions:—
General average as per foreign statement.

And in case of any loss or misfortune it shall be lawful to the insured, their factors, servants, and assigns, to sue, labour, and travel for in and about the defence, safeguard, and recovery of the aforesaid subject—matter of this insurance, or any part thereof, without prejudice to this insurance.

And it is declared and agreed that corn, fish, salt, fruit, flour, and seed shall be and are warrantable free from average, unless general, or the ship be stranded.

By the consent of the parties after issue joined,

(a) Although this is a decision to the effect that the Consular Court at Constantinople had, for the purposes of this case, jurisdiction to make the orders in question, it cannot be taken as a decision to the effect that the British Consular Courts in the Levant have general jurisdiction over average adjustments and statements. The decision of the Common Pleas decides only that the facts laid before them in this particular case are sufficient to enable them and to bind them in this case to decide that the Consular Court has jurisdiction in such matters until its decisions are reversed on appeal to the proper tribunal. In effect, the Common Pleas decides that it is not for them to investigate the question of jurisdiction where that jurisdiction has been exercised by custom by a properly constituted court for a considerable period; they consider that the Consular Court in such a matter is the best judge of its own jurisdiction, and they treat it in the same category as a foreign court, and respect its interpretation of the law administered in it until that interpretation has been varied or reversed by its Court of Appeal. At the same time, there can be no doubt that it has been the custom of the British Consular Courts in the Levant to exercise jurisdiction in similar cases, and this custom is in unison with that followed by the Consular Courts of all nations in the Levant: (See *Messina v. Petrocchino*, ante, vol. 1, p. 256.) This custom has been so useful, and the jurisdiction exercised so salutary in its effects that it is to be hoped that the Court of Appeal would consider long before deciding that no such jurisdiction existed.—*Ed.*

and by the order of Grove, J., on 18th Jan. 1872, there was stated for the opinion of the court, the following:—

CASE.

1. The plaintiffs carry on business as merchants and brokers in London and Marseilles, and the defendants are an insurance company carrying on business in London.

2. In Sept. 1867, Mr. Sovrono, who was a Greek merchant domiciled at Constantinople, and who was desirous of consigning to the plaintiffs at Marseilles for sale a cargo of 29,156 kilos of wheat belonging to him, chartered the vessel *General Chassé*, which was a British vessel belonging to Giuseppe Saliba, a Maltese subject, resident at Constantinople, to carry the said cargo of wheat from Varna to Marseilles, and caused the same to be shipped on board the said vessel at Varna on or about the 18th Dec. 1867. Mr. Sovrono also made advances to the master of the *General Chassé* amounting to the sum of 148*l.* 1*s.* 9*d.* on account of the freight payable under the charter-party. The plaintiffs and the said Sovrono were jointly interested in the adventure relating to the said cargo of wheat.

3. On the 22nd Nov. 1867, the plaintiffs effected with the defendants a policy of insurance for 1000*l.* (a copy of which policy, marked A., is annexed hereto, and is to form part of this case). This insurance is declared to be "upon 29,156 Constantinople kilos wheat, and advances valued at 9200*l.* general average as per foreign statement on the ship *General Chassé*, at and from Varna to Marseilles," and it is also declared to be warranted free from average, unless general.

4. On the 6th Nov. 1867, the *General Chassé*, with the said cargo of wheat on board, sailed from Varna for Marseilles. Very soon after leaving port she encountered heavy gales and thick weather, which continued for some hours before she came to anchor in the Bosphorus, as hereinafter mentioned. In fair weather the vessel would have taken from four to five days to have made the voyage to the Bosphorus.

5. On the 7th Nov., during a heavy gale from the north it became necessary, on account of the vessel nearing land, that she should carry a press of sail in order to prevent her making further leeway. This was accordingly done, and in consequence the vessel laboured very much, and shipped heavy seas, which carried away the jolly boat, and other parts of the vessel's apparel and furniture. It was also found necessary to throw overboard sundry articles which were on deck, in order that the working of the ship might not be impeded. The next day there was a strong gale from the north, and as the vessel got very near the land it became necessary, for the safety of ship and cargo, that a still further press of sail should be carried in order to avoid a leeboard. More canvas was accordingly set. This caused the *General Chassé* to strain very much, several of her sails were split and carried away, and she soon sprung a leak; the leak was, however, kept under by pumping, wheat being constantly pumped up with the water.

6. On the 24th Nov. the *General Chassé* was brought to anchor at Bajin Limon, in the Bosphorus, and on the following day having been taken in tow by a steaming, which it was necessary to employ by reason of the vessel's damaged

C. P.]

MAYRO AND ANOTHER v. THE OCEAN MARINE INSURANCE COMPANY.,

[C. P.]

and disabled condition, she was brought to anchor at Tophate, in the port of Constantinople.

7. On the 27th Nov. the master of the *General Chassé* petitioned the Judge of Her Majesty's Supreme Consular Court of Constantinople to appoint surveyors to survey the vessel, and accordingly surveyors were appointed by the court, who, on the 28th Nov. 1867, surveyed the vessel in the presence of the said Giuseppe Saliba, her owner, and Mr. Sorrono, and recommended that the voyage of the vessel should end at Constantinople, and that the cargo of wheat should be sold by public auction for the benefit of all concerned, thereupon the master petitioned the court that an order might be made for the immediate sale of the cargo by public auction, and this order was made on the same day.

8. On the 2nd Dec., Fourtuné Jourdain, agent of the Assurance Maritimes de France, prayed the said court for leave to intervene in the proceedings on the ground that the cargo was insured in his company. Such leave was accordingly granted to him, and upon his application the sale of the cargo was suspended, and a fresh survey ordered by the court.

9. On the 7th Dec., Mr. Henry Lamh petitioned the said court for leave to intervene in the proceedings as agent for the Maltese Underwriters, and leave was granted to him on the same day; also Mr. Hopper, Lloyd's agent, addressed a petition to the said court, stating that he approved of the steps taken by M. Jourdain, and praying that as an agent for Lloyd's he might attend the fresh survey, and his prayer was likewise granted.

10. On the 10th Dec. the fresh survey took place in the presence of the surveyors and Messrs. Jourdain and Hopper. It was found that about one fifth part of the cargo of wheat was damaged, and it was recommended by the surveyors that the sound portion should be at once transhipped, and the damaged portion sold by public auction.

11. The damage which the cargo was found as aforesaid to have sustained (so far as could be ascertained), had been caused by the *General Chassé* having carried a press of sail, and by her having consequently strained and shipped heavy seas and sprung a leak under the circumstances above-mentioned.

12. After the said survey of the 10th Dec., Messrs. Sorrono and Hopper petitioned the court to order the damaged portion of the cargo to be sold, and the sound portion to be transhipped; and the court having made an order in accordance with such petition, the damaged wheat was sold by public auction, and the undamaged wheat was in the beginning of Jan. 1868, transhipped on board an Austrian vessel, the *Francisco M.*, in which it was safely conveyed to Marseilles, its original port of destination.

13. There were no public warehouses or docks at Constantinople for warehousing wheat. There was no evidence to show what it would have cost to have warehoused the wheat in private warehouses. It was also uncertain whether it would have taken one or two months after the discharge of the cargo to have repaired the *General Chassé*, on account of the difficulty in procuring a proper berth for the vessel at Constantinople, and also on account of the possibility of bad weather interfering with the repairs. Under these circumstances it was considered advisable to tranship the sound wheat as above-mentioned. It was also

considered advisable to sell the damaged wheat, because it could not be transhipped together with the sound wheat without damaging the latter, and because it was not worth transhipping separately.

14. The *General Chassé* was afterwards repaired at Constantinople, and on the 21st Feb. she was fit to proceed to sea with cargo.

15. On the 3rd March 1868 Mr. Sorrono petitioned the court to appoint average adjusters to adjust the average in respect of the *General Chassé* and her cargo, and to ascertain the contribution due from the parties interested.

16. The court accordingly appointed average adjusters. They were sworn by the learned judge of the said Supreme Consular Court, and proceeded to hold meetings in the building of the court. At these meetings Mr. Sorrono and Messrs. Jourdain and Hopper were present, and they or their counsel were heard in support of their respective claims and contentions, but there was no agent of the defendants' present.

17. During the discussions before the average adjusters, the question having arisen as to the law by which the average adjustment ought to be governed, it was submitted to the learned judge of the court, who decided that it ought to be governed by the law of France as being the country to which the port of destination of the cargo belonged.

18. In pursuance of this decision the average adjusters made up the average adjustment according to the law of France, and such average adjustment was afterwards registered in the court and homologated by a decree of the court.

19. The law by which the average adjustment ought to have been regulated according to the law and usages prevailing at Constantinople, and applicable to the *General Chassé* and her cargo, under the circumstances of the case, was the law of France, and the said average adjustment was made up in all respects in conformity with such law.

20. Assuming that Her Majesty's Supreme Consular Court could acquire jurisdiction over the foregoing matters by the force of custom, there was not sufficient evidence of such custom to prove that it had in this matter acquired jurisdiction, but the plaintiffs rely on the documents marked B, which are contained in the appendix, and are to form part of the case, for the purpose of establishing that the court had jurisdiction.

21. In the said average adjustment, the damage which the cargo of wheat had sustained, as aforesaid, was treated as general average, and the sum payable by the defendants under the policy sued on, in accordance with the said average adjustment, would be 275*l.* 14*s.* 6*d.*

22. The defendants contend that they are not liable in respect of any damage to the wheat, and they have paid enough money into court to cover the plaintiff's claim, in respect of all items contained in the said average adjustment with the exception of the item representing the damage of the wheat.

23. The court is to be at liberty to draw inferences of fact.

24. A copy of the pleadings is herewith annexed, marked C, and is to form part of this case.

25. The question for the opinion of the court is, whether the defendants are, or are not, liable as aforesaid to pay the plaintiff a sum not exceeding that paid into court. If the court should be of

C. P.]

MAYRO AND ANOTHER v. THE OCEAN MARINE INSURANCE COMPANY.

[C. P.]

opinion in the affirmative, judgment is in to be entered for the plaintiffs for such sum and each interest, if any, as the court may direct, together with costs, the court being at liberty, if it should think proper, to refer the amount for which the verdict is to be entered to the decision of Arthur Cohen, Esq., Barrister-at-Law, upon such principles as the court may direct. If the court should be of opinion in the negative, then judgment is to be entered for the defendants with costs.

The following extracts from the Orders in Council respecting the administration of justice in the Ottoman Empire, dated 30th Nov. 1864, show the orders referred to in par. 20 and relied upon by the plaintiffs.

6. All Her Majesty's jurisdiction exercisable in the Ottoman dominions for the judicial hearing and determination of matters in difference between British subjects and foreigners, or for the administration or control of the property or persons of British subjects, or for the repression or punishment of crimes or offences committed by British subjects, or for the maintenance of order among British subjects, shall be exercised under and according to the provisions of this order, and not otherwise.

8. Nothing in this order shall be deemed to deprive Her Majesty's Consular Officers of the right to observe and to enforce the observance of any reasonable custom obtaining within the Ottoman dominions, or to deprive any person of the benefit thereof, except where this order contains some express and specific provision incompatible with the observance of such custom.

26. All Her Majesty's jurisdiction, civil and criminal, exercisable in the Ottoman dominions shall, for and within the district of the Consulate-General of Constantinople, be vested exclusively in the Supreme Consular Court as its ordinary original jurisdiction.

29. The supreme and every other consular court shall be a court of law and of equity, and (subject to other provisions of this order) shall have and may exercise all jurisdiction, power, and authority, legal, equitable, or other, which any Consul of Her Majesty has or may exercise in the Ottoman dominions.

41. The Supreme Consular Court shall be a court of Vice-Admiralty, and as such shall, for and within the Ottoman dominions, and for vessels and persons coming within those dominions, have all such jurisdiction as for the time being ordinarily belongs to Courts of Vice-Admiralty in Her Majesty's possessions abroad.

On this case the plaintiffs' points were first, that the loss was a loss by the perils insured against in the policy; secondly, that the average adjustment was a "foreign statement" within the meaning of the clause in the policy, and was consequently binding and conclusive against the defendants as to the matters therein treated as general average; thirdly, that the loss in question was properly treated as a general average loss; fourthly, that the Supreme Consular Court is a court of competent jurisdiction, and that the decision of that court as to the law by which the average adjustment ought to be governed is binding; fifthly, that the homologation of the said adjustment by a decree of the Consular Court renders the adjustment binding on the defendants as a decree of a court of competent jurisdiction; sixthly, that the ship's port of destination for the discharge of the cargo being Merselles, the defendants are bound to indemnify the plaintiffs against any loss which is a general average loss according to the law of France.

The defendants' points were first, that the plaintiffs were not shown to have been bound to contribute in general average under the adjustment; secondly, that the adjustment under the circumstances was not such an adjustment as was contemplated by the policy; thirdly, that the voyage

was not shown to have been necessarily broken up at Constantinople, and that the general average should have been settled upon the arrival in safety of ship and goods by adjusters conversant with the law and custom of the port of destination; fourthly, that the Supreme Consular Court had no jurisdiction over the settlement of the general average or the matters referred to in the case, and had no power to register the adjustment; fifthly, that the damage to cargo was a particular average loss from which the defendants are exempted by the terms of the policy; sixthly, that the defendants have paid into court sufficient to cover all that the plaintiffs have had to pay by way of contribution in general average, and are not further liable; seventhly, that the damage to the wheat by sea water was particular average according to English law from which the defendants are exempted by the terms of the policy, and that what took place at Constantinople did not extend their liability.

Watkin Williams, Q.C. (McLeod with him), for the plaintiffs.—The question is, where are you to state the average? here the adventure was abandoned at Constantinople; there was an agreement to that being done, the cargo and ship parted company, then it became necessary to state the average; and was it properly stated at Constantinople? Now the rule is, that the place at which general average shall be adjusted is the place of the ship's destination or of the delivery of her cargo, and then the law by which it is to be adjusted is the law of that place, see *Simonds v. White* (2 B. & C. 805). But where the voyage is terminated at an intermediate place, it would seem that that is the place at which the adjustment should be made. In *Fletcher v. Alexander* (3 Mar. Law Cas. O. S. 69; 18 L. T. Rep. N. S. 432; L. Rep. 3 C. P. 375), Bovill, C.J., says: "In this case, the adventure being in progress, the vessel, in consequence of the damage she had sustained, put back to Liverpool. The ship might have been repaired, and might have prosecuted her voyage and completed the adventure. . . . The ship was otherwise employed, and the voyage was broken up at Liverpool; Liverpool, therefore, was the place at which the average contribution was to be adjusted; the adjustment must be according to the law of England; and it seems to me that the value must be determined at Liverpool." The shipowners and freighters had a right to terminate the voyage at Constantinople under the circumstances, and the owner was not bound to repair. *Worme v. Storey* (11 Ex. 427) shows that there is no obligation to repair, but if the owner elects to repair, he must do so properly, and must not go on with the ship in an unworthy state. This was a judgment of Parke, B., and is approved by Willes, J., in *Blasco v. Fletcher* (1 Mar. Law Cas. O. S. 380; 9 L. T. Rep. N. S. 169; 14 C. B. N. S., 147), and in *De Quadra v. Swan* (16 C. B. N. S., 772). Here there was an agreement of all the persons who had a right to be consulted. [Brett, J.—The rule is that the owner is only not bound to repair if the damage is so great that it cannot reasonably be repaired.] He cited further

Dickenson v. Jardine, 3 Mar. Law Cas. O. S. 126; L. Rep. 3 C. P. 639; 6

Harris v. Searamanga, ante, vol. 1, p. 339; 25 L. T. Rep. N. S. 697; L. Rep. 7 C. P. 481;

Hendriks v. The Australian Insurance Company, ante, p. 244; 30 L. T. Rep. N. S. 418.

C. P.]

MAVRO AND ANOTHER. v. THE OCEAN MARINE INSURANCE COMPANY.

[C. P.]

And on the point as to jurisdiction, *Messina v. Petrocchino* (ante, vol. 1, p. 298; L. Rep. 4 P. C. 144), and read the Orders in Council of Nov. 30, 1864.

Bull, Q.U., and J. C. Mathew, contra.—There is nothing in the case to show that the average adjustment was properly made at Constantinople. Why was the adventure terminated there? It is said that a captain is not bound to repair his ship, a proposition founded on a dictum of Purke, B., in *Worms v. Storey* (ubi sup.). But it cannot possibly be that such a general rule as that was intended. [Lord COLERIDGE, C.J.: It must mean, "not absolutely under all conceivable circumstances"]. The consent of the shipowners and the shippers is not sufficient. [BARRT, J.: The advice of the surveyor was to sell the damaged portion, and tranship the remainder, and the court ordered it to be done. If the captain had sent on the cargo, there is authority that the adjustment should have been made at Marseilles.—MILLON, J.: You put the order of the court no higher than a private agreement. The jurisdiction of the court is exercisable by custom only, and the orders in council only confirm it. In the case there is no finding as to the custom. [BRETT, J.: The Consular Court is made a court of vice-admiralty. Yes, but a vice-admiralty court has no power to order transhipment. In *Power v. Whitmore* (4 M. & S. 141), Lord Ellenborough says: "Although by the comity which is paid by us to the judgment of other courts abroad of competent jurisdiction, we give a full and binding effect to such judgment, as far as they profess to bind the persons and property immediately before them in judgment, and to which their adjudications properly relate, yet we feel that we should carry that principle of comity further than reasonably ought to be done, or ever hitherto has in practice been done, if we should draw from the recital of facts and usages which are contained in those judgments, general evidence of the existence of those facts and usages, and allow them to be available for all causes and purposes, and consider them as applicable to, and obligatory upon other persons than the immediate parties to those judgments in which the recitals occur." On the next question, as to the words of the contract, *Harris v. Scaramanga* (ubi sup.) is not applicable. Here we have paid the owner of the cargo all that the owner of the cargo was ordered to pay under the average adjustment at Constantinople; and what he is seeking to recover from us is that which, beyond all doubt, but for these words, "as per foreign statement," would be a particular average loss. What, then, is the real meaning of those words? It must be that the underwriters indemnify the assured against any loss he incurs by reason of a foreign custom. Then the words "warranted free from average unless general," must be taken to mean "unless general by English law," and by English law the damaged wheat would not be general average. [Lord COLERIDGE, C. J.—Does he not agree to pay general average according to foreign law? No; whatever is general average, that is to say, by English law, shall be paid in accordance with any foreign custom to be introduced in stating it. [BARRT, J.—How do you get over the nineteenth paragraph? The adjustment was made in all respects the same as it would have been at Marseilles.] That is not clearly so, for there would have been a great difference in the expenses of stating the average.

Watkin Williams, Q.C., in reply.—There may have been various considerations as to the details in the place where the average was stated, but the law was the same in Constantinople as at Marseilles. Then as to the termination of the voyage: It did terminate at Constantinople, with the consent of all parties, as found in the case; and the only question is, has there been a general average statement binding upon the people concerned, independently altogether of the policy? If there has, then the underwriters must pay upon the footing of it.

Cour. adv. vult.

July 8.—The judgment of the court was delivered by Lord COLERIDGE, C. J.—This was an action on a policy of insurance on a cargo of wheat.

The ship, being disabled and some of the cargo damaged, put into Constantinople. Proceedings were taken in the Consular Court there, the result of which was that by the order of the court the damaged portion was sold and the sound portion transhipped. The entire cargo belonged to the plaintiff, an adjustment of average was by order of the Consular Court made at Constantinople, in which the average adjuster treated the damage to the wheat as general average. The policy contained the words, "General average as per foreign statement," and "free from average unless general." The defendants have paid into court sufficient to cover the plaintiffs' claim on all the items of the average adjustment except the item of damage to the wheat. This item they deny their liability to pay.

They relied mainly upon three points: First, that the Consular Court at Constantinople had no jurisdiction to make the orders which were made in this case; secondly, that the voyage was not necessarily broken up at Constantinople, and that the average should have been adjusted by an adjuster at Marseilles upon the arrival of the ship and goods in safety there; thirdly, that the words "free from average unless general," were intended expressly to exclude such an item as the one in dispute, which, by the law of England, would not be a general average loss at all. By the twenty-third paragraph of the case the court is to draw inferences of fact, and this enables us easily, and, as we think, satisfactorily to dispose of the first two points in the case.

We are clearly of opinion upon the facts stated in the case that the court at Constantinople must be taken to have had jurisdiction to make the orders which it did, and which were acquiesced in at the time.

We are also clearly of opinion upon the facts found in the case that it must be taken that the voyage was necessarily broken up at Constantinople. Some reliance was placed in argument upon the fact that the law of Marseilles, in the port of ultimate destination, was the same on the subject of general average as the law of Constantinople. But this fact alone would not be conclusive on the subject, and we notice it only to show that we have not overlooked it.

There remains only the question upon the true construction of the policy, and with respect to this the cases of *Harris v. Scaramanga* (ante, vol. 1, p. 339; 26 L. T. Rep. N. S. 697; L. Rep. 7 C. P. 481), and *Hendricks v. The Australian Insurance Company* (ante, p. 244; 30 L. T. Rep. N. S. 419), appears to us to be undistinguish-

[ADM.]

THE DIANA.

[ADM.]

able. The latter case was very recently argued before us, and we adhere to the opinion we then expressed.

We think therefore that there should be judgment for the plaintiffs.

Attorney for plaintiffs, W. Nash.

Attorneys for defendants, Walton, Bubb, and Walton.

COURT OF ADMIRALTY.

Reported by J. F. ASHFALL, Esq., Barrister-at-Law.

May 5 and 14, 1874.

THE DIANA.

Salvage—Practice—Collision—Right of party to blame to intervene in salvage suit—Conduct of suit—Bail—Costs.

Where a ship has been found to blame in a cause of collision, and a cause of salvage has been instituted against the other (the injured) ship, the owners of the ship found to blame have a right to intervene in the salvage cause to protect their own interest; and if they choose to put in bail to answer the claim of the salvors in lieu of the bail given by the owners of the injured vessel, the High Court of Admiralty will give them the conduct of the defence of the salvage suit; under such circumstances the owners of the injured vessel are entitled to have their bail released, and to be paid their costs up to the time when the new bail is put in.

THIS was a cause of salvage instituted by salvors against the German brig *Diana*. The *Diana* had been injured in collision by the American ship *Kendrick Fish*, and in a cause of collision instituted by the former against the latter vessel, the *Kendrick Fish* had been held alone to blame, and her owners consequently became liable to pay the salvage expenses incurred by the *Diana*.

May 5.—The case now came before the court, upon motion by the owners of the *Kendrick Fish* for leave to appear in and to defend the salvage cause against the *Diana*.

Butt, Q.C., for the owners of the *Kendrick Fish*, in support of the motion, contended, that as the interests of their clients alone were concerned they had a right to appear.

W. G. F. Phillimore, for the owners of the *Diana* opposed the motion.—The owners of the *Diana* are primarily responsible to the salvors, and moreover they are responsible to their bail for the conduct of the cause; the witnesses are all in the hands of the *Diana*'s owners, and, according to the practice of the court, the conduct of the suit is invariably left in the hands of the owners of the salvaged ship. Under any circumstances the owners of the *Diana* ought to be paid the costs they have incurred in the salvage suit up to the present time. They have prepared their answer, and are about to file it.

Butt, Q.C. in reply.

Sir R. Phillimore.—The owners of the *Kendrick Fish* are entitled to appear if they think fit, to protect their own interests. With regard to the owners of the *Diana*, they are entitled to all their costs of the salvage suit up to the present time, and they may file their answer, but after that the question of costs must be left an open question to be decided by the court hereafter. The *Kendrick Fish* may appear, and if the *Diana* incurs un-

necessary costs she will do so on her own responsibility.

May 14.—Butt, Q.C., moved on behalf of the owners of the *Kendrick Fish*, for the appointment of a day for the examination of witnesses.

Dr. Deane, Q.C., and W. G. F. Phillimore, for the owners of the *Diana* opposed (beginning by arrangement).—It is contrary to the practice of the court for the vessel, from whom the ultimate recovery will be had, to conduct the suit, and if the application is granted the effect will be to place the conduct of this cause in the hands of the owners of the *Kendrick Fish*. Having the conduct of the suit may give him opportunities of framing the examination of our witnesses, who will be theirs also, so as to affect the question of the amount of damage done in the collision, and so influence the inquiry before the Registrar and Merchants. They may be at liberty to intervene, but they should not be allowed to conduct the cause. Bail was put in for the owners of the *Diana*, and that bail is entitled to the protection of the owners of the *Diana*. [Sir R. Phillimore.—Apart from the question of practice it is obvious that the *Kendrick Fish* is the more interested, as she will have to pay.] The *Diana* is primarily liable, and will have to pay in the first instance. If the salvage suit had been tried first, the *Diana* alone could have defended. In probate suits the residuary legatee cannot take the conduct of a suit out of the hands of the executors, although he is the most interested. What priority is there between the bail, and the *Kendrick Fish*? [Sir R. Phillimore.—Suppose the owners of the *Kendrick Fish* give bail?] Then she must at the same time pay all the costs hitherto incurred by the *Diana*. This will be the first case in which a salvaged vessel has not been allowed to conduct her own suit. [Sir R. Phillimore.—The effect will be that the parties most interested in the result will conduct the suit.] No offer has hitherto been made to release the bail. [Sir R. Phillimore.—I might make it a condition that the bail should be released.]

Butt, Q.C., for the *Kendrick Fish*.—As an intervener I am entitled to examine witnesses, and ask for the appointment of a day for that purpose. [Sir R. Phillimore.—The Registrar tells me that according to the practice of the court an intervener may examine witnesses.] That is all I claim. [Sir R. Phillimore.—Suppose you have the carriage of the suit will you put in bail?] The owners of the *Kendrick Fish* have already put in bail to answer the damage, and that includes salvage.

W. G. F. Phillimore.—We are primarily interested in examining our crew, to make the salvage as small as possible. We shall have to pay the salvage in the first instance, and shall not recover it for some time, and then shall have to run the risk of the bail of the *Kendrick Fish* not being solvent.

E. C. Clarkson for the salvors.—Why should not the usual course be followed? It is doubtful whether an intervener can file an answer, and there is now a motion before the court to compel them to do it, and that motion I now press. They now ask to examine witnesses before filing an answer, and to this we object. [Butt, Q.C.—We have made a tender, and as soon as that is accepted or rejected we will file an answer.] Under any circumstances we object to the release of the *Diana*'s bail. It is our only security in this suit, and we shall not consent to release it unless we get equally good security.

ADM.]

THE KATHLEEN.

[ADM.]

Sir R. PHILLIMORE.—I am of opinion that the *Kendrick Fish* must ultimately pay all the costs (after taxation by the Registrar) incurred by the *Diana* before the order enabling the *Kendrick Fish* to intervene, but that question is not now before me; all I have to consider now is whether the interveners are entitled to examine witnesses. I shall grant the interveners' motion, but I think that they ought to be subordinated altogether for the *Diana*.

E. O. Clarkson.—I have no objection if they give proper security.

Dr. Deane, Q.C.—I expressly apply for the release of the *Diana's* bail.

E. O. Clarkson, I assent thereto, on bail being given by the *Kendrick Fish*.

Bull, Q.C.—We will put in bail.

Sir R. PHILLIMORE.—Then I shall order the *Diana's* bail to be discharged on the owners of the *Kendrick Fish* putting in bail in the salvage suit. I shall grant Mr. Clarkson's motion, as to the filing of the answer, but subject to question of tender. The interveners must file their answer as soon as the salvors have accepted or rejected the tender.

Solicitors for the salvors, *Loxless and Co.*

Solicitors for the *Diana*, *Fielder and Sumner.*

Solicitors for the *Kendrick Fish*, *Pritchard and Sons.*

Feb. 18, May 5, June 19, 20, and 22; July 14 and 22, 1874.

THE KATHLEEN.

Salvage—Derelict—Shipowner's lien for freight—

Loss of right to carry on cargo—Sale by order of court—Misconduct of salvors—Dispossessing original salvors—Right of recovery—Rival salvors—Pleading—Adoption of allegations of misconduct in answer—Cross-examination—Practice.

Where a ship and cargo are brought into port by salvors, and a suit is instituted in the High Court of Admiralty to recover salvage reward, that court will, on the application of the salvors, acting with the assent of the owners of the cargo, order a sale of the cargo to prevent deterioration from damage done, although the shipowner, desirous of carrying on the cargo so as to earn freight, opposes the sale, and offers to give substantial bail for both ship and cargo; but such sale will be ordered subject to all questions of right to freight.

Where a ship, injured by collision without fault of her master and crew, is abandoned by them, and is afterwards taken possession of and brought in safety into port by salvors, who institute a suit against ship and cargo, the shipowner, having by the abandonment put an end to his contract of carriage, loses all claim to have the cargo put into his possession to enable him to carry it on and so earn his freight, and all claim to be paid full freight out of the proceeds of the cargo, if sold by order of the court. Nor can the shipowner have any claim for pro rata freight unless there be a new contract express or implied to pay the same, and if the shipowner refuses to consent to a sale of the cargo by the court then applied for by the salvors and owner of cargo, unless he be paid full freight, no such contract can be implied.

Where in a cause of salvage against a derelict ship rival salvors institute separate causes and file

separate petitions, alleging misconduct against one another, the Court of Admiralty will not allow the defendants, in their answer to the petition of one set of salvors, to plead that in the petition of the other set there are allegations of misconduct, and that they, for the purpose of the cause, and not otherwise, adopt those allegations; they must either make the allegations of misconduct as their own statements, or omit them.

Where rival salvors file separate petitions, alleging misconduct against each other, and the defendants in their separate answers repeat the charges of misconduct made by each salvor against the other, so that the answers are contradictory, the defendants will not be allowed, on the hearing of both causes at the same time, to cross-examine one set of salvors to show that they, and not the other set, have been guilty of misconduct.

If first salvors lawfully in possession of a derelict ship are wrongfully and violently dispossessed by second salvors, who succeed in bringing the ship into safety, the second salvors will receive no benefit from the service they may render, but the whole reward will go to the benefit of the original salvors.

THERE were causes of salvage instituted by various parties against the barque *Kathleen*, her cargo and freight. On 27th Jan. 1874, a cause of salvage was instituted on behalf of the owners and master and crew of the steam tug *Palmerston*; in this suit appearances were separately entered by the owners of the *Kathleen* and by the owners of her cargo. On 30th Jan., the judge having heard the proctors for the plaintiffs and for the owners of cargo, ordered a commission of delivery, and that the vessel should be removed to a place of greater safety. On 2nd Feb. a cause of salvage (No. 6733) was instituted on behalf of the owners, masters, and crews of certain English luggers, the *William and Mary*, the *Ocean Ranger*, the *Mary Ann*, the *Four Sisters*, the *Sarah Elizabeth*, the *Black Bear*, and the *Stormweay*, against the *Kathleen*, her cargo and freight; and in this cause also appearances were separately entered on behalf of the respective owners of ship and cargo. On 3rd Feb. another cause (No. 6740) was entered on behalf of the owners, master, and crew of the *Palmerston*, and to this also separate appearances were entered; this cause was entered on account of some mistake in the precept in the first mentioned cause, and on 9th Feb. notice was given that that cause would be no further proceeded with. On the same day (9th Feb.) the plaintiffs (in cause No. 6733) applied to the court with the consent and at the request of the owners of cargo for a sale of the cargo, and an order for its sale was made; this order was applied for and obtained without notice to the owner of the *Kathleen*. On 13th Feb. the proctors for the owners of the *Kathleen* entered a caveat against the payment of any sum out of the proceeds of the sale of the ship and cargo, or either, when brought into court, and against release of the cargo.

Feb. 18.—The case came before the court on the following notice of motion:

I, William Flux, solicitor for the defendants, the owners of the *Kathleen*, in this cause, give notice that we shall by counsel on the 18th Feb. 1874, move the judge in court to order that the order made therein on the 9th Feb. 1874, for the sale of the cargo of the said vessel, shall be set aside, or the sale thereon directed to be suspended, until the payment into court of a sum equal to the gross freight of such cargo, or why the said

[ADM.]

THE KATHLEEN.

[ADM.]

defendants on giving bail to the value thereof, should not be allowed to carry the same forward to its destination in order to earn the freight, or to order that if the said order for sale is allowed to stand, the said defendants shall be paid the amount of the said freight out of the proceeds of the said sale, and that the plaintiffs pay to the said defendants the costs of this motion, on the ground that the said order for sale was obtained by the plaintiffs without any notice to the said defendants.

From affidavits filed it appeared that the commission of sale was, as is usual, put into the Marshal's hands for execution, and he sent down a competent person to examine the cargo, who recommended that it should be removed to London as it could there be more easily dried and would then be more likely to realise a better price. From an affidavit filed by the agent of the owners of the *Kathleen*, it appeared that the *Kathleen* had been seriously damaged by collision before the alleged salvage services, and had been abandoned by her master and crew; the cargo was cotton, and had been shipped at Charleston, U. S., for Bremen, at a freight of 2300l.; and the owners claimed to be entitled to carry the cargo on from Dover, where the ship and cargo then were, to Bremen, so as to earn the freight; they objected to the cargo being brought to London for sale, on the ground that the expense of so doing would exceed the expense of taking the cargo to Bremen; they were desirous of forwarding it to Bremen as soon as it was discharged from the *Kathleen* and offered bail in respect of it to the salvors. From affidavits filed on behalf of the owners of cargo it appeared that some parts of the cotton were wetted and other parts saturated with salt water, and that the iron bands round the bales were rusting and damaging the cotton; that the cotton was daily deteriorating in consequence of its wetted condition, and if carried to Bremen it would lose much in value, and be scarcely marketable, whereas if taken to London it would get there in a day or two by rail and be sold at once, thus giving the purchasers time to dry it before it became so damaged that it could not be put into a merchantable condition; the owners of cargo submitted that as the ship had been brought into Dover derelict without the assistance of owners, master, or crew, of the ship, she was no longer in their possession, and they had lost their lien on the cargo.

Aspland, for the owners of the *Kathleen*, in support of the motion.—The shipowners are entitled to a stoppage of the sale in order to be enabled to carry the cargo on to Bremen, and so earn freight or to have their full freight paid here either to themselves or into court. In the *Sobolomsten* (L. Rep. 1 Adm. & Ecc. 293; 15 L. T. Rep. N. S. 393; 2 Mar. Law Cas. O. S. 436), where freight was similarly claimed out of the proceeds of sale of the cargo, it is said, "By British law the following points seem to me settled: first, that upon the vessel becoming disabled at an intermediate port, the master is allowed a reasonable time within which to reship or tranship, so as to earn his freight; second, that the whole freight is payable if by default of the owner of cargo the master is prevented from forwarding the cargo from the intermediate port to its destination; (*Cargo ex Galam*, Bro. & Lush. 167); third, that no freight is payable if the owner of cargo against his will is compelled to take the cargo at an intermediate port; fourth, that to justify a claim for *pro rata* freight there must be a voluntary accept-

ance of the goods by their owner at an intermediate port, in such a mode as to raise a fair inference that the further carriage of the goods was intentionally dispensed with: (*Vlierboom v. Chapman*, 13 M. & W. 238)." In that case the owners of cargo only stood by, and did not prevent a sale; here they have promoted the sale. In *The Teutonia* (ante, vol. 1, p. 214; L. Rep. 4 P. C. 171; 26 L. T. Rep. N. S. 48), the principle of *The Sobolomsten* is upheld. The ground of their opposition is that the cargo will be destroyed by waiting, and hence they claim the right to sell it; we are entitled either to carry it on, or if they prevent us we may claim full freight. [Sir R. PHILLIMORE.—The cargo has been damaged by an accident, and is in course of deterioration. Have not the owners a right to sell it here?] Subject to our right to carry on or get full freight. [Sir R. PHILLIMORE.—Even if it should be destroyed by the delay would you claim a right to carry on?] No, it is our duty to take means to preserve it, and we should be bound to dry it before carrying it on: (*Notara v. Henderson*, ante, vol. 1, p. 278; L. Rep. 7 Q. B. 225; 26 L. T. Rep. N. S. 442.) We are entitled to our freight; if we are not paid it we may carry on subject only to a cross action in case we thereby damage the cargo. [Sir R. PHILLIMORE.—What is the legal consequence of obtaining from the court an order for the sale of the cargo. Does it not oblige the owners to pay either full or *pro rata* freight?] The sale took place on the motion of the salvors made at the request of the owners of cargo. [Sir R. PHILLIMORE.—That seems to be an acceptance of the cargo short of its destination, and if so, the shipowners are entitled to *pro rata* freight.] That is the case only when the shipowners consent to deliver the cargo short of its destination; here, however, they have never abandoned their right to carry on and claim full freight. The owners of cargo are not entitled to take it out of the shipowners' hands as long as they are willing to carry it on. *Pro rata* freight is due only when two conditions are fulfilled; first, when there is a voluntary acceptance of the cargo by the owners of cargo; secondly, when there is a consent of the shipowner to deliver short of the agreed destination:

Vlierboom v. Chapman, 13 M. & W. 238;

Tendall v. Taylor, 4 E. & B. 217.

In effect the contract can only be dissolved by the consent of both parties, and if the owners of cargo think fit to take the cargo here without the consent of the shipowners, they must perform their part of the contract by paying the whole freight. The fact that the ship was abandoned does not take away the shipowners' claim to freight. An abandonment is not a total loss, and does not dispossess the owners of their property or rights, the legal possession of the ship and cargo remains in the owners, the salvors being their agents only:

Thornely v. Hobson, 2 B. & Ald. 513.

E. C. Clarkson for the salvors.—In so far as the motion affects the salvors as to costs, I oppose it. But it is to the salvor's interest to establish the claim for freight. The shipowner did not by the desertion of his crew lose his lien on the cargo, and his contract still remains. The ship having been arrested by the salvors, the shipowner does all he can to recover possession by entering an appearance, and the arrest of the court is only for the

ADM.]

THE KATHLEEN.

[ADM.]

purpose of protecting the salvor's lien, and does not deprive the owner of his right of property. This court has given salvage reward in respect of freight in many cases of derelict ships, and if the owners of cargo are right here the court has always been in error. This is not a question of lien, it is a question whether the shipowners can or cannot fulfil their contract. If they can they are entitled to do so or to recover their freight. Hence it comes to be a question of whether the court will order a sale, and out of the proceeds thereof the payment of freight or a delivery up of the cargo to the shipowners, on their giving bail, in order to enable them to complete their contract. [Sir R. PHILLIMORE—I am strongly of opinion that I ought to order a sale.] Then will the court allow the cargo to be sold and subsequently released without payment of freight? [Sir R. PHILLIMORE.—That involves the question of whether any freight is due upon cargo which is so damaged that it cannot be carried on without serious injury, and which is in consequence stopped and sold here?—As that is caused by the acts of the owners of cargo, freight is recoverable.]

W. G. F. Phillimore for the owners of cargo.—The ship was found derelict and brought into port and arrested by salvors. She has been unloaded, and there is now no cargo on board. Are the shipowners still in possession of the ship and cargo so as to entitle them to freight? The real question here turns upon the question of lien. So long as the cargo remains in the possession of the shipowner, the owner of cargo cannot touch it without the payment of the full freight, by reason of the lien which the shipowner has in respect of that freight. Here, however, the lien is gone by the abandonment of the owner, and by the substitution of the salvor. The ship and cargo are now in the possession of the court holding for the salvor. [Sir R. PHILLIMORE.—The marshal tells me that the shipowner was a consenting party to the unlivery of the cargo. This may be important in considering whether he preserved his lien, or whether he can claim full or only *pro rata* freight.] It is clear from the affidavits that the cargo ought to be sold at once, in consequence of its rapid deterioration. Here the cargo was so damaged that it could not be carried on without drying it. Before any right to freight accrues to the shipowner it is his duty to take the cargo out and dry it, and carry it on to its destination: (*Notara v. Henderson, ante*, vol. 1, p. 278; L. Rep. 7 Q. B. 225; 26 L. T. Rep. N. S. 442.) That case decides that a master has no right to carry on a cargo in a damaged condition for the purpose of earning freight. His duty may be to sell it, or otherwise deal with it, even if he thereby lose his chance of earning freight. This doctrine obviously arises out of the decision of Lord Stowell in *The Gratitude* (3 C. Rob. 240), on the duties of a master. [Sir R. PHILLIMORE.—But that does not affect the right to *pro rata* freight. There can be no doubt as to a master's power to sell.] In *Notara v. Henderson (ubi sup.)* it is laid down that no right to *pro rata* freight can arise without a compromise between the parties. [Sir R. PHILLIMORE.—Do not the circumstances of this case show that there was a compromise here, by the unlading at Dover and sale of the cargo at the request of the owners of cargo.] No such inference of fact can be drawn here, because the respective owners of ship and cargo are at complete issue as to what

should be done with the cargo. The abandonment of the ship was a loss of lien on the cargo; she was left, as her crew say, to save life, but was afterwards brought into safety by salvors. The presumption is that there was neglect of duty on the part of her master. Hence it is clear that there was an absolute surrendering on the part of the shipowners, through their agent, of all intention of completing the contract and of all rights of lien.

Aspland in reply.—Neither the court nor the salvors have the legal possession of the ship and cargo. The salvors are in the position of legal agents, having a lien upon it, and the court aids them to retain that lien. But the salvors' possession, subject to their lien, is the possession of the owners: (*Thornely v. Hebborn*, 2 B. & Ald. 513). They hold for the benefit of themselves and the owners, the legal possession remaining in the owners. The shipowners have never abandoned their lien. An abandonment of a ship is not a refusal to complete the contract which she is then bound to perform, but rather a confession of inability to complete at the time, with a reservation of the right of so doing, if other persons should succeed in getting the ship to a place of safety. There is no intention on the part of the shipowners to take this cargo on to Bremen in its damaged condition; they propose to dry it first, and so perform their duty as carriers. *Notara v. Henderson (ubi sup.)* is a strong authority that the owners of cargo cannot claim to take the cargo out of our possession without the payment of full freight.

Sir R. PHILLIMORE.—I think that the duty of the court in the present stage of the case is clear. The evidence presented to me to-day establishes that this cargo is fast deteriorating through the damage it has sustained by salt water, and that it is for the advantage of all parties that a sale should take place at once. One thing alone is sufficient to induce me to make this order of sale, and that is, the owners of the cargo have expressed their wish for the sale in order that further deterioration may be prevented. And, as I understand the matter, the owners of the cargo press for this sale even if it should turn out that they are bound to pay freight for the cargo whether in full or *pro rata*. Hence I must order the sale to take place, and, for that purpose, that the goods be removed to London. As to the other question, I shall at present express no opinion. The matter will so rest that the shipowners can apply at a later stage of the case for the payment to them of their freight, and the question can then be raised in a more formal manner on petition, so that not only my opinion can be taken into also that of the court of appeal. That seems to me to be the right way to deal with the question of law, which is one of considerable importance and difficulty. As the proceeds of the sale of the cargo will be paid into court, the shipowners will have full security for their claim for freight if it should turn out that they are entitled to it.

May 5.—The case again came before the court on motion on behalf of salvors to reject an answer filed by the defendants.

Subsequently to the above proceedings the two causes (Nos. 6753 and 6740) were consolidated and another cause (No. 6769) was instituted on behalf of the owners, master, and crew of the French lugger *St. Claire*, and pleadings were filed.

[ADM.]

THE KATHLEEN.

[ADM.]

The petition in the consolidated causes (Nos. 6733 and 6740) alleged that the English luggers on 25th Jan. left Hastings to fish; that the *Ocean Ranger*, when about eighteen miles to the southward of Hastings, sighted a vessel in distress and made towards her; she proved to be the *Kathleen*; when the *Ocean Ranger* got up to the *Kathleen* it was found that she had been in collision with some other vessel, and that she had a large hole in her port bow, extending below the water line, and that her sails and rigging were much damaged; the *Kathleen* had been abandoned by her master and crew, but when the *Ocean Ranger* got up to her a French fishing boat, which proved to be the *St. Claire*, of Boulogne, was lashed alongside the *Kathleen*; the *Ocean Ranger* made fast to the French boat, and three of her crew got on board the *Kathleen*. The French boat had on board a quantity of sails, provisions, and several coils of rope, including the hawsers and a quantity of running gear and blocks, evidently taken from the *Kathleen*. When the three men from the *Ocean Ranger* got on board the *Kathleen* they found some of the crew of the French boat engaged in getting some spare sails out of the sail rooms, and putting them on board the French boat, whilst others were cutting away the running gear of the *Kathleen* and getting it on board their boat. The crew of the French boat had stripped the cabin of the *Kathleen* of everything, even to the cabin stove, and they also took away the ship's compass, leaving her without any compass. After the lapse of about an hour, the *Black Bee* arrived, and after she arrived some of the Frenchmen cut away the spanker of the *Kathleen*, and took it away and put it into their boat, whilst others were cutting away the guys and braces, which they also put into their boat. The other Hastings luggers then arrived, and the *Mary Ann* was sent for a tug, but could not find one till she got to Dover; the master of the *Elizabeth* asked the assistance of the Frenchmen in saving the ship, but it was refused; the Frenchmen took one of the pins out of the wheel and tried to unship it, but were stopped by the crews of the English luggers; the Frenchmen, having laden their boat with tackle and articles belonging to the *Kathleen*, left her, and took with them the small boat of the *Kathleen*; they were asked to leave the small boat, but refused. When the Frenchmen left, the English crews were obliged, in consequence of the braces having been cut, to attempt to steady the sails that were standing by means of ropes, and it was with great difficulty that ropes could be got, so completely had the Frenchmen stripped the ship. The petition then went on to allege that the English luggers towed the ship through an increasing sea for some distance, with much risk, and ultimately, with the assistance of the tug *Polmerston*, of Dover, she was beached under the lee of the Admiralty Pier at Dover, where her damage was partially repaired and some of her tackle landed; she was then taken to a place between the piers at Dover, and some of her cargo discharged, so as to lighten her and let her get alongside the pier for final discharge, which she eventually did. It was further alleged the master and crew of the French vessel had no intention of saving the *Kathleen*, and that she was saved by the exertions of the plaintiffs alone, for which they claimed reward.

The petition filed in the other cause (No. 6780)

alleged that the *St. Claire* was a French lugger, manned by six hands, all told; that she sighted the *Kathleen* on the morning of the 25th Jan., about twenty miles N.N.W. of Etaples, on the coast of France; that the *Kathleen* then had a signal of distress flying, and that her people seemed to be passing to and from between the *Kathleen* and another large vessel not far from her; the crew of the *St. Claire* hoisted a signal to know if assistance was wanted, but got no answer; soon after the signal of distress was hauled down and the third vessel went away; the crew of the *St. Claire* then boarded the *Kathleen* and found her deserted and injured by collision. The cargo being light, there was no danger of the vessel sinking so long as the deck did not give way; but as the water was rising in the hold, it was deemed expedient to remove the sails and other perishable stores to a place of safety. The master of the *St. Claire*, therefore, with the assistance of one of his men, proceeded to pass such perishable stores as were portable into the lugger. They then got the mainsail of the *Kathleen* (which was partly set) round, and hoisted a stay sail between the stump of her foremast and her mainmast, so as to be able to steer her, and having taken on board one of the trawling warps of the *St. Claire*, they made it fast and got everything ready to tow the *Kathleen* to Boulogne-sur-Mer. The weather was almost calm, and the crew of the *St. Claire* waited for a breeze to spring up. Towards evening the wind freshened, blowing from the N.W., and, with the assistance of the *St. Claire*, the *Kathleen* began to slowly move towards Boulogne, and as the wind continued a fair breeze, she would in all probability have arrived there without difficulty or further assistance about the time of high water but for the events following: About an hour before sunset an English fishing boat came alongside, and about three-quarters of an hour after she came up six or more English fishing boats came up, and about twenty fishermen from them *boarded the *Kathleen* and pushed the master of the *St. Claire* and the man who was assisting him in the navigation of the *Kathleen* away from their work, and threatened to throw them overboard, and otherwise illused them and put them in terror. The men from the English boats cast off the tow rope from the *St. Claire*, and forcibly took possession of the *Kathleen*. The master of the *St. Claire*, seeing that it was impossible to retain possession against the numbers on board, left the *Kathleen*, under protest, with the man who had been assisting him, and returned on board the *St. Claire*, where he held a consultation with his crew. The English fishermen turned the head of the *Kathleen* towards the English coast, and the master and crew of the *St. Claire* finding that they could do nothing further proceeded at once to Boulogne. Immediately on their arrival at Boulogne-sur-Mer, the master of the *St. Claire* delivered the goods and stores saved from the *Kathleen*, which were on board the lugger, to the proper authorities, and gave information of the circumstances before stated. The *Kathleen* was taken to Dover by the English fishermen, and the master and two of the crew of the *St. Claire* followed her there. The petition further alleged that at the time the crew of the *St. Claire* was dispossessed there was a fair wind for Boulogne, which was easier of access than any port on the English coast, and they could easily have taken the *Kathleen* into Boulogne, and were in

[ADM.]

THE KATHLEEN.

[ADM.]

the act of so doing; that by the wrongful act of the English fishermen the *Kathleen* and the cargo were subjected to greater risk and expense, and that if the services had been completed by the crew of the *St. Claire* they would have effected a much better salvage than that which was effected; and that the owners, masters, and crews of the English fishing boats had by their misconduct and violence forfeited any claim they otherwise might have had for salvage services, and under the circumstances before mentioned the plaintiffs were entitled to recover such salvage reward as they would have been entitled to if the *Kathleen* and her cargo had been salvaged by their unassisted services.*

To the petition in causes No. 6733 and 6740, the defendants, owners of ship and cargo, filed an answer alleging that the *Kathleen* came into collision with another vessel, sustained the damage stated in the petition, and that on the morning of the 25th Jan. the crew of the *Kathleen* were taken on board the other vessel and taken to Deal; before losing sight of the *Kathleen* her crew saw the French lugger *St. Claire* approach the *Kathleen*, and the crew board her. The statements in the petition were not admitted to be true, save as appeared in the answer. The *Kathleen* was brought into Dover as in the petition alleged, but of what occurred on board or in relation to the *Kathleen* from the time when those on board the *Mallowdale* lost sight of her until she was brought off Dover the defendants had no knowledge. The answer then stated that a cause of salvage No. 6769 had been instituted, and was then pending in this honourable court on behalf of the owners, master and crew of the lugger *St. Claire*, against the *Kathleen* and her cargo and freight, and against the defendants intervening, and in the petition filed in the said suit it was alleged on behalf of the plaintiff therein, that upon some of them going on board the *Kathleen* they intended and prepared to tow her, and were in the act of towing her to Bonlogne-sur-Mer, and would in all probability have taken her to Bonlogne without difficulty, but that about twenty English fishermen, &c. [The answer then set out the statements in the petition in cause No. 6769, which are marked above within asterisks, and then continued.] "For the purpose of this answer, (but not further or otherwise, the defendants herein being necessarily ignorant of the actual facts), the defendants herein adopt the several allegations in the said petition on behalf of the *St. Claire* contained, and say that the same are respectively true." The answer further alleged that the beaching of the *Kathleen* after her arrival at Dover was against the remonstrances of the master, and was an improper proceeding, causing unnecessary damage to the cargo. The answer concluded by praying the judge to determine whether either and which of the conflicting allegations and claims made on behalf of the plaintiff and the owners, master, and crew of the *St. Claire* are in whole or in part well founded, and in case he shall find anything due to the plaintiff to pronounce such a moderate sum to be due, &c.

To the petition in cause No. 6769 the defendant filed an answer which commenced with similar admissions and denials as the answer in the other cause, and continued as follows:

3. A cause of salvage has been instituted, and is now

pending in the Consolidated Cause No. 6733 and 6740, in this honourable court on behalf of the owners, masters, and crews of the vessels *Williams* and *Mary*, *Ocean Ranger*, *Mary Ann*, *Four Sisters*, *Sarah Elizabeth*, *Black Bear*, and *Stornoway*, and on behalf of the owners, master and crew of the steam tug *Falmesdon* against the barge *Kathleen*, her tackle, apparel, and furniture, and the cargo now or lately laden therein and the freight due in respect of such cargo, and against the defendants, and on the petition filed in the said suit it is alleged on behalf of the plaintiffs therein that some of them went on board the *Kathleen* and found the Frenchmen (meaning the crew of the *St. Claire*) engaged in stripping the *Kathleen* of its sails, running gear, cabin furniture, and compass, with which they sailed off in their boat taking with them also the small boat of the *Kathleen*. That the master of the *Sarah Elizabeth* asked one of the plaintiffs if they (the Frenchmen) would assist in saving the *Kathleen*, but he refused to do so; that at the time when the said Englishmen went to the assistance of the *Kathleen* the master and crew of the *St. Claire* were not attempting and did not intend to attempt to save her, and they subsequently refused to join the English crew in their attempt to save her, and that by the services of the plaintiffs therein the *Kathleen* and her cargo were saved from total loss, for which services the said plaintiffs claim full salvage reward.

4. For the purposes of this answer (but not further or otherwise, the defendants being necessarily ignorant of the actual facts) the defendants herein adopt the allegations in the said petition on behalf of the said English boats contained, and aver that the same are respectively true.

The answer concluded by praying the judge "to determine whether either and which of the conflicting allegations and claims made on behalf of the plaintiffs, and of the owners, masters, and crews of the said English boats and steam tugs, are in whole or in part well founded," and in case he should find any, to be due to the plaintiffs for their alleged services, to pronounce such a moderate sum to be due, &c.

To the answer in the consolidated causes, Nos. 6733 and 6740, no objection was taken by the plaintiffs in that cause, and the plaintiff* filed a conclusion denying the allegations set forth in the answer as being contained in the petition in cause No. 6769, and also the other allegations of the answer.

To the answer in cause No. 6769 the plaintiffs in that cause objected, and gave notice that they should move the judge to reject the 3rd and 4th articles of that answer, upon the grounds that the same were impertinent and embarrassing, and contained matters of hearsay, and referred to pleadings in another cause, and to condemn the defendants in the costs of the motion.

G. Bruce for the owners, master, and crew of the French lugger *St. Claire*, plaintiff in cause No. 6769. —The pleading is bad. It should either definitely allege misconduct or omit it altogether. As the allegation of misconduct stands at present it depends rather upon the question whether the plaintiffs in the other cause pursue their claim than upon the actual fact. The defendants must allege such facts as we can answer. To leave our misconduct dependent upon allegations of a petition filed by rival salvors is embarrassing.

Butt, Q.C. and Aspland, for the defendants (the owners of the *Kathleen*), contra.—The ship having been abandoned, the defendants' only means of knowledge of the facts are the allegations made by the plaintiffs. Those allegations would be a good answer if they alleged the misconduct directly, but as the defendants are unwilling to allege misconduct, except where it has actually taken place, they could only allege what

[ADM.]

THE KATHLEEN.

[ADM.]

they heard from the other plaintiffs, leaving it to the rival salvors to prove or disprove their respective statements. This form of pleading is necessitated by the want of interpleader issues in this court. It is impossible for the defendants to decide whose is the misconduct, and to charge misconduct directly without the means of proving it, is contrary to the practice of this court.

W. G. F. Phillimore for the defendants (the owners of the cargo of the *Kathleen*), against the motion.—The pleading must be read as if for the purposes of this case the defendants adopted the allegations of the other plaintiffs' petition, and alleged them as statements of their own.

Sir R. Phillimore.—I have nothing to do at present with other pleading in other cases; the only question which I have to decide is whether the pleadings in the present case are in proper form or not. Now I am clearly of opinion that they are not in proper form. The defendants must either elect to leave the matter on the statements of the salvors, not denying their statements, but pleading ignorance of the real state of facts, and to let them contest the right to recover, or they must positively and directly raise the question of their misconduct on the pleadings, by alleging that misconduct as a distinctive allegation made by themselves, the defendants. I am of opinion that this is an improper mode of pleading, and that the two articles of the answer must be reformed. Such a mode of pleading is wholly without precedent in this court.

June 19, 20, and 22.—The defendants having amended their answer in cause No. 6769, and alleged the misconduct of the French salvors as a substantive fact, not adopting the statements of the English fishermen, but giving the facts as their own statements, the two causes came on for hearing at the same time; the two sets of salvors were separately represented by counsel, and the owners of the *Kathleen* and the owners of her cargo were also separately represented. Evidence was given by the English salvors in support of their petition, and by the French salvors in support of their petition. Counsel for the defendants wished to cross-examine the plaintiff's witnesses as to the misconduct alleged in the answer, but the court declined to allow such cross-examination, on the ground that the answers filed in the causes practically contradicted one another, and they were thereby precluded from setting up in one case what they repudiated in the other. The effect of the evidence is sufficiently stated in the judgment.

Dry, Q.C. and *Gainsford Bruce* for the French salvors, contended that their clients had rendered meritorious service.

Cohen, Q.C. and *E. C. Clarkson*, for the English salvors.—If a salvor, hoping to salvo property, is utterly incapable of so doing, he cannot recover reward merely because he remains by the ship, no success, no salvage reward. There must be a willingness to assist in the actual service which brings the property into safety. The French crew were not willing to assist in bringing the ship into Dover. They rest their claim solely on being dispossessed by the English crew. There was no violent dispossession, there having been no intention of getting the ship into a place of safety.

Milward, Q.C. and *Aspland* for the owners of the *Kathleen*, contended that the French salvors had rendered no service entitling them to reward.

Butt, Q.C. (*W. G. F. Phillimore* and *Stubbs* with him), contended that even if both sets of salvors were entitled to reward they ought not to have more than if one set only were entitled.

Dry, Q.C. in reply.

Sir R. Phillimore.—In this case two causes of salvage have been instituted, the one by the owners, masters, and crews, of certain English luggers, the other by the owners, master, and crew, of the French lugger *St. Claire*. Before going into the case it is necessary that I should refer to the pleadings, and the effect they have had upon the cross-examination of the plaintiff's witnesses by the defendants, and the ruling of the court thereon. For this purpose I must look at the pleadings, and examine the dates on which they were filed. The petition of the French salvors is dated 2nd March 1874, and that of the English salvors 11th March 1874. The answer, filed on behalf of the barque, and adopted by the owners of her cargo, was not filed until 11th April. Consequently the defendants had both petitions before them when drawing their answers. In the answer to the petition of the English salvors the defendants have adopted the allegations of misconduct made in the petition of the French salvors "for the purposes of their answer and not otherwise." In their answer to the French salvors' petition they have absolutely adopted the allegations of misconduct made against the Frenchmen in the English salvors' petition. In this state of the pleadings—a novelty in this court, as one answer absolutely contradicts the other, although there is practically only one cause, and not two, before the court—the court was of opinion that counsel for the owners of the barque and her cargo were not at liberty to cross-examine the witnesses produced on behalf of the French salvors, because, having adopted their statements for one purpose, they cannot use them to contradict those witnesses for another purpose. To that ruling the court adheres after considerable reflection. Now the vessel and the cargo to which this service was rendered was a derelict, which had come into collision with the ship *Malloredale* on 24th Jan. The *Malloredale* has been pronounced to blame for that collision in a suit in this court brought by the owners of the *Kathleen* and her cargo. I advert to this because the *Malloredale* remained all night with the *Kathleen*, and it was next morning thought impossible to save her; she was, therefore, deliberately abandoned and deserted by her master and crew. It is not, therefore, in the power of the owners of the ship and cargo to complain of hardship in having to pay remuneration for services to which alone they are indebted for whatever remained of their property. The value of the salvaged property, ship and cargo, is 14,000*l*. There is no doubt as to some of the facts here, there is no doubt at all that the French salvors were the first to come up to the *Kathleen*, and they seem to have reached her about 10 a.m. on 25th Jan. It is of importance to ascertain the position of the *Kathleen* then, was she, as the Frenchmen say, eighteen miles from Boulogne, or was she fourteen miles from Hastings, as the Englishmen said? I have carefully gone through the evidence with the Elder Brethren, and guided by them, and looking at the place of collision, I think it right to adopt the opinion of the Elder Brethren, namely, that the ship was in the place where she was put by the English sailors. Per-

[ADM.]

THE KATHLEEN.

[ADM.]

haps neither party is quite right, but the English account is more nearly accurate. The course which the Frenchmen admit they adopted was, that, thinking, not unnaturally, that the *Kathleen* would sink, they proceeded to take on board a number of things which they afterwards took into Boulogne, and for which they received salvage remuneration according to the French Law. It would be very unjust to condemn either of the sets of salvors of any intention of plundering. The truth is, that both parties, thinking that it was very doubtful whether the vessel would not sink, thought it expedient to take as much out of her as they could before they proceeded to see if she could be saved or not. The French sailors, having laden their vessel with a variety of articles, then proceeded to try and tow the *Kathleen*. They got a hawser on board for the purpose, and, according to their own account, had towed her some three leagues or more at the time when the English sailors came up. The Englishmen say that the Frenchmen had never attempted to tow the vessel at all, but were simply engaged in cutting away sails and rigging with the intention of carrying away as much as they could and making off as soon as possible to Boulogne. The difficulty in reconciling the evidence of the two sides is greatly enhanced, because it is clear that neither party understood the language of the other. The Englishmen say that the Frenchmen, some time after leaving, returned and offered to assist in towing; that they threw out a rope, but the Englishmen would have nothing to do with them, because they had declined their assistance in the first instance. The Frenchmen say that they were towing when the Englishmen came up, and that their hawser was cast off by the latter, and that they were willing to assist, but they said nothing about retreating. It appears to the court that the truth lies between the two statements, and that the Frenchmen did intend to take part in the towing, but that they were, rightly or wrongly, intimidated by the acts of the Englishmen, in consequence of the mutual ignorance of each other's languages. I do not mean to say that the Englishmen used any actual violence to dispossess the Frenchmen; if I did come to any such conclusion I should have to pronounce that the Englishmen are not entitled to any salvage reward. I think it desirable that I should state the law upon this point, as such cases may arise again, and it is important that both French and English fishermen should know what the law is. Lord Stowell, in *The Glendevall* (1 Dod. 414, 416):—"Those who have obtained possession of a ship as salvors have a legal interest, which cannot be divested before adjudication takes place in a court possessed of competent authority; and it is not for the king's officers, or any other person on the ground of superior authority, to dispossess them without cause. Cases may certainly exist in which the interference of the king's officers may be not only justifiable, but even laudable; they may find persons in possession who are unfit, from inexperience, to be trusted with valuable property, or who have been guilty of gross misconduct, which may render their removal proper and necessary. But these necessities must be made apparent to the court; and persons taking possession and bringing in a ship under such circumstances must understand it as their duty, in the first place, to justify themselves for the steps they have taken.

... The court is asked to give a larger sum, on account of a greater number of salvors; the owners, therefore, are materially interested in resisting the additional claim which has been set up. The merchants ought not to be charged with a higher rate of salvage on account of the unnecessary interference of the second salvors. The original salvors are likewise interested in this claim, for it must operate as a discouragement to salvors to be liable to be turned adrift and baffled by an opposition of this kind. I have no hesitation, therefore, in confirming the doctrine I have over and over again laid down, that persons dispossessing original salvors without reasonable cause shall receive no benefit from the services they may afterwards perform, but the whole reward shall go to those who have been wrongfully dispossessed. Those who are wrongdoers shall take no advantage from their own wrong. The exertions they may use in bringing the ship shall enure not to their own profit, but to the profit of those who would otherwise have performed the service." That is Lord Stowell's judgment, and I think it is a very clear and perfect exposition of the law. But I am not of opinion that the Englishmen intended forcibly to dispossess the Frenchmen, and to prevent them from taking part in the service. I am clearly of opinion that it was not in the power of the French lugger to render any efficient service by herself; nor indeed could any successful service have been effected without the assistance of steam power; but I do think that the French lugger was intending, at the time when she thought the English sailors would not allow her any longer to perform salvage services, to tow the vessel, and that she was endeavouring so to do, and this endeavour I shall take into consideration in awarding salvage reward. It is difficult to arrive at the truth of these statements, but taking the probabilities and the admitted facts, this seems to be the fairest conclusion at which I can arrive. There can be no doubt that the Englishmen, when they had taken possession of the ship and were engaged in towing her, behaved well, and took the best means in their power to effect their object, and showed that they were not actuated by purely selfish motives in sending for a steam tug. After consultation with the Elder Brethren, I am of opinion that the English salvors incurred no danger in the services they rendered to the *Kathleen*, with this exception, that these who were put on board the barque to make fast the tow rope, and who remained on board whilst she was being towed by the tug, were exposed to considerable danger, and are therefore entitled to a larger proportion of remuneration than the others. The English fishing boats appear to have towed the barque about seventeen miles in seventeen hours, and the court is of opinion that this was a very meritorious service, as it brought the *Kathleen* so much nearer the tug. It has been truly said that, according to the evidence in the case, it was very improbable that the *Kathleen* would have been saved without the interference of steam power; and that it was most probable that she would have gone ashore at Dungeness but for the assistance of the steam tug. But, at the same time, it must be remembered that those who brought the means of saving the ship were the English boatmen, and, though they did not possess steam power themselves, they sent for it, and through their agency the vessel was saved. The

[ADM.]

THE KATHLEEN.

[ADM.]

tug itself also incurred considerable peril whilst she was towing the *Kathleen* in consequence of the disabled condition of that vessel. It only now remains to state the conclusion at which I have arrived as to the amount of salvage that ought to be awarded. The value of the property must be taken at 14,000*l.*, and out of this I award to the *Polmerston* 1500*l.*; to the various luggers, seven in number, 1750*l.*, that is to say, to the *Stormysea*, which came up later, I award 200*l.*, to the *Ocean Ranger* I award 300*l.*, and to the rest of the English luggers 250*l.* each. Then I shall award 100*l.* to the French salvors. I shall only give one set of costs. I am at a loss to understand why the salvors could not have consolidated their suits and have proceeded upon one set of pleadings.

Clarkson.—Then a difficulty will arise as to who is to receive the costs allowed.

Sir R. PHILLIMORE.—I will avoid that difficulty by awarding a sum for costs nomine *expensarum*; to the English salvors 200*l.*, to the French 100*l.*

July 14.—The question of the liability of the owners of cargo to pay freight to the owners of the *Kathleen* now came on for argument. In accordance with the direction of the court a petition had been filed by the shipowners claiming the payment of the freight out of the proceeds of the sale of the cargo. The petition was as follows:—

1. The *Kathleen* was a barque of 462 tons (registered tonnage), or thereabouts, and December 1873, was laden at the Port of Charleston, in the United States of America, with a cargo consisting of 1620 bales of cotton, under several bills of lading, whereby the same was to be delivered at the port of Bremen (the dangers of the sea excepted) unto the order of the several shippers or consigns, or to the order of the said cotton at certain rates per pound of invoice weight (amounting for the whole of the said cotton to the sum of 2051*l.* 16*s.* 10*d.*) and primage and average (amounting to the sum of 104*l.* 1*s.* 10*d.*).

2. The *Kathleen* sailed from Charleston with the said cargo on board, and was proceeding on her voyage to Bremen on the 24th Jan. 1874, when she was run into in the English Channel, off Hastings, by the *Malloisdale*, an iron ship of about 1200 tons (registered tonnage), which struck her on the port bow, cut her down, and otherwise did great damage to her. For this collision the *Malloisdale* was solely to blame.

3. On the morning of the following day (the 25th Jan.) the master and crew of the *Kathleen* were compelled to leave her, as she had become unmanageable, and were taken on board the *Malloisdale* (which had remained by the *Kathleen* during the night) and landed at Deal.

4. After the master and crew of the *Kathleen* had so left her, a French lugger, the *St. Claire*, of Boulogne, came up to the *Kathleen*, and some of the crew of the *St. Claire* went on board of the *Kathleen*, and remained there until after a number of fishing boats from Hastings had come up, and the men from the said Hastings boats had taken charge and possession of the *Kathleen*.

5. Eventually the said Hastings men with the assistance of a lugger from Deal, and of the steam tug *Palmerston* from Dover, succeeded in bringing the *Kathleen* and her cargo to Dover, where she arrived on the 27th Jan.

6. A salvage suit (No. 6725) to which the owners of the *Kathleen* duly appeared, but which has since been abandoned, was instituted on the 27th Jan. on behalf of the owners, master, and crew of the steam tug *Palmerston* against the *Kathleen*, her cargo and the freight due in respect thereof, and on the same day the ship and cargo were arrested in that suit, and on the 30th Jan. a commission of annuity issued in the said suit, under which the said cargo was sold.

7. On the 2nd Feb. the salvage suit No. 6733 was instituted in the sum of 3000*l.*, and on the 5th Feb. the salvage suit No. 6740 was instituted in a like sum against the *Kathleen*, her tackle, apparel, and furniture, and the

cargo then lately laden thereon, and the freight due in respect thereof; and the ship and cargo were arrested in the said suits respectively. The said two last-mentioned suits, which were instituted on behalf of the said English boats heretofore mentioned and of the steam tug *Palmerston*, have since been consolidated. A salvage suit (No. 6739) was also instituted on the 23rd Feb. in the sum of 3000*l.* against the said vessel, her cargo, and the freight due in respect thereof, on behalf of the owners, master, and crew of the said French lugger *St. Claire*; and the *Kathleen* and her cargo have been arrested in that suit also.

8. Appearances were entered in the various suits heretofore mentioned by Messrs. Stokes, Saunders, and Stokes who were duly authorised in that behalf, on behalf of all the owners of the cargo of the *Kathleen*. And appearances were also duly entered by the said William Flux, on behalf of the owners of the *Kathleen*, to the said last-mentioned suits respectively.

9. On the 9th Feb. Messrs. Clarkson, Son, and Greenwell, solicitors for the plaintiffs in the suit No. 6733, at the instigation and request of the several owners of the said cargo, acting by the said Messrs. Stokes, Saunders, and Stokes, but without the consent or knowledge of and without giving any notice to the owners of the *Kathleen*, or any person acting on their behalf, although appearances had then already been entered as aforesaid on their behalf, moved for and obtained an order from this honourable court directing that the said cargo should be sold.

10. The said cargo had been wet, and had suffered considerable damage from sea water, but the same could, at the time when the said order for its sale was obtained, have been re-shipped and carried on to Bremen so as to arrive there, and the same would have arrived there in a merchantable condition as cotton, and the owners of the *Kathleen* could and were always ready and willing and desired and intended to re-ship and carry the same forward, taking due care of it, and using all necessary precautions against its further deterioration, and would have so done, and only delivered it, upon payment of freight according to the aforesaid bills of lading, if they had not been prevented from doing so by the proceedings on the part of the owners of the said cargo herein alleged.

11. The owners of the *Kathleen* had not, nor had the said William Flux, or any other person acting on their behalf, any notice or knowledge of the said order having been applied for or made until the 12th Feb., when the said William Flux accidentally became acquainted with the fact. He thereupon immediately gave notice to the solicitors for the plaintiffs in the said suit No. 6733, and to the solicitors for the owners of the said cargo, that he should move the right honourable the judge to set aside the said order for sale, and to order that the owners of the *Kathleen* should be allowed, on giving bail in the said salvage suits for the said cargo to carry the same on to its destination in order to earn freight, or to order that, if the said order for sale were allowed to stand, the owners of the *Kathleen* should be paid the amount of the said freight out of the proceeds of the said sale.

12. The said motion was heard on the 15th Feb., and was opposed on behalf of the owners of the said cargo, who asked the court and argued that the said cargo should not be allowed to be re-shipped and carried on to Bremen, but should be brought to London and there sold. The owners of the *Kathleen* in court offered to give bail for the cargo as aforesaid, and insisted on their right either to carry on the said cargo so as to earn freight, or to be paid freight if the owners of the said cargo preferred to require delivery and take the same out of their hands at Dover. The right honourable the judge, after hearing counsel on all sides, directed that the sale theretofore decreed of the said cargo of the *Kathleen* should be proceeded with, and that for the purposes of such sale the said cargo should be brought to London, and decreed a commission for the removal thereof accordingly, reserving all questions as to freight.

13. Pursuant to such last-mentioned order, the said cargo was removed to London, and sold by auction on 12th March, and realised 14,932*l.*, and the net proceeds of such sale (amounting to upwards of 13,000*l.*) are now in the registry of the court.

14. In the circumstance above stated, the owners of the *Kathleen* submit that they are entitled to the freight, which they would have earned by carrying the said cargo

ADM.]

THE KATHLEEN.

[ADM.]

on to Bremen, if they had not been prevented from doing so by the intervention of the owners of the said cargo, and their election to take the same out of the shipowners' hands without their consent at an intermediate port, and that they are entitled (subject to the rights of the salvors of the said ship and cargo) to a lien upon the proceeds of the said cargo, now in the registry, in respect of such freight; and if not entitled to the full amount of such freight, that they are entitled to freight *pro rata*, or to a reasonable remuneration for the carriage of the said cargo from Charleston as aforesaid. By the exertions and expenditures of the owners of the *Kathleen*, in carrying the said cargo from Charleston to Dover, the same was greatly increased in value.

15. The owners of the *Kathleen*, upon the arrival at Dover of the said cargo in a wet and damaged condition, and before the said order for the sale thereof was made, incurred various expenses in, about, and with a view to the drying and improvement of the condition of the said cargo, and its preservation from further damage and deterioration from damp, and also in general average expenses. The said expenses were reasonably and properly incurred in the interest of the owners of the said cargo, and the said cargo was greatly benefited thereby. The owners of the *Kathleen* submit that they are entitled (subject as aforesaid to the rights of the said salvors) to a lien upon the proceeds of the said cargo for such expenses so incurred for the preservation thereof.

The petition concluded by praying the right honourable the judge to declare that the owners of the *Kathleen* were entitled (subject to the rights of the salvors of the *Kathleen* and her cargo) to a lien upon the proceeds of the sale of the said cargo for the freight or other remuneration due to the said owners of the *Kathleen* in respect thereof, and for the expenses reasonably and properly incurred by them in preserving the said cargo from deterioration when the same had been brought to Dover, and in general average expenses, to refer it to the registrar and merchants to ascertain the amount thereof, and to direct that (subject to the rights of the said salvors) the said owners of the *Kathleen* should be paid the amount that might be due to them in respect of the premises out of the proceeds of the cargo, and to condemn the owners of the said cargo in the cost of the proceedings, and that otherwise right and justice might be administered in the premises.

The owners of cargo filed the following answer:

1. The allegations contained in Articles 1 to 9 of the petition, both inclusive, are true.

2. The said cargo had been wet, and had suffered considerable damage from sea water. It could not have been re-shipped at Dover. If it could have been re-shipped it would have been only so re-shipped after great delay and with much damage, and it would not have arrived at Bremen in a merchantable condition as cotton. If it had so arrived in a merchantable condition as cotton it would have been as cotton of greatly inferior kind and value. It was proper and necessary, in order to avoid a great depreciation in value, to sell and deliver the said cargo as quickly as possible.

3. Save as hereinbefore appears the several allegations contained in Article 10 of the petition are untrue.

4. As to the notice of motion stated in the 11th article of the petition, and the order of the right honourable the judge stated in the 12th article thereof, they refer to the said notice of motion, and the minute of the said order, but save as aforesaid the allegations contained in Articles 11, 12, and 13 are true.

5. The several allegations contained in Articles 14 and 15 of the petition are untrue.

6. By reason of the premises above stated and admitted, the owners of the *Kathleen* have no claim against the said cargo or the owners thereof for any freight; and if any expenses were incurred by the owners of the *Kathleen*, as pleaded in the 15th article of the petition, the owners of the *Kathleen* have no claim against the said cargo or owners thereof for any such expenses.

7. The owners of the *Kathleen* did not in any case fulfil their contract to carry the said cargo to Bremen,

and are not entitled to any freight, or to any sum in respect of freight, or to any remuneration for carriage of the said cargo.

The owner of the *Kathleen* concluded the pleadings, denying the allegations of the answer, save as appeared by the petition.

At the hearing evidence was given on behalf of the shipowners showing that the cotton might have been carried forward to Bremen, so as to arrive in specie and fit for use as cotton, and that in fact the time occupied in transshipping and forwarding it would not have occasioned any appreciable depreciation in the value of the cotton, but the witnesses admitted that some depreciation would have taken place, and that it was an advantage to have it sold in London. The shipowners were ready to carry on the cotton, and would have done so, but for the order of sale. It could have been carried forward, so as to arrive in Bremen before it was actually sold in London, and the rate for carrying would have been 17s. 6d. per ton.

Milward, Q.C. and *Aspland* for the shipowners.

—So long as the cotton could have been carried forward so as to arrive in specie, and the shipowners were willing to forward it, we are entitled to our freight. It may have been a wise discretion on the part of the owner of the cargo to have it taken out and sold in this country, but that will not justify them in saying that the contract of carriage is at an end. The owner of cargo ought to prove it impossible that any considerable part of the cargo could arrive in specie before they can support their present contention. They repudiate all freight. The strongest position which the owners of cargo can take is that the cotton would have been depreciated by being carried forward. Hence we are entitled to full freight, or at least to *pro rata* freight. In *The Teutonia* (L. Rep. 4 P. C. 71; 26 L. T. Rep. N. S. 48; ante, vol. 1, p. 214) it was held that if the owner of cargo demands his goods short of port of destination he is entitled to full freight. In *The Saldamela* (L. Rep. 1 Adm. & Ecc. 233; 15 L. T. Rep. N. S. 333; 2 Mar. Law Cas. O. S. 433) the ship was not a derelict, but, with that exception, the facts were similar to these, and it was there held that the owners of cargo having submitted, without objection, to a sale of their cargo, they had waived their right to have the cargo carried forward, and had impliedly accepted it short of its destination so as to create an implied contract to pay *pro rata* freight, which seems to have been all that was claimed. In the present case the acts of the owners amounted to a promise to pay at least *pro rata* freight; they actively interfered, and the order for sale was made on the application of the salvors acting at their instigation, and the sale took place after the court had ordered that the sale should be subject to any questions of freight due. No liability attaches to the shipowner for not carrying on in this case. The damage preventing the completion of the contract in the first instance was occasioned by the collision; an excepted peril, being a peril of the seas. After the arrival of the ship at Dover we were willing to carry on the cargo. The fact that cargo is damaged gives no right to the owner to take it out of the hands of the shipowner, except on the payment of freight. *Natura v. Henderson* (ante, vol. 1, p. 278; L. Rep. 7 Q. B. 225; 26 L. T. Rep. N. S. 442) was an action against a shipowner

ADM.]

THE KATHLEEN.

[ADM.]

to recover damage to a cargo of beans by salt water; the ship had been in collision, for which she was not to blame; the collision occurred at an intermediate port; her master refused to deliver them at the intermediate port, except on payment of full freight; the owners of the cargo offered *pro rata* freight, but this was refused; the master carried the goods on to their port of destination without taking any steps to dry them; the action was brought to recover the injury sustained over and above that caused by the wetting from the collision by reason of the beans being left in a wet condition. It was alleged to be the duty of the master to take them out and dry them before carrying them on. Willes, J., in delivering the judgment of the Exchequer Chamber, says, "The law up to a certain point is clear and well settled by authority; the shippers, though on the spot, were not entitled to the possession of the beans for any purpose, without paying the full freight to Glasgow. The freight was not due, but the shipowners were entitled to retain the goods as security for earning it. The offer of *pro rata* freight may have been reasonable, but it was one which the shipowners were not bound to accept; and it must be treated as an attempt to compromise, not affecting the right of the parties, though it may bear upon the reasonableness of the course pursued, assuming such reasonableness to be material in determining the question of neglect. It was argued for the shipowners that the fact of the shippers being upon the spot negatived any implied duty on the part of the master, as agent of necessity, to take care of the goods; but this argument will not bear examination. The shippers were present, but they could not lawfully touch the goods without leave. The shipowners refused to let them do so without payment of a sum not yet earned, and insisted upon retaining the goods, with the rights and consequently the duties of the original bailment, whatever those might be. The shippers thereupon insisted upon the goods being properly taken care of by the shipowners, who retained the control of them as a pledge for their freight." We had a clear right to carry on the cargo, even if we did not take proper measures to dry it; although the owners of cargo might have had an action against us for neglect in this respect. Freight is due upon the arrival of the cargo at its port of destination, whatever its condition: (*Dakin v. Odey*, 15 C.B. N. S., 616). We, however, must be assumed to have been ready to take all proper measures to preserve the cargo, nor would the expense of drying and transhipping, if necessary, for the preservation of the cargo have fallen upon the shipowners, but upon the owners of the cargo—

Blanco v. Fletcher, 14 C.B., N. S., 147;

Norata v. Henderson, special case, par. 14; L. Rep. 3 Q.B. 350;

Cargo ex Arpa, ante, p. 6; 23 L. T. Rep. N. S. 745; *Great Northern Railway Company v. Scafield*, L. Rep. 9 Ex. 132; 30 L. T. Rep. N. S. 562;

Trenson v. Dent, 8 Moore, P.C.C. 429.

Secondly, how far does the fact of the ship having been abandoned and a derelict when found by the salvors affect our right to recover freight? Salvors taking possession of a ship take it only as agents for the owners, and no rights are altered by the service, and the shipowners are entitled to recover possession subject only to the salvor's lien. The abandonment does not take the right

of property out of the true owner, and if he claim its return on being brought into port, the salvors hold possession for him only; he is never adversely dispossessed—

The Aquila, 1 C. Rob. 37;

Thornley v. Nelson, 2 B. & Ald. 513.

In *Briggs v. The Merchants' Assurance Company* (13 Q.B. 167) it appears that the court allowed a shipowner to give bail for both ship and cargo which had been abandoned, and consequently to retain his control over the cargo. The American law is the same as the English. In *Jordan v. The Warren Insurance Company* (1 Story's C.C. 342), Story, J. says, "Now nothing is better founded in the law on this subject than that the shippers are bound to pay the full freight for the voyage if the cargo is carried to the port of destination, and specifically remains, notwithstanding at its arrival it is, by reason of sea damage, utterly ruined and worthless. This doctrine, although formerly a matter of some doubt, is now firmly established, and, indeed, must be manifestly correct upon principle. It is as clear that, after shipment of the cargo on the voyage, the shippers have no right to demand it at an intermediate port, short of the port of destination, without payment of the full freight for the voyage, whether the cargo arrive there in a damaged or in an undamaged state." In *The Propeller Mohawk* (8 Wallace U.S. Sup. Ct. Rep. 155, 161), it is said, "In cases where the disaster happens in consequence of one of the perils within the exception in the bill of lading, or charter-party, the only responsibility of the vessel is to reft and forward the cargo, or the portion saved, or if that is impracticable to forward it on another vessel, and the owner is then entitled to freight. If part of the cargo is so far damaged as to be unfit to be carried on, the master may sell it at the intermediate port, as the agent for the shipper, for whom it may concern, and carry on the remainder. In this class of cases the vessel is only responsible for carrying on the cargo, being exempt from any damage by the exception in the contract of affreightment. And it is perfectly settled, that if the shipper voluntarily accepts the goods at the place of the disaster, or at any intermediate port, such acceptance terminates the voyage and all responsibility of the carrier, and the master is entitled to freight *pro rata itinere*." Our contract never having been put an end to we are entitled to full freight, as we always insisted on carrying on the goods till sold by the court; or, at least, to *pro rata* freight, in consequence of the action of the owners of cargo in having the goods sold here.

Bull, Q.C., and *W. G. F. Phillimore* (*Stubbs* with them), for the owners of cargo.—We submit that no freight is due. A condition precedent to the right to recover full freight is delivery at Bremen, and there has been no such delivery. [*Sir R. Phillimore*.—But if the court has by its action stopped delivery, which would otherwise have taken place, must not the shipowner still retain his rights whatever they may be?] Even on equitable grounds the shipowner is not entitled to full freight, as it would have cost him something to carry the cargo forward, but the real answer to the claim for full freight is, that the contract has never been performed. But can the shipowner claim *pro rata* freight? If entitled a shipowner to recover *pro rata* freight, there must have arisen a

ADM.]

THE KATHLEEN.

[ADM.]

new contract, either express or implied by law from certain facts. Where a hindrance to the completion of the voyage arises at an intermediate port, and the owner of cargo accepts the goods at that port, the law implies a contract on the part of the shipowner to pay freight *pro rata itineris peracti*. The consideration in that case is that the goods are delivered to the owner at an intermediate port, and that the master thereby agrees to surrender the lien to which he is entitled to enable him to earn the full freight. In this case the shipowner had become dispossessed of the goods. He had abandoned them *sine spe recuperandi*. It is immaterial whether the abandonment was right or wrong; the possession was out of the owners of the ship. The possession was in the salvors, and afterwards in the court. The master never became repossessed, and so never had the opportunity of giving up his lien to the owners of cargo, and creating a new contract to pay freight *pro rata*. The possession of the salvor, if for the benefit of any person except themselves, was for the benefit, so far as the cargo was concerned, of the owners of the cargo. The damage to the ship by the collision came within the excepted perils of the bill of lading, and the shipowner is not liable for non-delivery, but the bill of lading goes no farther; it excuses the shipowner, but does not create a new contract. Moreover, *pro rata* freight can only be due when both parties consent to a delivery at the intermediate port. Here neither party would consent to the payment of *pro rata* freight. The shipowners claimed full freight, or the right to carry on. Hence it cannot be said that the shipowners were assenting parties to any contract stipulating for the payment of *pro rata* freight. They cannot now ask the court to set up a contract which they have hitherto refused to adopt. In all the cases cited the shipowner continued in possession of the goods, and in such cases it must be admitted that he may retain the goods and carry them on in the exercise of his right of earning freight. Here, however, there is no possession by the shipowner. Even where goods are sold by a master in the exercise of a wise discretion, before arrival at the port of destination, he is not the agent of the owners of cargo to accept delivery for them, and so create a contract to pay *pro rata* freight: (*Vlierboom v. Chapman*, 13 M. & W. 230). The master is bound, no doubt, to carry goods on if the merchant does not interfere, but not otherwise: (*Trouson v. Dent*, 8 Moore P. C. C. 419) and he can only recover freight in case of such carrying on or such interference. In *Notara v. Henderson* (L. Rep. 5 Q. B. 346; 22 L. T. Rep. N. S. 577; 3 Mar. Law Cas. O.S. 419) it is said: "What then ought the master to have done? If he had been in a foreign port, where the freighter was not and could not have been consulted, it would have been his duty either to provide for sending home the cargo, when sufficiently dry, by another ship, or for selling it on the spot, as might best serve the interest of the freighter. He could not have justified the taking them on in their then condition, if any better course could have been adopted, and if he sold them he would not have been entitled, according to the decision of the Court of Exchequer in the case of *Vlierboom v. Chapman* (*ubi sup.*), even to freight *pro rata*." A new contract is absolutely necessary to found the claim to *pro rata* freight. In the same case in the Exchequer Chamber (L. Rep. 7

Q. B. 234) it is said: "There are unquestionably cases in which the exercise of such a duty would be incumbent upon the master, as representing the owners of the ship, and for their interest. As for instance, in the case of a perishable cargo so damaged by salt water that it could not in its existing state be taken forward in specie to the port of discharge, so as to earn the freight, but which could, at an expense considerably less than the freight, be dried and carried on. In such a case to earn the freight, it might be for the interest of the owner of the ship to save the cargo by drying. To sell it or abandon it would give no right to freight *pro rata* against the owner of cargo, nor any right to recover against the underwriter on freight." If in the opinion of the court the cargo was in such a state that to save further deterioration it was right to sell it in London, then the master, if he had been in possession, ought to have sold it there, and then he could have recovered no freight; he cannot put the case higher than if he sold it himself. The contract of affreightment was at an end by reason of the happening of an excepted peril, and the shipowners set up this peril as an excuse for not performing their contract; how can they now say that the contract is subsisting? If the contract is so at an end the duty of the master, if he had brought the ship into port, would have been to sell the cargo: (*The Gratiotline*, 5 C. Rob. 240). But on the sale there would have been no right to freight.

Milward, Q.C. in reply.

Cur. adv. vult.

July 22. Sir R. PHILLIMORE.—The *Kathleen*, a vessel laden with cotton, coming from Charleston to Bremen, came into collision with a vessel called the *Maloesdale* on the 24th Jan. last. The damage which she received induced the master to abandon her; no bill of lading was issued to him on that account; she was abandoned and became a derelict. She was afterwards saved in her shattered condition by certain salvors, English and French, and brought with her cargo into Dover on the 27th Jan. I awarded 3500*l.* salvage remuneration with certain costs. On the 30th Jan. I made an order for delivery of her cargo. On the 9th Feb., on an affidavit of the owner of the cargo as to the deterioration of the cotton, I ordered a sale to take place. On the 16th Feb. the unloading was completed. On the 18th Feb. the shipowner offered to carry on the cotton to Bremen. I ordered the sale, however, at the request of the owners of the cargo, reserving all questions as to freight. The sale took place on the 12th March. The ship sold for 5500*l.*, and the cargo for 14,000*l.*; the freight claimed is 2500*l.* The money (the produce of the sale of the cargo) has been paid into court, and I am now asked, after payment of the salvage reward, to deduct the freight amounting to the sum mentioned before the residue be paid out to the owner of the cargo.

Whatever right the shipowner had, has been preserved to him, for, as Mr. Justice Story said, in the case of *The Ship Nathaniel Hooper* (3 Sumner's Rep. 553): "The possession of the property by the court through its officers, is a possession protective of the interests of all concerned, and not displacing the rights or lien of any party."

It is urged on behalf of the shipowner—first, that the cotton could have been carried on in another

ADM.]

THE STEAMSHIP PENNSYLVANIA.

[AMERICAN REPS.]

ship, and would have arrived at Bremen, though partially injured, in specie. Secondly, that he was willing and ready to carry it on in another ship; thirdly, that the collision was not in any way imputable to him or the consequence of his fault; fourthly, that the collision was one of the excepted perils in the contract contained in the bill of lading. All these propositions are true.

It was further urged that it must be presumed that he would have taken proper measures for drying the cotton before it was transhipped. The cases of *Notara v. Henderson* (L. Rep. 7 Q. B. 217), and *Blasco v. Fletcher* (14 C. B. N. S. 147), and other cases were relied upon. It was contended, therefore, that the shipowner was entitled to full freight, or at least to *pro rata* freight. The latter question may be conveniently disposed of first.

There is no express contract for a *pro rata* freight. According to the decisions at common law, however, a title to *pro rata* freight may arise out of a new implied contract with the shipowner to which both parties assent. But it was truly observed by Mr. Butt, that in this case neither party consented. The shipowner resisted as much as he could the delivery of the goods, and each party stood upon what he considered to be his rights; the shipowner to carry on the cargo, the cargo owner to receive the goods. Moreover, it has been proved by the evidence that the shipowner demanded full freight. I am of opinion that no *pro rata* freight is due.

The only question, in truth, is whether the shipowner is entitled to the full freight. I have been referred, by the industry of counsel, to a great many cases, and they contain valuable principles of law, but in all of them I think the element of mixed fact and law present in this case is wanting.

In this case the vessel was a derelict; in other words, the owner through his agent, the master, had abandoned all possession of the ship, and at the time of abandonment had certainly lost all right to freight or to carry on the cargo. It has been urged that the salvors have only a lien for their remuneration, and this is true. But it is also true that they are in lawful possession, and cannot be displaced by the owners. When the salvage suit begins the property is placed in the custody of the court, which is bound to do what is best for it. In this case the court ordered the sale of the cargo for the benefit of the parties interested. If no claimant appears the property in the ship would after a certain length of time belong to the Crown. Sir John Nicoll in the case cited by counsel (*The Dantzig Packet*, 3 Hag. 385) draws the distinction between salvage rendered to a ship in distress and a ship abandoned. "It is different," he says, "in the case of a derelict; there the first occupant has a vested interest and an exclusive right of possession, if alone he can save the property; he takes possession, indeed, for the benefit of the Crown, in the first instance, but subject to a liberal remuneration." It is, indeed, true that the original shipowners are allowed a *persona standi* in this court, and receive the remainder of their abandoned property after the legal charges on it have been satisfied; but the same can be predicated of the owners of the cargo, which, if the contract still subsisted between them and the shipowner, would not be the case; for the ship would have a right to represent the cargo as well as the ship. In fact, the possession of the cargo

abandoned by the shipowner vested first in the salvors and afterwards in this court before it could be restored to the owners.

On the whole, I am satisfied that the contingency provided for in the bill of lading as nullifying the contract, namely, "the danger of the seas," has happened, and that the original contract between the owners of the ship and of the cargo is at an end. I shall, therefore, grant no freight in this case.

Solicitors for the English salvors, *Clarke, Son, and Greenwell*.

Solicitors for the French salvors, *Deacon, Son, and Rogers*.

Solicitors for the owners of the *Kathleen, Flus* and *Co.*

Solicitors for the owners of cargo, *Stokes, Saunders, and Stokes*.

AMERICAN REPORTS.

SUPREME COURT OF THE UNITED STATES.

Reported by R. D. BENEDICT, Proctor and Advocate.

THE STEAMSHIP PENNSYLVANIA.

Collision at sea—Steamer and barque—Foghorn and bell—Speed in fog—Contributory negligence—Presumption.

A steamer going at the rate of seven miles an hour in a fog, came into collision with a barque, which was lying to and making a headway of a mile and a half an hour. Those on the barque were ringing a bell, but were not blowing a foghorn. The barque was sighted by the steamer's lookout about three or four hundred feet distant, a little on the steamer's starboard bow. Her helm was first ported, then starboarded, and then ported again, and she struck the barque about amidships, sinking her almost instantly.

Held that the steamer was in fault in going at too great a speed in the fog. That the barque was in fault in not blowing a foghorn instead of ringing a bell. That the presumption was that this fault of the barque contributed to the collision. That if it was impossible to rebut that presumption, and that the damages must be apportioned (differing from the *Prize Council* in the case of *The Pennsylvania* (23 L. T. Rep. N. S. 55).

This was an appeal by the owners of the *Pennsylvania*, from a decree of the Circuit Court of the United States for the Southern District of New York, holding her liable for the loss of the barque *Mary A. Troop*, which was sunk by a collision with the *Pennsylvania* on 15th June 1889. The evidence in the case did not vary materially from the evidence in the suit brought against the *Pennsylvania* by the owners of the cargo on board of the barque, the decision in which is reported in 23 L. T. Rep. N. S. 55, except that it was more complete as indicated in the judgment.

For the barque, *R. D. Benedict*.

For the steamship, *William Allen Butler*.

STROUD, J., delivered the opinion of the Court:—It may be that when the barque was discovered by those on board the steamer it was too late to avoid a collision. The two vessels were then not more than three or four hundred feet apart, and the steamer had the barque almost across her bow. Yet it is possible that if her helm had been put to starboard instead of to port when the lookout an-

[AMERICAN REPS.]

THE STEAMSHIP PENNSYLVANIA.

[AMERICAN REPS.]

nonced "bell on the starboard bow," and had been kept ported, the collision might either have been avoided or have been much less disastrous. By porting her helm she was turned toward the point where the bell indicated the barque was, and this apparently increased the danger of a collision. But if this is not to be attributed to her as a fault, there is no excuse to be found in the evidence for the high rate of speed at which she was sailing during so dense a fog as prevailed when the vessels came together. The concurrent testimony of witnesses is that objects could not be seen at any considerable distance, probably not farther than the length of the steamer, and yet she was sailing at the rate of at least seven knots an hour, thus precipitating herself into a position where avoidance of a collision with the barque was difficult, if not impossible, and would have been, even if the barque had been stationary. And she ought to have apprehended danger of meeting or overtaking vessels in her path. She was only two hundred miles from Sandy Hook, in the track of outward and inward bound vessels, and where their presence might reasonably have been expected. It was, therefore, her duty to exercise the utmost caution.

Our rules of navigation, as well as the British rules, require every steamship, when in a fog, "to go at a moderate speed." What is such speed may not be precisely definable. It must depend upon the circumstances of each case. That may be moderate and reasonable in some circumstances which would be quite immoderate in others. But the purpose of the requirement being to guard against danger of collisions, very plainly the speed should be reduced, as the risk of meeting vessels is increased. In the case of *The Europa* (Jenkins' Rule of the Road at Sea, p. 62), it was said by the Privy Council: "This may be safely laid down as a rule on all occasions, fog or clear, light or dark, that no steamer has a right to navigate at such a rate that it is impossible for her to prevent damage, taking all precaution at the moment she sees danger to be possible, and if she cannot do that without going less than five knots an hour, then she is bound to go at less than five knots an hour." And we do not think the evidence shows any necessity for such a rate of speed as the steamer maintained. It is true her master, while admitting she was going seven knots, states that he don't consider she could have been steered going slower—could not have been steered straight. And two other witnesses testify that, in their opinion, she could not have been navigated with safety and kept under command at a less rate of speed than seven miles an hour. These, however, are but expressions of opinions based upon no facts. They are of little worth. And even if it were true that such a rate was necessary for safe steering, it would not justify driving the steamer through so dense a fog along a route so much frequented, and when the probability of encountering other vessels was so great. It would rather have been her duty to lay to. But there is the evidence of one who had been a ship-master, and who once crossed the Atlantic as a passenger in this steamer. He states that on the passage she did not, to the best of his knowledge, average over four knots during twenty-four hours, and that he noticed no difficulty in her steering at that low rate of speed. As he was in the habit of going to sea he would probably have noticed difficulty if there had been any. This is a fact of more weight than any

mere opinions unsupported by observation or trial. We think, therefore, it must be concluded that the steamer was going at an undue rate of speed, and that it was her fault that she came into a position from which she could not, or certainly did not, escape without colliding with the barque.

It is next to be considered whether any fault of the barque contributed to the collision. That she was in fault is beyond controversy. She was in plain violation of the rules of navigation, which required her to blow a foghorn. Both our own and the British shipping Acts enact that sailing ships when under way shall use a foghorn, and when not under way shall use a bell. The British Merchant Shipping Acts expressly declare that owners and masters of ships shall use no other fog signals than such as are required by the regulations, and that if in any case of collision it appears to the court before which the case is tried that such collision was occasioned by the non-observance of any regulation made by the Act, or in pursuance thereof, the ship by which the regulation has been infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the court that the circumstances of the case made a departure from the regulation necessary. Our own statute does not contain this provision expressed, but its meaning is the same. The barque in this case was a British ship, as was the steamer. She was under way, moving slowly, indeed little, if any, more than a mile an hour, with her helm lashed three-quarters to port, but on her starboard tack, carrying two close-reefed topmasts, foresail, fore topmast and mizzen staysails, and with no sails aback, so far as it appears. She was constantly changing her position. It was her duty, therefore, to blow a foghorn, and not to ring a bell. By ringing a bell, as she did, she gave a false signal, and, so far as she could, assured all approaching vessels that she was not under way. There is some evidence that a bell can be heard as far as can a foghorn, and some that it can be heard farther. On the other hand there is evidence that a foghorn can be heard farthest. However this may be the barque had no right to substitute any equivalent for the signal required by the navigation rules. In the case of *The Emperor* (Holt's Rule of the Road, 38), it was said "it is not advisable to allow these important regulations to be satisfied by equivalents, or by anything less than a close and literal adherence to what they prescribe." In addition to this it may be remarked that a bell can never be an equivalent for a foghorn. It gives different information. Both may notify an approaching vessel that the signalling ship is in the neighbourhood, but the one gives notice that the ship is moving, and the other that the ship is stationary.

Concluding then, as we must, that the barque was in fault, it still remains to inquire whether the fault contributed to the collision—whether in any degree it was the cause of the vessels coming into a dangerous position. It must be conceded that if it clearly appears the fault could have had nothing to do with the disaster, it may be dismissed from consideration. The liability for damages is upon the ship or ships whose fault caused the injury. But when, as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the

[AMERICAN REFS.]

THE HERRING.

[AMERICAN REFS.]

disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been. Such a rule is necessary to enforce obedience to the mandate of the statute. In the case of *The Fenham* (23 L. T. Rep. N. S. 329), the Lords of the Privy Council said "it is of the greatest possible importance, having regard to the Admiralty regulations, and to the necessity of enforcing them, to lay down this rule: that if it is proved that any vessel has not shown lights, the burden lies on her to show that her non-compliance with the regulations was not the cause of the collision." In some cases it is possible to show this with entire certainty. In others it cannot be. The evidence in the present case leaves it uncertain whether if a foghorn had been blown on the barque, it would not have been heard sooner than the bell was heard, and thus earlier warning have been given to the steamer—reasonable warning to have enabled her to keep out of the way. It was not without reason that the statute required a foghorn for ships under way, and a bell for those not under way. The Legislature must have known it was important ships should have the earliest possible notice of the proximity of other moving vessels. They might be approaching each other. If so, they would come together sooner than they could if one of them was not under way. It may be assumed therefore, that the Legislature acted under the conviction that a foghorn could be heard at a greater distance than a bell, and required the use of one rather than that of the other for that reason. To go into the inquiry whether the Legislature was not in error—whether in fact a bell did not give notice to the steamer that the barque was where she was as soon as a foghorn would have done—is out of place. It would be substituting our judgment for the judgment of the law-making power. It would be admitting the validity of an equivalent for that which the statute has made a positive requirement.

Then how can it be shown on the part of the barque that the failure to use a foghorn certainly contributed in no degree to the collision? How can it be proved that if a foghorn had been blown those on board the steamer would not have heard it in season to have enabled them to check their speed or change their course, and thus avoid any collision? Though there were two look-outs on the steamer, each in his proper place, the barque's bell was not heard until the vessels were close upon each other. Who can say the proximity of the vessels would not have been discovered sooner if the barque had obeyed the navy regulations? If it be said this is speculation, it may be admitted, but it is speculation rendered necessary by a certain fault of the barque. It is equally speculative to conclude that the collision would have taken place if a foghorn had been used instead of a bell, and infer therefrom that the fault of the barque had no relation to the disaster. The truth is the case is one in which, while the presumption is that the failure to blow a foghorn was a contributory cause of the collision, and while the burden of showing that it was in no degree occasioned by that failure rests upon the barque, it is impossible to rebut the presumption. It is a well known fact that in some states of the atmosphere a foghorn can be heard at much greater distances than in others. How far it could

have been heard when this collision occurred can never be known. Nor can it be known what precautions the steamer would have adopted if the true and proper signal had been given her. Hence, it appears to us the barque has not proved that her failure to obey the shipping regulations was not a concurrent cause of the injury she received, and, consequently, as both vessels were in fault, the damages, according to the Admiralty rule, should be divided.

We have not overlooked the fact that in a libel by the owners of the cargo of the barque against the steamer for damages resulting from the same collision, it was held by the Judicial Committee of the Privy Council in England, that the disaster was chargeable to the steamer alone: (*The Pennsylvania*, 23 L. T. Rep. N. S. 55.) But with great respect for the tribunal that thus decided, we do not feel at liberty to surrender our judgment, especially in view of the fact that the case is now more fully presented and the evidence is more complete than it was in the British Court.

The degree of the Circuit Court is reversed, and the cause is remanded with instructions to enter a decree in accordance with this opinion.

U. S. DISTRICT COURT—DISTRICT OF OREGON.

Collated by J. P. ASHFALL, Esq., Barrister-at-Law.

IN ADMIRALTY.

Tuesday, Aug. 18, 1874.

THE HERRING. (a)

Seamen's wages—Shipping articles—Duration of voyage—Merchant Shipping Act 1873—Wrongful discharge—Foreign ships—Jurisdiction—Leaving ship without permission of master—Desertion—Setting aside inequitable contracts. Under the Merchant Shipping Act of England of 1873, the shipping articles need only specify the maximum duration of the engagement of a seaman, and the places or parts of the world to which it does not extend:

Held, that a specification of the places to which the voyage or engagement might extend, was an implied agreement that it was not to extend to any other, and, therefore, a sufficient compliance with the Act.

A Court of Admiralty will not decline jurisdiction of a suit by foreign seamen against a foreign vessel to recover wages, when it appears that the voyage has been completed or broken up, or the seamen have been discharged by the wrongful act of the master.

Seemable, that the court will not decline jurisdiction when it appears the seamen have been discharged with their own consent before the expiration of the voyage, without the payment of wages already earned, or any agreement or understanding concerning them.

A seaman is bound to stay by the vessel according to his agreement, whether the master takes any means to compel him to do so or not, and, therefore, where seamen leave a vessel before the completion of the voyage, although with the knowledge of the master, and upon his promise that they should not be arrested therefor, but without his consent, they are guilty of desertion.

(a) From the written judgment of the learned judge as given in the *Chicago Legal News*.

[AMERICAN REPS.]

THE HERMINE.

[AMERICAN REPS.]

Contracts with seamen upon a discharge before completion of voyage concerning wages already earned, will be set aside or disregarded by Court of Admiralty if inequitable.

Quantum meruit, what seamen entitled to on.

This was a cause of wages instituted by certain British seamen against the British barque *Hermine*.

The facts sufficiently appear from the judgment.

A. C. Gibbs and Hughes, for the libellants.

W. H. Effinger, for the claimants.

DEADY, J.—Peter Whelan and five others bring this suit against the British barque *Hermine*, to recover the sum of 489.98 dollars, alleged to be due them as wages for service as seamen on said barque, on a voyage from Liverpool to this port.

The libellants shipped on the *Hermine* at Liverpool on the 21st Jan. 1874, as ordinary seamen, on a voyage from Liverpool to Portland (Oregon), and any ports and places in the Pacific, Indian, and Atlantic Oceans, China and Eastern seas; thence to a port for orders and the continent of Europe (if required), and back to a final port of discharge in the United Kingdom; term not to exceed three years; "at the monthly wages of 3l. 5s."

It is alleged in the libel that the libellants, during the voyage, were "fed upon very poor food, of such poor quality as to endanger their health and render them liable to scurvy and other sickness," and that therefore they asked for their discharge at this port, "unless they could be better treated and fed," and that thereupon the master discharged them, but refused to pay them their wages.

The answer of the claimants, G. H. Fletcher and Co., of Liverpool, denies that the libellants were poorly fed or otherwise improperly treated on the voyage, or that they left the vessel on that account, or that the master discharged them, and avers that the libellants deserted the vessel, and thereby forfeited their wages.

The *Hermine* arrived at this port on the 5th Aug., and a few days afterwards the libellants asked the master, Alfred H. Hiscock, for their discharge. He replied, that he was willing to discharge them if they would forfeit the wages earned, as he would have to pay double or more wages for seamen in this port to take their place. Roberts wanted 15 dollars, but finally agreed to take 5 dollars. Rogers agreed to the same terms; and the others said they would forfeit their wages if the master would give them a legal discharge.

On the following day, Monday, Aug. 10, the libellants, by the direction of the master, met him at the British consul's office. The matter was then stated to the consul, who declined to discharge the men unless they were paid in full. This the master declined to do, and the consul directed the men to return on board. Some conversation then ensued between the master and the men, the latter being still anxious to leave the vessel, the result of which was, that the former promised if the libellants left he would not arrest them. Thereupon the libellants returned to the vessel, and after some hours the master followed. The result was that the master paid the men from 3 dollars to 4 dollars apiece, except Roberts, to whom he paid 8 dollars, when they took their effects and quietly went ashore on the same day. In addition to these

sums, they had each received a month's wages in advance, and 6 dollars from the ship chest on the voyage.

The master did not expressly assent to the libellants quitting the ship, but he had good reason to believe they would do so, and took no means to prevent it. In fact, the money paid libellants was given to and received by them with the tacit understanding that if they were allowed to clear out without being troubled or arrested, they would make no further claim against the vessel.

The libellants had no cause to complain of their treatment on the voyage. On the trial they testified that the beef and bread were bad, but the weight of evidence is, that both were as good as is usually furnished at the port of Liverpool. They were otherwise very well supplied and cared for, and were in good health during the whole of the long voyage. Neither did they complain of bad food or ill-treatment of any kind to the British consul, although they had ample opportunity to do so, if they desired; nor did they leave the vessel on that account, but, so far as appears, for the purpose of bettering their condition in a pecuniary point of view. The wages out of this port average 40 dollars per month—more than twice the rate at which they were engaged to serve on board the *Hermine* for the next two and a half years.

It is admitted that the answer correctly describes the voyage set out in the shipping articles, but the libellants maintain that the description of the voyage beyond this port is so vague and uncertain as to render the contract so far void, and therefore the libellants are entitled to their discharge and wages here, as being the legal end of the voyage.

The contract having been made in a British port for service on a British vessel, its validity must depend upon the law of that country. This is the general rule of law, and it is particularly applicable to cases like this in the Admiralty Courts, which "are in some sense international courts charged with the duty of declaring the law applicable to ships;" (*The Acis*, 2 Bonedict, 386; *The Jerusalem*, 2 Gal. 191; *The Infanta*, 1 Abb. Ad. R. 263.)

Sect. 149 of the English Merchant Shipping Act 1854 provides that the shipping articles shall, among other things, contain the following: "The nature, and as far as practicable, the duration of the intended voyage or engagement." The Merchant Shipping Act 1873, amends this section, so that the agreement, "instead of stating the nature and duration of the intended voyage or engagement," may "state the maximum period of the voyage or engagement, and the places or parts of the world (if any) to which the voyage or engagement is not to extend."

No English authorities have been cited upon the construction of this provision, but I think that under the Act of 1873, if not the one of 1854, the description of the voyage is sufficient. The maximum duration of the engagement is fixed at three years, and although the articles do not expressly "state the places or parts of the world" to which it is not to extend, I think they do so sufficiently when they mention "the places, &c." to which it may extend. By a necessary implication, all other "places or parts of the world" than those mentioned are excluded from the engagement—it does not extend to them.

Upon this point counsel for libellants cited *Shore v. Wope* (2 Curtis, 301), in which the agreement was

held void, because the articles only described the voyage as being "from the port of Boston to Valparaiso, and other ports in the Pacific Ocean, and from thence home direct, or *via* ports in the East Indies or Europe," without any limitation upon the time to be occupied in making such voyage. The court held that the agreement was void because it did not comply with the Act, which required that the agreement should declare "the voyage or voyages, term or terms of time," for which the seamen may have shipped. But in the case at bar, the duration of the engagement is limited, and it is to be inferred, from the opinion of the court in *Snare v. Wope* that, if there had been a like limitation in that case, the court would have held the agreement valid, notwithstanding no definite or specific voyage was described in it.

On the part of the claimant it is objected that, this being a suit for wages earned by foreign seamen on board a foreign vessel, the court ought to decline the jurisdiction, and remit the libellants to the tribunals of their own country.

Upon this point counsel cites *The Napoleon* (Olcott, 208); *Graham v. Hoskins* (id. 224); *Dorris v. Leslie* (1 Abb. 123); *The Infanta* (id. 263); *Buckett v. Klorkeyer* (id. 462). The rule established by these cases is to the effect that the court will not take jurisdiction in such cases, unless it is necessary to prevent a failure of justice, as where the voyage has been completed or abandoned, or the seamen discharged, or the contract otherwise dissolved by the wrongful act of the owner or master. These cases were all decided in the same court, and they carry the rule against the jurisdiction to the extreme. In considering this question in Benedict's Admiralty Practice, § 282, it is said that "nothing within the territory of a nation is without the jurisdiction. . . . In the present state of international intercourse and commerce, all persons in time of peace have the right to resort to the tribunals of the nation where they may happen to be, for the protection of their rights. The jurisdiction of the courts over them is complete, except when it is excluded by treaty." In *The Jerusalem* (2 Gal. 188), Mr. Justice Story states the rule as follows: "Where the voyage has not terminated, or the seamen have bound themselves to abide by the decisions of the tribunals of their own country, foreign courts have declined any interference, and remitted the parties to their own tribunals for redress. But where the contract has been dissolved by the regular termination of the voyage, or by the wrongful act of the other party, the cases are not infrequent in which foreign courts have sustained the claim for mariners' wages."

In any view of the matter, this appears to be a proper case for exercising the jurisdiction. The libellants allege that they were discharged by the master in this port without the payment of wages. If the libel be true, the voyage is terminated as to them by the wrongful act of the master. Under such circumstances, it would be mere mockery, and a denial of justice, to remit the libellants to the forums of Great Britain, for, being discharged in this port, they are practically denied the means of access to such forums. Indeed, I think the court ought not to decline the jurisdiction, even if it appeared that the libellants were discharged with their own consent, without the payment of wages, or any agreement or understanding upon the subject, or upon terms that are

manifestly inequitable and unjust. In such cases they ought to recover, as upon a *quantum meruit*. Being separated from the vessel with the consent of the master, if they are not allowed to enforce any claim which they may have against her in this court, it is a practical denial of justice.

Upon the facts of the case, the libellants appear to have been guilty of desertion. They cannot complain that the master was aware of their intention to quit the ship, and took no means to prevent it, or to compel their return after they had left. That is a matter between him and his owners. He may have had good reason to believe, as he stated in his testimony, that they would leave the ship in spite of him, and that it was no use to try to prevent it; that they shipped with the intention of making their way to this coast, and then deserting the vessel.

However this may be, the libellants were bound by their contract with the owners to stay by the ship until the completion of the voyage, unless they were actually discharged by the master, or so maltreated as to justify their leaving without his consent. They had no right to leave the ship simply because they could do so, or because the master assured them that he would not trouble them for it if they did. Even if it could be said that the master connived at their quitting the ship, their act was none the less desertion. In so doing they wilfully violated their contract with the owners, and they cannot now evade responsibility therefor, by showing that the master was aware of their intention, and took no means to prevent it.

Of course the master is the agent of the owners, and if it appeared that by any artifice or representation he had induced the libellants to quit the vessel under an impression that they had a right to do so, the case would be altered.

But I do not think there is any ground for supposing that the master desired to get rid of these men without paying them their wages. No motive is shown for any such conduct, and, so far as appears, the vessel can gain nothing by their leaving, even without their pay. But with the libellants the case is otherwise. They evidently acted upon the fact that they could command more than double the wages, in or out of this port, they were receiving on the *Hermine*. The pretence that the food was substantially bad, or that they were otherwise ill-treated, is evidently an afterthought. If the food was bad, they could and should have complained to their consul, especially when they were before him on this very subject of being discharged.

But supposing it to be true that the libellants not only left the vessel with the knowledge of the master, but also with his consent, still I do not think they are entitled to recover.

In the first place, upon this theory of the case, all the circumstances attending the payments made them before leaving go to prove that such payments were made and received in satisfaction of any claim the libellants might have against the ship for their services. It was competent for them to agree with the master to quit the vessel, and receive so much for their services. True, a court of admiralty, in the interests of the seamen, will look into such contracts and dealings, and if any substantial advantage has been taken of them, so far disregard them and do justice in the premises.

AMERICAN REPS.]

THE MERRIMAC.

[AMERICAN REPS.]

In the second place, if the libellants were discharged without any understanding or agreement as to the payment of wages, then they ought to recover such sum, if any, as under all the circumstances they are equitably entitled to—as upon a *quantum meruit*. Under the circumstances what are their services worth to the vessel? Allowing the monthly rate of wages mentioned in the articles, according to the libel there is due to the libellants about \$1 dollars apiece at this port. To supply their places from here to Liverpool, allowing four months for the voyage, at 40 dollars per month, will cost 160 dollars per man. The difference between that and the price the libellants agreed to perform the same services for is 90 dollars per man—more than the sum claimed by the libellants. It follows that the libellants, having failed to perform their contract, are not equitably entitled to anything, because, all the circumstances considered, their services are not worth so much to the vessel as they have received for them.

And this is so upon the imposition most favorable to the libellants—that the *Hermine* will return to Liverpool direct; for by the terms of their contract they might be required to serve two and one half years before being discharged, and to supply their places during all this time, at the enhanced wages of this port, or the other seas mentioned in the articles, would add very much to the loss sustained by the vessel.

Let the libel be dismissed, and a decree entered for the claimants for costs.

Thursday, March 31, 1874.

THE MERRIMAC. (a)

Damage—Towage—Negligence of tug—Duty to furnish towing rope—Control—Collision—Responsibility.

H. agreed with W. to tow his scow from Astoria to Cape Disappointment for 20 dollars, without mentioning which should furnish the tow line:

Held, that in the absence of any usage or understanding to the contrary, the tug was bound to furnish the tow line as a part of the necessary means to perform the towage, as undertaken.

Where evidence was offered by H. to prove a custom to the effect that the tow was bound to furnish the tow line in such cases:

Held, that it was not sufficient and that the master of the tow could not be affected by it if established, unless knowledge of it was brought home to him.

Where a man on the tow furnished a line to the tug at the request of the master of the latter, but stated at the time that he did not think it sufficient to tow with:

Quere, should the line be considered as furnished by the tow and at her risk, or otherwise?

The contract to tow the scow and her cargo from Astoria to the Cape, was a contract for the hire of the tug for the carriage or transportation of the same for a compensation, and was therefore a bailment of the kind denominated Locatio operis mercium vehendarum, in which the master of the tug was the bailee, and responsible for ordinary skill and diligence.

The tug M. left Astoria with the scow J. F. in tow, 200 feet astern, on the last of the ebb tide,

for Cape Disappointment, and met the flood tide and S. W. wind abreast of Seal Island, so might have been reasonably expected, where such tide and wind always make a rough sea, and in attempting to tow said scow against the same, the tow line of the tow and also of the tug parted, and the scow went on Chiuook Spit and was lost:

Held that the tug did not exercise ordinary skill and diligence in undertaking the voyage on the last of the ebb tide, or in attempting to tow the scow against the flood tide and wind; and therefore is responsible for the consequent loss of the same.

Under the circumstances of the employment, with the exception of steering the tow, working her pump, and handling her end of the tow line, the tug is responsible for the navigation of both vessels; and her duties were those of a private carrier for hire, just as much as if she had had her own deck instead of astern, at the end of a tow line.

Where a tug negligently places a tow in a peril from which she is lost, it is no excuse that the tow might have been saved, but for a mistake of or want of skill in the crew of the latter, in bending a tow line in a dangerous and sudden emergency, or the want of extraordinary ground tackle.

Where a tow has parted from the tug and gone adrift, and is in great peril, and the latter, at the request of the crew of the former, attempts to take them off, and in so doing collides with the tow and sinks her, the tug is not responsible for the consequences of such collision, unless it was intentional or the result of gross negligence.

This was a suit instituted to recover damages for the loss of the John Francis and her cargo. The defendant's vessel was engaged in towing the John Francis. The facts are fully set out in the judgment.

John A. Woodward and H. H. Northup for libellant.

W. Strong and Joseph N. Dolph for respondent.

DEADY, J.—This suit is brought to recover 2500 dollars damages sustained by the libellant in the loss of the *John Francis*, and her cargo of eighty cords of ash wood, through the negligence of the tug *Merrimac* while engaged in towing said *John Francis* from Astoria to Cape Disappointment, on 9th Sept. 1873.

The vessel lost was a "schooner scow," of 95½ tons burden, 120 feet in length, 21 feet in breadth, and 4½ feet in depth, with two masts and a rudder and steering gear; she was decked over, fore and aft, carried an anchor weighing 240 pounds, with 30 to 40 fathoms of chain; she was built in 1866 for the wood and hay trade on the Columbia river, at a cost of 4500 dollars. Some time in 1872, libellant bought her for 1100 dollars, and afterwards put 800 dollars worth of repairs, rigging and sails upon her. The *Merrimac* is a single engine propeller, of 50 or 60 horse power, and 45 tons burden, and has been engaged for some years in towing on the Columbia river, and over the Bar to and from the sea. About 1st Sept. 1873, the libellant met the master of the *Merrimac*, Richard Hobson, at Portland, where conversation was had between them to the effect that the former expected to be at Astoria in a few days with his scow, bound for Cape Disappointment, when he would want a tug, and that the latter would be ready to tow him over. Early in the morning of the 9th, the *John Francis* arrived at Astoria from the mouth of the Sandy in tow of the libellant's little steamer—the *Wasp*.

(a) This report is taken from a report of the case in the *Pacific Law Reporter*, supplied by the learned Judge deciding the case.

[AMERICAN REPS.]

THE MERRIMAC.

[AMERICAN REPS.]

The *Merrimac* having heard the previous evening that the scow was on the way, came over to Astoria from Conventville in the night to meet her. Here the libellant and the master of the tug met and made a contract whereby the latter agreed to tow the scow over to the Cape for 20 dollars, nothing being said as to who was to furnish the tow line. This was about 8 o'clock and near the last of the ebb tide. The master of the tug directed the libellant to have the anchor of the scow lifted, and let her drift out from the wharf and he would come around with the tug and take her in tow, and in the meantime the libellant was to take the *Wasp* in near shore and secure her, and come off to the scow in his skiff. The tug came alongside of the scow, and asked libellant's brother, who was the only person on board, to give him the line that was lying on the forward part of the scow, which he did. The tug then steamed along slowly, with the scow astern, for nearly a mile, when the libellant and another brother came on board the tow, and the tug steamed away at the rate of four or five knots an hour. The distance from Astoria to the Cape is about fifteen miles. Abreast of Sand Island and about four miles from the Cape, they met the flood tide and wind from the south-west. At this point the sea is always rough during the flood tide. The wind and tide being on the tow's quarters, she began drifting to leeward, when the tug turned up to the tide and the strain or surge parted the line some feet outside of the scow. The tug then backed up and gave the tow her line, which very soon parted short off some 15 or 20 feet from the scow. Thereupon the tug gave the tow the long end of her line and directed it to be bent on to the long end of the tow's line, which was done; but the knot slipped while being drawn through the water and the line parted before it was drawn taut. By this time the scow had drifted within 100 feet of Chinook Spit, and the master of the tug directed the tow to drop her anchor, which was done in about three fathoms of water, with twenty-five fathoms of chain. This was near the first black buoy. The scow, under the force of the wind and tide, dragged her anchor slowly in the direction of the spit, and the men on her called to the tow to come and take them off. The tug backed up to windward and alongside the scow, but as she reversed her engine to go ahead it caught on the centre for a moment, and she drifted closer to the tow. As she passed the bow of the scow a swell caught her and carried her across it, where her propeller got foul in the anchor chain, until it was paid out further, when she got away. During this time the guard of the tug struck the bow of the scow at one corner, and broke it down, so that the sea poured in and filled her in a few moments, whereupon the crew of the tow ran aft, jumped into their skiff and got on board the tug, which was distant some 200 yards waiting for them. The tug proceeded to the Cape and returned at ebb tide, but the scow had drifted so far into the breakers, that it was not considered safe to go to her with the tug. By the next morning at 10 o'clock, her bow was pulled out of her with the fastening of the anchor chain, and she went on to the spit and was lost. The cargo of wood floated out as soon as she filled and was lost.

The line taken from the tow was a 4½ inch

line, about 40 fathoms in length, and apparently in good condition. Henry Wilson, who gave it to the tug, testifies that the *Merrimac* came alongside, and Hobson asked him if the line lying forward on the tow "was strong enough for a tow line." He answered, "I do not know; I do not believe she is;" when Hobson sang out, "Heave that line, and do not stand there to look at it." Hobson testifies—I asked Wilson, "If that was the line he was going to tow with?" What he said in reply I do not recollect." I then ordered him "to give us the line quick before we drifted away." Ingalls, who took the line from the tow, testifies: "We went alongside and asked if they had a line, and they began to hunt one up. They said they had one, and I took the line myself and made it fast to the hits." J. W. Bloomfield, a passenger on the tug, and the person to whom the wood was sold to arrive at the Cape, testified that "Hobson asked one of the men on the scow whether he had a good line. The man said he did not know whether the line was good or not. I think the man was Wilson's brother. Hobson said, 'Hurry and give us the line anyway.'" Upon this testimony I conclude that the transaction of taking the line from the tow took place substantially as stated by Henry Wilson. The line of the *Merrimac* was a 4½ inch Manila rope of about 40 fathoms in length. It had been spliced and subjected to severe strain in towing rafts of saw logs. Either of them were probably sufficient to tow the scow in smooth water, or with the tide, but not against the flood-tide between Sand Island and Chinook Spit, as the fact of their parting as they did abundantly proves.

In this case the result is a safe criterion by which to judge of the sufficiency of the lines: *The steamer Webb* (14 Wal. U. S. Sup. Ct. Rep. 406, 414).

The contract being silent as to who should furnish the tow line, the respondent alleged and gave evidence tending to prove that there was a custom at the mouth of the Columbia river that in such cases the tow should furnish the line. The evidence in support of the usage is weak—comes mainly from witnesses who are interested in tugs—and in my judgment falls far short of establishing any such custom. The most that can be claimed for it, is that it establishes a usage in the case of sea-going vessels, particularly when being towed astern, that the tow shall furnish the line or pay the tug extra for furnishing it, but in the case of scows and the like, that the tow shall furnish the line if she has one, but if not, the tug shall furnish it without extra charge. Besides, it is clear, that no usage upon the subject was known to the libellant, and before he can be affected by a custom so recent and local as this is claimed to be, knowledge of it must be brought home to him: (2 Parsons on Contr. 37.) My impression is that the undertaking to tow the scow from Astoria to the Cape, bound the respondent to furnish the necessary means to do the service with, and, in the absence of any custom or understanding to the contrary, to furnish a sufficient tow line, as a part of such means. But the tow did furnish the line, and I think the tug ought not to be held responsible for its sufficiency, unless it appears there was some understanding that it was to be used at the risk of the latter. If the master of the tug called for the tow's line, and it was given and used without anything further being said or done by either party, the reasonable infer-

ence would be that the parties understood the contract as requiring the tow to furnish the line, or that they thereby modified or supplemented it to that effect. But in this case, the man on the tow, in giving the line, also said he did not think it was sufficient, and there is reason for holding that if the master of the tug took the line, notwithstanding this opinion, he took it upon his own judgment and risk. He testifies that he thought the line was sufficient. Still, when the master of the tow came on board, he made no objection to the use of the line, and manifestly did not think it inefficient. Upon the whole, it is not clear to my mind whether the circumstances under which the line was given and taken from the tow constitute an implied agreement that it was to be used as the line of the tow and at her risk, or otherwise. As the case may be satisfactorily disposed of upon another ground, it is not necessary to definitely decide this question.

The contract to tow the scow and her cargo from Astoria to the Cape was one of the hire of the carriage or transportation of the same for a compensation, and was therefore a bailment of the kind denominated, *Locatio operis mercedem vehendarum*. The services of the tug and her master and crew were hired by the libellant for that purpose. This constituted the libellant the bailor and the respondent the bailee of the scow and her cargo: (Story on Bailments, Section 370; Edwards on Bailments, 338.)

This is a bailment which is beneficial to both parties and the bailee is responsible for ordinary skill and diligence: (Ed. on Bail. 371; Story on Bail. 457.) But he is not a common carrier, and may contract for a more restricted liability than the law imposes upon him: (*Alexander v. Greene*, 3 Hill, 12; *The steamer Webb*, 14 Wal. 414.) Counsel for respondent insists that this hiring did not amount to a bailment of any kind, and in support of this proposition, cites a dictum of Bronson, J., in *Wells v. The S. N. Co.* (2 Comst. 208), to that effect. It was decided in that case that the proprietor of a tow boat was not a common carrier, as to the boat towed, but the dictum that such proprietor was not a bailee, and that the transaction was not a bailment, is in direct opposition to the language of all the authorities, as well as that of the learned judges elsewhere in the same opinion, and in *Alexander v. Greene* (sup.).

The master of the tug being a bailee for hire, and, as such, responsible for ordinary skill and diligence in the performance of his contract, what was his duty in the premises? Impliedly he undertook to furnish a tug, properly equipped and of sufficient capacity and power to take the scow to the Cape, and for the exercise of ordinary skill and prudence in selecting the proper time to make the voyage, with reference to the craft to be towed, and the wind and tide or other ordinary peculiarities of the navigation, and in the conduct of the enterprise in the case of any unlooked for or extraordinary emergency.

Of course the relations between the tug and the tow may be modified by express agreement or the reasonable implication arising from the circumstances and nature of the employment in a particular case, so as to make the tug the mere servant of the tow, and under its direction. In such a case the liability of the tug may be limited to the mere point of furnishing a sufficient motive power for

the tow, while the whole responsibility as to the time and manner of making the voyage or transportation would rest with the tow: (*Sturgis v. Boyer*, 24 How. U. S. Sup. Ct. Rep. 121.)

In this case the scow being towed astern, a distance of some 200 feet with her own master and crew aboard, the tug is not responsible for the manner in which she was steered. It is evident from the circumstances that the tow relied upon her own steering gear and crew to keep her in the proper place in the channel, so far as the course of the tug would permit: (*Sprout v. Hemmingway* 14 Pick. Mass. 7.) Neither is the tug responsible for any injury which may have happened to the tow by reason of any defect or deficiency in her condition, construction or appointments, considered as a scow. It was implied in the contract to tow her, that the *Johanna Francis* was as seaworthy as vessels of her class and construction ordinarily are.

But as to all the other matters involved or to be performed in the undertaking, I think the tug is responsible for any lack of ordinary care or diligence on the part of the respondent.

The water to be crossed was not an ordinary one. The peculiar difficulties and dangers of the voyage were well known to the respondent, and almost unknown to the libellant. The vessel to be towed was a flat-bottomed one, with a square head and stern, well loaded down with wood. She could be towed to the Cape on the ebb tide with comparative safety, while it is almost certain that she could not be towed against a flood tide between Sand Island and Chinook Spit.

Under the circumstances there was a want of ordinary skill and diligence on the part of the respondent in leaving Astoria with this scow in tow for the Cape on the last of the ebb tide. He could not expect to carry it with him, and must have known that he would meet the flood tide and wind at Sand Island, where it always makes a rough sea, against which it would be dangerous to tow the scow: (*The Brooklyn*, 2 Benedict, 352; *The Caleb*, 4 Ben. 15; *The Olive Baker*, 1b, 174; *The Blanche Page*, 1b, 186; *The M. A. Lennox*, 1b, 190; *The Deer*, 1b, 335.) To obviate the force of these facts counsel for respondent claims that the voyage was delayed half an hour waiting for the libellant to join the scow, after the tug had hitched on to her, and that this was the cause of being caught in the flood tide.

Taking all the circumstances into consideration, I do not think this proposition is supported by the evidence, and if it was, it does not justify the respondent in putting the scow into the peril from the effects of which she was lost.

The testimony as to the time which elapsed between the hitching on to the scow and the libellant's joining the latter, varies from fifteen to thirty minutes, and as to the distance made in the meantime, from a quarter of a mile to a mile.

The weight of the evidence is that the time was not to exceed twenty minutes and the distance not more than three quarters of a mile. The tug was making four to five knots an hour until she met the flood tide, and had the ebb served, she would have made the Cape in something more than three hours. The evidence is not clear and direct to the fact, but the reasonable inference from all the circumstances is that the tug did not make more than two and a half knots an hour against the flood tide. The witnesses all agree that the

[AMERICAN REFS.]

THE MERRIMAC.

[AMERICAN REFS.]

vessels met the flood tide abreast of Sand Island, and this is very probable when it is remembered that they left Astoria on the last of the ebb tide—near low water. As indicated by the chart, this is about four miles from the Cape. If then there had been no delay in starting, the tug would have met the flood tide in apparently the roughest place in the channel—about two miles from the Cape—and encountered substantially all the perils she did, with, in all probability, the same results.

But, for the sake of the argument, admit that the loss occurred on account of the delay. That does not excuse the respondent. The delay occurred while the respondent was in command and the scow was under his direction; and it does not appear that the libellant occupied any more time in making the *Wasp* fast and getting back on the scow than was necessary and anticipated, and allowed for when the contract was made. By his undertaking he was bound to know whether it was prudent to start when he did or proceed on the voyage after the libellant came on board. The libellant gave no direction in the premises from the time the contract was made until he called to the tug to take them off the scow and assumed no risks save those which the law had necessarily cast upon him.

But suppose that the respondent had good reason to believe, when he started, that he could make the Cape without encountering the flood tide, still when the fact proved otherwise, I think it was his duty, as a prudent man, to return to a place of safety and await the high tide and smooth water; particularly when it is considered that the only tow lines on board were insufficient to draw the scow through that sea, even if she could ride it.

With the exception of steering the tow, working her pump and handling her end of the tow line, the tug is responsible for the navigation of both vessels. Her duties were those of a private carrier of the tow for hire, just as much as if she had had her own deck instead of astern at the end of a tow line. In *Sturges v. Boyer et al* (24 How. 122), it was held that "whenever the tug, under the charge of her own master and crew, and in the usual and ordinary course of such an employment, undertakes to transport another vessel, which, for the time being, has neither her master nor crew on board, from one point to another, over waters where such accessory motive power is necessarily or usually employed, she must be held responsible for the proper navigation of both vessels." While in this case the tow had her master and crew on board, yet they had nothing to do with the navigation of either vessel, except to steer the tow in the wake of the tug, to work her pump and handle her end of the tow line. In other respects the navigation of the tow was as much under the control of the tug as if there had been no one on board of her. The master of the tug selected his own time for starting, as he said that the scow could not be towed over the route except in time of smooth water. While they were under weigh no communication passed between them, except when the tug backed down to give the tow her line.

Respondent also insists that if the two pieces of lines had been properly bent together, the knot would not have slipped and the scow might have been saved. Each of these lines had just snapped like a mere thread, and there is nothing in the evidence or circumstances which makes it even

probable that the increase in length, caused by fastening them together, would have made them sufficient to tow the scow against that tide and wind if the knot had held.

The fault alleged is, that the libellant did not seize the knot. But certainly it could not have been expected that when the scow was about going into the breakers the libellant would take time to go aft and get some small cord and deliberately seize this knot. Nothing of the kind was directed or suggested by the respondent when he gave the order to bend the lines together. Apparently the knot was well made, but while being drawn through and against the water it loosened, and, as the line became taut, slipped. But even a mistake in this matter by the libellant would not excuse the tug, which had already negligently brought the scow into this peril: (*The Webb*, 14 Wal. 417.)

As to what followed after the scow cast anchor, I do not think it material. It is possible that the scow might have ridden safely at the place she was left by the tug, until the turning of the tide, if her anchor had been larger and the chain longer. But the peril which resulted in her loss, had already been incurred by the negligence of the respondent: (*The steamer Webb*, 14 Wal. 417; *The Merrimac*, 1b. 203; *U. S. Co. v. N. V. and F. A. S. Co.*, 24 How. 313.) The libellant was not bound to have provided his scow with ground tackle sufficient to hold her in such an extraordinary position as that. In my judgment, her ground tackle was sufficient for all ordinary emergencies.

So, with the collision that occurred in attempting to take the libellant and his brothers from the tow, after the anchor was dropped. The responsibility of the tug under the contract to tow the scow, was at an end. For the time being, the undertaking had been abandoned by the tug. In going to the scow, at the request of the libellant, the tug was employed more as a salvor than otherwise, and is not responsible for an injury to the scow caused by a collision under such circumstances. There is no doubt but that the collision occurred, and that the scow was sunk and the wood washed away as the immediate consequence of it. But I do not think the tug was handled so unskillfully or carelessly as to make her liable for the consequences.

In the bill of particulars the scow is charged at 1800 dollars, the wood 400 dollars, and the furniture, stores, clothes, &c., at 301 dollars. I find their value as follows: Scow, 1200 dollars; wood, 280 dollars; other articles, 150 dollars; making in all 1630 dollars. The wood cost libellant 2½ dollars a cord, on the bank, at Sandy, and he had sold it, to arrive, at the Cape for 4½ dollars. I have allowed 3½ dollars per cord for it at Astoria. These are coin valuations, to which I add 10 per centum for the difference between coin and currency, which makes 1793 dollars. The libellant within a day or two of the disaster went out to the wreck and recovered the anchor and chain from the sand and some blocks, ropes and rigging from the hull of the scow. Of these he has sold all but the rigging for 73 dollars, which he values at 40 dollars. Allowing him ½ of this amount for saving these things, the remainder 75.33½ dollars must be deducted from the above, which leaves the sum from which the libellant is entitled to a decree 1717.66½ dollars and the cost of suit.

ADM.]

THE ROEBUCK.

[ADM.]

COURT OF ADMIRALTY.

Reported by J. P. ARTHUR, Esq., Barrister-at-Law.

May 22 and June 2 and 3, 1874.

THE ROEBUCK.

*Master's wages—Forfeiture—Drunkenness—Disobedience to owner's orders—Desertion.**Occasional drunkenness in port on the part of the master of a vessel will not, if unaccompanied with neglect of duty, work a forfeiture of wages.**Semble, that constant drunkenness on the part of a master, whether there be proof of neglect of duty or not, will work a forfeiture of either the whole or part of his wages, according to circumstances.**Where a master receives express orders from his owners as to the voyages which he is to make and the ports to which he is to take the ship, and those orders are given under and with a view to a state of circumstances (political) out of which danger might arise to the ship, and which are known to and discussed by the master and owner at the time when they are given, the master is not justified, out of an alleged apprehension of that danger, in taking the ship on other voyages and to other ports; and if he does so take the ship, he will not be entitled to recover his wages for the time during which she is engaged against the owners' orders, even if the voyages are for the owners' benefit.**A master's wages may be forfeited by desertion, but there can be no absolute desertion of his ship working a forfeiture of the whole of his wages if there be an animus revertendi upon the part of the master.**Where a master quits his ship and remains away for such a time and under such circumstances as lead his owner reasonably to suppose that he has no intention of returning, the owners will be justified in removing the vessel from the place where it is left, and appointing another master; and the original master will not be entitled to recover his wages for any period after the time when he so quitted the ship.*

THIS was a cause of wages instituted on behalf of James Gordon, master mariner, against the barque *Roebuck*, and her owner intervening. The facts are stated in the pleadings and the judgment of the court. The petition filed on behalf of the master was as follows:

1. On the 17th July 1871, the plaintiff entered into an agreement with one Duncan Macdonald, of Glasgow, in the county of Lanark, then and until the 26th Aug. 1873, the owner of the above-named British barque or vessel *Roebuck*, by which the said Duncan Macdonald hired the plaintiff to act as master of the said barque or vessel for the space of two years, at wages after the rate of 12l. per month, and it was also agreed by and between the said parties that one half of each such monthly sum should, during the continuance of the aforesaid term of hiring, be regularly paid by the said Duncan Macdonald, as owner of the said barque or vessel, as aforesaid, to the wife of the plaintiff, then residing at Glasgow aforesaid.

2. On the 27th Aug. 1873, one Kenneth Macdonald, of Dundee (hereinafter called the defendant), became the registered owner of the said barque or vessel.

3. On the 25th July 1871 the said barque or vessel was lying at the port of Liverpool, and the plaintiff, on or about the last-mentioned day, joined her there as master of her, in pursuance of the above-mentioned agreement.

4. The plaintiff continued to act as master of the said barque or vessel, in pursuance of the above-mentioned agreement, from the day in the last preceding article mentioned up to and until the end of April or the beginning of May 1872, at which date the plaintiff was, by the said Duncan Macdonald, wrongfully and unlawfully deprived of his command as master of the said barque or

vessel, and of the benefit of the above-mentioned agreement, and was then wilfully abandoned and deserted in the manner in this petition hereinafter described.

5. On or about the 31st July 1871, up to which time the said barque or vessel had been lying since the before-mentioned 25th day of the same month in the port of Liverpool, the plaintiff sailed as master of the said barque or vessel on the following voyage; that is to say, having loaded a cargo of coals at Liverpool, he sailed from Liverpool for Monte Video, where he arrived on or about the 30th Sept. in the same year; sailed thence on or about the 30th Nov. following for Buenos Ayres, and arrived there on or about the 1st Dec. 1871; sailed thence for Port Santa Cruz on or about the 23rd Jan. 1872, and arrived there on or about the 15th Feb. 1872; sailed thence on or about the 22nd March 1872, for Sandy Point, in the Straits of Magellan, and arrived there at the latter end of March 1872. The then owner, Duncan Macdonald, was at Sandy Point, and came and thenceforward remained on board the said barque or vessel; sailed thence on or about the 15th April 1872, for the Santa Cruz River, and arrived there on or about the 25th day of the same month, and the said barque or vessel was there anchored in a safe place not far from the mouth of the said river.

6. Whilst the said barque or vessel was lying at anchor in the Santa Cruz River, as in the last preceding article mentioned, the plaintiff was ordered by the said Duncan Macdonald, who was then on board of the said barque or vessel as aforesaid, to go ashore on the coast of Patagonia, and on behalf of the said Duncan Macdonald to proceed to a certain island known as Mount Lion Island or the Rookery, and lying close to the mainland of Patagonia, about twenty or twenty-five miles to the southward of Mount Entrance, in order to see on behalf of the said Duncan Macdonald what guano, if any, was on the said island, and to choose a good and safe place for anchorage in the vicinity of the said island.

7. In obedience to the said order of the said Duncan Macdonald, and at his request as aforesaid, and for no other reason whatsoever, the plaintiff, on or about the 29th April 1872, did go ashore and did then proceed to the said island for the purposes in the preceding article mentioned, and whilst engaged in the performance of the same, at or near the said island, was there wilfully abandoned and deserted by and by the order of the said Duncan Macdonald, as in the next following article described.

8. The plaintiff was always ready and willing, and it was always his intention, after the performance by him on behalf of the said Duncan Macdonald as aforesaid, of the purposes for which he had proceeded to the said island, by the order and at the request of the said Duncan Macdonald as aforesaid, forthwith to return to and rejoin the said barque or vessel, but before he could do so, and whilst he was engaged at or near the said island on behalf of the said Duncan Macdonald as aforesaid, as the said Duncan Macdonald well knew, the said barque or vessel, having the said Duncan Macdonald on board as aforesaid, and under his direction sailed away, and the plaintiff was thereby left deserted and abandoned at or near the said island.

9. The plaintiff continued, after being deserted and abandoned as hereinbefore described, to make every effort to rejoin the said barque or vessel, and in so doing suffered many grievous privations and hardships; but since the said desertion and abandonment he never saw her again until he reached Buenos Ayres, on or about the 8th July 1872, when the said Duncan Macdonald, unlawfully and contrary to the tenor of the before-mentioned agreement, refused to allow the plaintiff to rejoin the said barque or vessel, or to act as master of the same.

10. Up to the 31st Nov. 1872, or thereabouts, the plaintiff was unable to obtain employment in any homeward-bound vessel, but upon or about that day the plaintiff shipped on board the steamship *Caroline*, bound for Antwerp as acting second officer, and he arrived on board the said steamship at Antwerp on or about the 2nd March 1873. The plaintiff thence forthwith proceeded to Liverpool, and there reported himself to the Superintendent of the Mercantile Marine Board on or about the 8th of the same month.

11. There were on board the said barque or vessel at the time when the plaintiff left her, as in the seventh article hereinbefore mentioned, numerous chattels, clothes, instruments, certificates, papers, and other effects, the private property of the plaintiff, which the plaintiff was then obliged to leave behind him in the said barque or

[ADM.]

THE ROEBUCK.

[ADM.]

vessel, and none of which the plaintiff has since been able to recover.

12. Seven monthly sums of 6*l.* each were paid by the said Duncan Macdonald to the plaintiff's wife in part performance of the agreement in the first article above-mentioned, and the last of such payments was made to her on or about the 27th Feb. 1872, and the plaintiff himself received from the said Duncan Macdonald sums of money amounting to 41*l.* 16*s.*, which are credited to the defendant in the schedule annexed to this petition, but save as herein stated the plaintiff has not, nor has his said wife received any payment or payments from or on account of the said Duncan Macdonald, or otherwise on account of the owners of the said barque or vessel in respect of wages, or in respect of any other matter in reference to which he now claims.

13. The plaintiff, during the whole of the aforesaid voyage of the said barque or vessel, well and truly performed his duty as master of the same up to the time when the said Duncan Macdonald caused him to be abandoned and deserted as aforesaid, and unlawfully and without any just cause or excuse deprived him of the command of the said barque or vessel as aforesaid, and of the benefit of the agreement hereinbefore mentioned. Yet the said Duncan Macdonald caused the plaintiff to be abandoned and deserted as aforesaid, and prevented him from further performing the said agreement, as the plaintiff was at all times ready and willing to do, and save as aforesaid, the said Duncan Macdonald did not pay, nor has the defendant, although requested so to do as and being the owner of the said barque or vessel, paid to the plaintiff the sum due to him under the terms of the said agreement, or otherwise in respect of the premises, and the same still remains owing and unpaid to the plaintiff.

14. The plaintiff claims as due to him the amount set forth in the schedule annexed to this petition.

The Schedule referred to in the above petition.

The account of the plaintiff, James Gordon.

	£	s.	d.
Wages as master for two years, at 12 <i>l.</i> per month, from July 25, 1871, to July 25, 1872,	288	0	0
Deduct payments to wife,	41	16	0
Advances			83 16 0
			304 4 0
Add ten days' double pay	8	0	0
			2212 4 0

The answer filed on behalf of the defendant was as follows:

1. The defendant admits the statements contained in the second article of the petition of the plaintiff to be respectively true.

2. The statements contained in the first article of the said petition are respectively untrue, in so far as they represent the engagement of the plaintiff by the said Mr. Duncan Macdonald, the former owner of the *Roebuck*, to have been for a period of two years. The said engagement was for a voyage from Liverpool to Monte Video and Port Gallagos, in Patagonia, and back to the United Kingdom.

3. The terms of the agreement between the plaintiff and the said Mr. Duncan Macdonald were not reduced to writing, but the said Mr. Duncan Macdonald expressly told the plaintiff at the time of engaging him that any disobedience on his part to the orders given to him by the said Mr. Duncan Macdonald for the conduct of the said voyage and adventure would subject the plaintiff to dismissal and forfeiture of wages.

4. The outward cargo of the *Roebuck* for the said voyage and adventure consisted of 651 tons of coal, shipped by the said Mr. Duncan Macdonald to Monte Video, for sale there on his account, and a large amount of stores and merchandise, in value upwards of 600*l.*, shipped for Port Gallagos, to be there delivered to one Don Louis Piedra Buena in exchange for guano, which the said Don Louis Piedra Buena had contracted to supply to the said Mr. Duncan Macdonald in return for the said stores and merchandise. The homeward cargo of the said voyage was to consist of the said guano.

5. The said Mr. Duncan Macdonald expected himself to meet the *Roebuck* at Monte Video, and to direct the re-

mainder of the said adventure in person. In case, however, he might not be able to effect this, the said Mr. Duncan Macdonald, shortly before the *Roebuck* set sail, gave the plaintiff explicit written instructions for the conduct of the said voyage and adventure.

6. According to the said written instructions, the plaintiff was, after discharging the said coals at Monte Video, to proceed straight to Port Gallagos, and there obtain guano from the said Don Louis Piedra Buena in exchange for the said stores and merchandise. The said instructions contained also directions to the plaintiff on no account to part with the said stores and merchandise without first getting possession of guano in exchange, and not to give more than a certain price, therein named, for the said guano.

7. The *Roebuck* sailed from Liverpool on the 31st July, and reached Monte Video on the 13th Sept. 1871. About a month after her arrival there the said Mr. Duncan Macdonald arrived thither, pursuant to his intention as aforesaid, and after seeing the said coals nearly all discharged, the said Mr. Duncan Macdonald, early in November, determined to precede his said ship to Port Gallagos. The said Mr. Duncan Macdonald accordingly ordered the plaintiff immediately the few remaining coals had been discharged to follow him with the *Roebuck* to Port Gallagos. The said Mr. Duncan Macdonald then went to Port Gallagos.

8. After the departure of the said Mr. Duncan Macdonald from Monte Video as aforesaid, the plaintiff, in violation of the said orders given to him at Monte Video by the said Mr. Duncan Macdonald personally, as well as of the written instructions aforesaid, instead of proceeding with the *Roebuck* to Port Gallagos, proceeded with the said barque upon the voyage enumerated in the fifth article of the said petition. This the plaintiff did in collusion with the said Don Louis Piedra Buena, and in the manner hereinbefore mentioned.

9. The said Don Louis Piedra Buena having come to Monte Video soon after the departure of the said Mr. Duncan Macdonald, the plaintiff unlawfully entered into an agreement with the said Don Louis Piedra Buena, by which both parties agreed not to recognise the said Mr. Duncan Macdonald in their dealings in respect to the said Port Gallagos portion of the cargo of the said barque, and the purchase and shipment of guano in exchange for the same. The plaintiff at the same time unlawfully entered into an agreement with the said Don Louis Piedra Buena for the purchase and shipment of the said guano on terms and conditions altogether contrary to the said written instructions given to the plaintiff by the said Mr. Duncan Macdonald.

10. After remaining three weeks at Monte Video, the plaintiff, acting in collusion with the said Don Louis Piedra Buena, sailed with the said barque in ballast to Buenos Ayres, reaching that place about the 1st Dec. 1872, and at Buenos Ayres the plaintiff chartered the said barque to a firm of Roques and Co., for a voyage to Santa Cruz with stores and building materials.

11. The plaintiff remained with the *Roebuck* for seven weeks at Buenos Ayres, and towards the end of Jan. 1873 the plaintiff, taking on board the said Don Louis Piedra Buena, sailed in the said barque for Santa Cruz, besides the said cargo shipped pursuant to the said charter-party, the plaintiff took a large number of passengers to Santa Cruz.

12. On the arrival of the *Roebuck* at Santa Cruz on the 15th Feb. 1873, the plaintiff landed the said cargo and passengers, and, also contrary to the written instructions of the said Mr. Duncan Macdonald, the plaintiff there delivered to the said Don Louis Piedra Buena the Port Gallagos portion of the original cargo of the said barque, with receiving any equivalent for the same.

13. The plaintiff remained with the *Roebuck* at Santa Cruz, till the latter end of March 1873, when he sailed with the said barque for Sandy Point, which is in the Straits of Magellan, a long way past Port Gallagos aforesaid, passing Port Gallagos without calling there; the plaintiff brought the said Don Louis Piedra Buena and some associates of the said Piedra Buena on board the said barque to Sandy Point, where the said Piedra Buena had a residence.

14. The plaintiff brought the *Roebuck* to Sandy Point about the beginning of April 1873, and was there met by the said Mr. Duncan Macdonald, who had for the last five months been endeavouring to obtain tidings of his missing ship.

ADM.]

THE ROEBUCK.

[ADM.]

15. The said Mr. Duncan Macdonald then charged the plaintiff with having run away with the said barque, and threatened the plaintiff with legal proceedings on their return to England, and the said Mr. Duncan Macdonald thereupon remained on board his ship to look after his interests.

16. The Port Gallagos portion of the cargo of the said barque having been delivered by the plaintiff in violation of his orders, and without any equivalent, to the said Don Louis Piedra Buena, at Santa Cruz, the said Mr. Duncan Macdonald, in order to procure an equivalent for the same from the said Don Louis Piedra Buena, entered while at Sandy Point into an agreement repudiating that made by the plaintiff as aforesaid with the said Don Louis Piedra Buena, to supply the said barque with a cargo of guano, at Mount Lion Island, the place mentioned in the sixth article of the petition of the plaintiff.

17. On the arrival of the *Roebuck* at the said Mount Lion Island, the said Don Louis Piedra Buena went ashore, promising to return to superintend the shipment of the said guano.

18. Subsequently, in consequence of a message from the said Don Louis Piedra Buena, the plaintiff, contrary to the wishes of the said Mr. Duncan Macdonald, went ashore for the ostensible purpose of selecting, with the assistance of the said Don Louis Piedra Buena, an anchorage at which the said barque might safely take on board her said cargo of guano.

19. When the plaintiff so quitted the said barque, the plaintiff promised to return to her on the next or the second day after his departure, but nothing was seen of the plaintiff till the fourth day after his said departure, when he was seen on horseback on shore, in the company of Don Louis Piedra Buena, by a boat's crew of the *Roebuck*. The plaintiff did not offer to return to the said barque with the said boat's crew, but rode off with the said Don Louis Piedra Buena in an opposite direction. On the day following, nothing could be seen of the plaintiff by those on board the *Roebuck*.

20. The said Mount Lion Island is within easy distance of Santa Cruz, where there are two settlements, and the said Don Louis Piedra Buena also had a residence in the vicinity of the said island.

21. On the next day, the sixth after the plaintiff's said departure from the *Roebuck*, the wind setting in strong on shore, it became impossible for the said barque to continue any longer off the said Mount Lion Island with safety, and the said Mr. Duncan Macdonald, acting on the advice of the mate of the said barque, gave orders for the said barque to put to sea.

22. The statements contained in the seventh and eighth articles of the said petition, with reference to the alleged abandonment of the plaintiff by the said Mr. Duncan Macdonald, at Mount Lion Island aforesaid, are respectively untrue. On the contrary, the plaintiff there deserted from and abandoned the said barque without intent to return, or, if otherwise, the plaintiff's recent conduct and the plaintiff's connection with the said Don Louis Piedra Buena gave the said Mr. Duncan Macdonald reasonable and probable cause for supposing that the plaintiff had so deserted from and abandoned the said barque without intent to return as aforesaid, and the plaintiff was left behind as aforesaid by reason of his own negligence, and justifiably, in order to preserve the said barque from being wrecked on the said island.

23. Subsequently, in July 1872, when the *Roebuck* was at Buenos Ayres, the plaintiff presented himself, and thereupon the said Mr. Duncan Macdonald, as he lawfully might, refused to reinstate the plaintiff in the command of the said barque, and appointed another master at the request of her Majesty's consul at Buenos Ayres.

24. During the said voyage and the stay of the *Roebuck* at the said several ports, the plaintiff was constantly intoxicated, and incapable, through his drunkenness, of discharging the ordinary duties of a master of a vessel.

25. During the said period of five months the plaintiff had ample means of communication with the said Mr. Duncan Macdonald, but never attempted to avail himself of the same.

26. The plaintiff has never accounted to the said Mr. Duncan Macdonald for a large portion of the proceeds of the said coals shipped to Monte Video, which the plaintiff there received, and for the freight under the said charterparty from Buenos Ayres to Santa Cruz, nor for the passage money of the said passengers conveyed by the

plaintiff as aforesaid from Buenos Ayres to Santa Cruz, nor for the value of the goods delivered by the plaintiff to the said Don Louis Piedra Buena at Santa Cruz, nor for divers moneys of the said Mr. Duncan Macdonald by the plaintiff wrongfully expended in disbursements in respect of the said voyages, and wrongfully appropriated by the plaintiff to his own use during the continuance of the same.

27. The statements contained in the eleventh article of the said petition are respectively irrelevant and repugnant, and save as herein appearing the statements contained in the several articles of the said petition are respectively untrue.

28. The misconduct of the plaintiff as above-mentioned has been such as to ensure to a total forfeiture by the plaintiff of all wages in respect of the said hiring of the plaintiff by the said Mr. Duncan Macdonald, or, if otherwise, the sum paid to the plaintiff by the said Mr. Duncan Macdonald or his agents in advance on account of wages, and in allotment money to the wife of the plaintiff, exceeds the sum mentioned in the said petition and the schedule thereto annexed, and the sums due and owing by the plaintiff to the said Mr. Duncan Macdonald in respect of the matters in the twenty-third article of this answer mentioned, form a set-off and counter-claim to the claim of the plaintiff within the true intent and meaning of the 101st section of the Merchant Shipping Act 1854, which said set-off and counter-claim is for a sum grossly exceeding any balance of wages due to the plaintiff in respect of his said hiring by the said Mr. Duncan Macdonald.

To this answer the plaintiff replied as follows :

1. Save as appears by the petition, filed in this cause, and by the articles herewith following, the plaintiff denies the truth of the several allegations contained in the said answer of the defendant.

2. With regard to so much of the eighth article of the defendant's said answer, as alleges that the plaintiff proceeded upon the voyage enumerated in the fifth article of the plaintiff's said petition, contrary to all order or instruction alleged in the sixth, seventh, and eighth articles of the defendant's said answer, to have been given by the said Duncan Macdonald to the plaintiff, that the plaintiff should proceed straight from Monte Video to Port Gallagos for a cargo of guano, to be there supplied by the Don Louis Piedra Buena, in the defendant's said answer mentioned, the plaintiff while otherwise wholly denying the truth of the several statements contained in the said sixth, seventh, and eighth articles, as of those contained in the other several articles of the defendant's said answer respectively, admits that he was ordered or instructed by the said Duncan Macdonald to proceed straight from Monte Video to Port Gallagos for the said guano; but says that he was justified in not so proceeding (either for the reasons set forth in the next article hereinafter following).

3. Shortly after the said Duncan Macdonald left Monte Video, as in the seventh article of the defendant's said answer mentioned, and before the plaintiff could proceed from thence with the said barque, the plaintiff learnt from trustworthy sources of information at Monte Video, that the said Port Gallagos was not a port to which such a vessel as the said barque was could safely get, and further that ships proceeding to Port Gallagos or to the ports adjacent thereto for guano would be seized, and that in fact ships so proceeding were being seized, owing to certain disputes which had then arisen between the Argentine and Chilean Governments as to their territorial rights in that district, and by reason of the premises the plaintiff justly believed it to be his duty as master of the said barque, and acting for the best interests of the said Duncan Macdonald, not then to proceed to Port Gallagos, but as he did not know and had no means of knowing where the said Duncan Macdonald then was, and save as herein aforesaid, had no instructions how he should act to arrange, as in fact the plaintiff did, upon the best terms he could get for the shipment of the said guano upon the said barque, by the said Don Louis Piedra Buena, at some other most safe and convenient place. It was for the lawful reason and purpose, and for no other, that the plaintiff, with the privacy and approval of the agents for the said barque at Monte Video, and with all possible diligence proceeded as he properly might upon the several voyages enumerated as aforesaid in the said fifth article of the plaintiff's said petition.

[ADM.]

THE ROEBUCK.

[ADM.]

4. The statements made in the twenty-sixth article of the defendant's said answer, respecting an alleged wrongful expenditure and wrongful appropriation by the plaintiff of moneys of the said Duncan Macdonald, are respectively untrue. There is nothing due or owing from the plaintiff to the said Duncan Macdonald, and if the allegation contained in the aforesaid article, that the plaintiff never accounted to the said Duncan Macdonald in any respect, is in any respect true, the plaintiff says that he has always been ready and anxious to account to the said Duncan Macdonald; and the said non-accounting, if any, is wholly due to the wrongful act of the said Duncan Macdonald in causing the plaintiff to be deprived of the possession of his papers, as in the eleventh article of the plaintiff's said petition mentioned, and to the wrongful refusal and neglect of the said Duncan Macdonald to restore to him any of the said papers, or to allow him to have access to the same, or to the necessary materials for making up the accounts or otherwise, in any way to come to account with the plaintiff, although often requested by the plaintiff so to do.

The defendants rejoined, and concluded as follows:

1. With the exception of the statement that the plaintiff violated the orders of the said Mr. Duncan Macdonald in proceeding upon the voyages enumerated in the petition of the plaintiff, all the statements contained in the said reply of the plaintiff are respectively untrue.

2. The orders so admitted by the plaintiff to have been violated by him as aforesaid, were given to the plaintiff with express reference to the said alleged territorial disputes, the existence of which the plaintiff falsely asserts that he learned after the departure of the said Mr. Duncan Macdonald, and the said disputes were discussed by the said Mr. Duncan Macdonald and the plaintiff both on previous occasions, and particularly on the occasion of the said Mr. Duncan Macdonald giving the plaintiff the orders so admitted by the plaintiff to have been violated by him as aforesaid.

3. The said disputes, if such existed, did not concern the barque *Roebuck*.

4. The said port of Port Gallagos was a good and safe port for such a vessel as the said barque.

5. The said written instructions given by the said Mr. Duncan Macdonald to the plaintiff contained precise instructions as to the mode of selecting a perfectly safe anchorage for the said barque in the said port of Port Gallagos.

May 22, and June 2 and 3.—*Kennedy*, for the plaintiff.—Three charges are made against the plaintiff: first, drunkenness; secondly, desertion; thirdly, wilful disobedience to orders. First, as to drunkenness: forfeiture of wages is the legal consequence of drunkenness only when the performance of the master's or seaman's duty is thereby interfered with: (*The Atlantic*, 7 L. T. Rep. N. S. 674; *Lush*, 566; 1 Mar. Law Cas. O. S. 274.) [Sir R. PHILLIMORE.—It cannot be deduced from the last-mentioned case that a master does not forfeit his wages if he is constantly drunk, although his drunkenness may not interfere with the performance of his duties.] In *Button v. Thompson* (20 L. T. Rep. N. S. 568; L. Rep. 4 C. P. 330; 3 Mar. Law Cas. O. S. 231), it was held that "drunkenness and abusive language subversive of discipline" did not work a forfeiture of wages already earned. On the facts, I submit that there was no habitual drunkenness on the part of the master, and, such as there was, he never was drunk on duty or during times when there was any duty to be done by him as master of the ship.

Secondly, as to desertion. In order to establish a total desertion, operating as a forfeiture of all wages, there must be an intention proved on the part of the master or mariner absolutely to quit the ship; there must be no *animus revertendi*, or there will be no forfeiture: (*The Two Sisters*, 2 W. Rob. 125, 138.) On the facts, I submit that there was no desertion. The plaintiff went, ashore, with

the owner's consents, leaving all his property in his cabin, and his intention clearly was to return as soon as he had transacted the business upon which he landed, which was ship's business. [Sir R. PHILLIMORE.—The real question is, whether he intended to return after he met the ship at Mount Lion Island.] He would not have gone there at all if he intended to desert, and the fact of the ship leaving that place was a desertion by the owner of the plaintiff.

Thirdly, as to the plaintiff's alleged disobedience to the orders of his owner. To work a forfeiture of wages for disobedience to orders, the disobedience must take place with a guilty intention, a corrupt motive, and the order must not be impossible of performance. If the violation of orders be *bona fide* for the good of the shipowner and of the whole adventure, although it might be an error of judgment, I submit it would work no forfeiture. The evidence of guilty intention or misconduct on the part of the master, when it is sought to show that he has forfeited his wages, must be conclusive:

The Thomas Werthington, 3 W. Rob. 128, 134;
The Joseph Dexter, 20 L. T. Rep. N. S. 829; 5 Mar. Law Cas. O. S. 248.

[Sir R. PHILLIMORE.—Do you carry your contention so far as to say that, if I consider it proved that the owner gave at Monte Video his distinct and positive orders, in view of the possible hostilities between the Chilean and Argentine Governments, and the master violated those orders by preferring to follow his own judgment, he would not forfeit his wages.] In *The Camilla* (Swabey, 312, 314), it is said: "Two questions then arise: First, whether, assuming all the facts pleaded to be true, a forfeiture of the wages up to the day the master left the ship has taken place? Secondly, if not, whether the master was lawfully dispossessed? At the hearing I pressed the learned counsel for the owner to state what were the principles or authorities upon which he could support his argument that a forfeiture had taken place. Upon that head, I could obtain no satisfaction, nor was I surprised, for I believe none are to be found. I do not say, however, that a case might not exist in which the court would refuse to pronounce for wages, such as the master not discharging the duty of master at all, making over the command of the vessel to another person—a case which might be imagined—but I know of no case where the master has actually discharged the duty, as in the present instance, where facts of this description have been admitted as an answer to his demand; precedents, of course, were not to be found in this court, for the jurisdiction has too recently been conferred upon it to allow of any arising. I can find none at common law, and, for the reasons I am about to state, I think none can be found. I am of opinion that neither error, nor want of seamanship, nor improper refusal to sign a bottomry bond, could, in an action at law, where a master was suing for wages, be admitted as evidence in bar, or even in redemption of his claim, if he had actually continued in command of the ship. But, then it may be said, is there no remedy against the master if in essential respects he has broken his agreement? That, I apprehend, is not so. I conceive that any injury the owner may have received under such circumstances might be elsewhere the subject of a cross-action. I apprehend that the law on this subject is to be found in the judgment

ADM.]

THE ROEBUCK.

[ADM.]

in *Mondell v. Steel* (8 M. & W. 458), and in the Notes in Smith's Leading Cases to *Cutter v. Powell*. It is with great reluctance that I have entered upon the consideration of what is done at common law, because I well know how easily I might fall into a mistake; but the circumstances of this case have compelled me so to do, and for this reason, that the jurisdiction as to the claims of masters for their wages is, by the 191st section of the Merchant Shipping Act, conferred upon this court, and masters are thereby entitled to all the remedies which belong to mariners; and I conceive that the true intent of the section is, that I shall deal with all such cases on the same principle as a court of common law would do; and that the statute intended only to give masters a remedy against the ship, and to give this court an equitable jurisdiction to take cognisance of and settle disputed accounts. In this case the question is not one of disputed account. Nothing stated in the answer of the owner is in the nature of a set-off; the claim is not a debt, or anything like a debt; it is a claim for unliquidated damages; nor do I think the peculiar terms of the contract render it otherwise. For these reasons I am of opinion that, even if the evidence supported the allegation, I must still pronounce for the claim of wages up to the time of dismissal." Hence, even if the court finds disobedience to orders by the master, the owner's remedy is by cross-action at common law, not by an attempt to have his wages forfeited in this court. Wages can only be forfeited where the master wilfully refuses and neglects to perform his contract, and in this case there has been no refusal or neglect; and, moreover, it is for the owner who makes the charges upon which he relies, to prove them strictly before he can make out a case of forfeiture:

The Thomas Worthington (ubi sup.).
The Two Sisters (ubi sup.).

[SIR R. PHILLIMORE.—The question of disobedience involves three points: First, was there disobedience to the owner's written instructions; secondly, was there disobedience to his verbal instructions at Monte Video; thirdly, did the owner by his acts waive or condone the plaintiff's disobedience?] The practical effect of the written instructions given at Liverpool was, that the master should go to a named consignee and get cargo from him at a named place, if possible. He goes to the consignee and finds he cannot get cargo at the place named, and acting on the instructions of the consignee, he goes elsewhere and employs the ship for the benefit of the owner. This was reasonable conduct on the part of the master, and in adopting it he took every measure to secure the ship from danger. The intermediate voyages taken by the master were for the benefit of the owner, and not for that of the master, as the accounts would show; and these voyages were all properly conducted and were to ports where it was most likely that a home cargo could be procured. Again, by continuing the master in command of the ship after leaving Port Gallagos, the owner waived all former misconduct of the master, if he had been guilty of any. The master is entitled to full wages up to the time of the arrival of the ship in England.

Butt, Q. C. and *Warr*, for the defendant.—First, the plaintiff was guilty of wilful and reiterated disobedience to positive orders given to him. He was bound to go to a named place, and did not go; he was ordered not to give up cargo with

payment, and he gave it up; he was ordered not to give more than a certain sum for gunno, and he made an agreement to give considerably more than that sum. Again, a document was found in his cabin, by which the consignee of the owner repudiated all dealings with the owner, and agreed to deal only with the master. There was no condonation of the master's disobedience; the owner was obliged to keep him on at Sandy Point to enable him to get his ship back to a civilised port; no other master could have been found there; moreover, the evidence of the plaintiff's misconduct was not so clear then as when his papers were found.

Secondly, as to desertion, whether he deserted or not, the owner had reason to believe he would desert, from his previous conduct, and was justified in going away with the ship, and leaving him when he did not return to her. If he was justifiably left, wages after that time would not be recoverable. Up to the time of the arrival of the ship at Sandy Point, the plaintiff's wages are, as we submit, forfeited by the plaintiff's misconduct. From that time to the time of the plaintiff's desertion, it would be difficult to support a forfeiture; but a very different question arises as to the wages the plaintiff would have earned if the ship had continued under his command. He claims for two years. If he had not gone on the intermediate voyages he would have been back in England sooner than the ship arrived there. Hence, even if this contract is for a specified time, and we submit it is not, the plaintiff's own misconduct compels an inquiry with the length of time that would have been occupied in the voyage. We submit that a master cannot recover wages which he would have earned, but did not, by reason of his not continuing the voyage. Neither *Butt v. Thompson* (ubi sup.), nor *The Two Sisters* (ubi sup.), are any authority to show that such recovery can be had. Therefore we submit to the five months' intermediate voyages the plaintiff can recover nothing; that from the time of leaving Sandy Point to the time he left the ship at Mount Lion Island, he may recover, but that after that time he can recover nothing.

Kennedy, in reply.—Whether there is or is not a regular contract for a specified time, still, if the dismissal at Mount Lion Island was wrongful, the plaintiff is entitled to damages in respect of breach of his contract; and those damages must be measured by the time which it took to complete the voyage: (*The Great Eastern*, L. Rep. 1 Adm. 385.) There is no evidence to show that any of the misconduct alleged could be brought home to the plaintiff. The plaintiff had no interest in desertion.

SIR R. PHILLIMORE.—This is a cause of wages instituted on behalf of James Gordon against the barque *Roebuck*, to recover his wages due and earned during the time he was master of that vessel, to the amount set forth in the schedule to that petition. The history of the case extends over a considerable period of time, and I have had very great difficulty in ascertaining the material dates, in consequence of the evidence of the principal witnesses on both sides having been so badly given; but I have, to the best of my ability and with great pains, endeavoured to extract from their evidence those dates, which I will now enumerate.

On the 17th July 1871, the plaintiff entered into an agreement with Mr. Duncan Macdonald, the then owner of the *Roebuck*, who subsequently

[Adv.]

THE ROEBUCK.

[ADM.]

parted with his interest to the present defendant, to serve as master of that vessel on a voyage from Liverpool to South America and back, and was duly appointed. The first document of importance to be consulted in this case is the bill of lading, which in terms is as follows:

Shipped, by the grace of God in good order and condition, by Duncan Macdonald, merchant and shipowner, Glasgow, in and upon the good ship or vessel called the *Roebuck*, whereof is master for the present voyage James Gordon, and now lying in the harbour of Liverpool and bound for Monte Video and Port Gallagos, Patagonia, to say: three crates crockery, &c. (the other goods being chiefly ropes, hardware, and provisions) marked and numbered as in the margin, and are to be delivered in the like good order and well conditioned at the aforesaid Port Gallagos, Patagonia (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever excepted), unto Louis Buena, merchant, sell or his assigns, be or they paying freight for the said goods so far, if any, as not already paid for and charged in the account of the said goods, payment of which account is to be given to the master of the said ship: be shipping other goods on discharge or return for and to the said merchant as the master may purchase or agree in absence of his owners, so far as such may cover accounts, with primage and average accustomed. In witness whereof the master or purser of the said ship hath affirmed to two bills of lading, all of this tenor and date, the one of which two bills being accomplished, the other one to stand void. And so God speed the said good ship to her destined port in safety. Amen.

Dated in Liverpool, 23d July 1871.

JAMES GORDON.

There is no doubt, therefore, from this document, as to the port in which the goods were in the first instance to be delivered.

The next document is the instructions given by Mr. Macdonald to the plaintiff as to the conduct of the voyage. It is as follows:

Dear Capt. Gordon.—The following goods, shipped on board the *Roebuck* at Liverpool, on account of the owner or Capt. Louis P. Buena, of Santa Cruz and Sandy Point, and to be delivered to him at Port Gallagos as conditionally instructed, three crates of crockery ware, fourteen coils rope, &c. (the rest being hardware and provisions). The whole cost, freight, and charges of the above goods to Capt. Louis P. Buena come to 600*l.*, exclusive of interest from date of the goods being shipped, and for which you can take from him guano or other produce he may have of value in return, he reserving his whole produce for me of whatever kind suitable for being brought to the English market, as formerly agreed to by and between us when I was at Santa Cruz in January last.

With regard to the guano exclusively belonging to himself, and which no other parties can touch, he was to work it himself and keep all for me, but only the price at which he was to charge me for guano was not fixed, but that depends very much on where it is got, the expenses attending its being collected, cleaned, and putting it on board ship. But unless the guano is good, dry and clean, well freed from sand and stones, I would not like to pay more than 10*l.* per ton for it, and our own men taking it off with the ship's boats and loading it; 10*l.* per ton would pay Capt. Louis and his companion very handsomely for collecting, cleaning, and drying and lashing, but, however, you will see what their ideas are in this respect; at all events—

And these are very important words:

Do not promise or sign anything that would make the cost exceed 15*l.* or at the outside 20*l.* free on board, including all labour, loading, and lashing. I may be able to be there with you myself, but if I am not you must do your best to make the best bargain with them you can for me—

And then follow still more important words:

You must take care and not part with the goods until you get possession of the guano from them, and a written contract with them for what they are to charge me for

everything. I think you will find Capt. Louis a gentleman.

You proceed to Monte Video in the meantime with the coals. You are consigned to Mr. C. D. Horne; he will sell the coals for you for the best price that can be got. I have no doubt his commission for doing so, collecting the money, and doing all the ship's business that you require any broker to do, is to be 2*l.* per cent. on the gross price of the coals. That was what he told me he would charge when I saw him last, and promised on these terms that I would consign to him.

Then follow some immaterial directions, and the instructions continue:

On leaving Monte Video you go direct to Port Gallagos, where I showed you on the chart, about 57 degrees south latitude, and where I ordered Capt. Louis P. Buena to meet you. You get about 200 tons of very good guano there on the small island on the north east side, a little inside the entrance to the river. When making the port, keep to the south in shore, and low land to the left, giving a wide berth to the bar and shallow banks outside the mouth of the river for miles. See chart.

Then follow very minute directions how the bar lay, and as to the best way in which the entrance might be effected and the ship securely anchored, which I need not read, and the instructions proceed:

If Capt. Louis does not meet you here, you will require to explore the coast northward in quest of guano your self, calling at the places I pointed out to you on the chart.

The rest of the instructions are unimportant in the present inquiry. They were signed by Mr. Macdonald. Now the next document to be noticed is the plaintiff's appointment as master of the ship, which was in the form of a letter under date of the 17th July, and is as follows:

Glasgow, 17th July 1871.

Capt. Gordon.

Dear Sir,—The result of our interview to-day, and the recommendations I have had from Mr. George Paterson and the other certificates you showed me, I hereby engage you as master of my barque *Roebuck*, now in Liverpool, on a voyage from there to South America, outward with a cargo of coals to Monte Video, and thence southward for guano and otherwise, as I may direct you. Your wages to be 12*l.* a month, and I agree to pay to your wife one-half of the said wages monthly, during the time you are in my employ. You are to join the vessel and enter on your duties on Wednesday next, in Liverpool, and to follow what directions I may give you then and from time to time thereafter, so far as the same shall be practicable, and do your duty as master and attend to my interest in that capacity to the best of your abilities, which I trust will prove to be mutual interest and satisfaction. I am, yours truly,

DUNCAN MACDONALD, Sole and Managing Owner.

The vessel sailed from Liverpool on the 31st July 1871, and the plaintiff claims wages up to the time of the vessel's return to Liverpool in July 1873, and the question in the case before the court is, whether the plaintiff is entitled to the amount he claims as master, at 12*l.* a month, or whether he ought, in accordance with the defence set up by the late owner, to be held to have wholly or partially forfeited such wages.

There is no doubt that a master may so misconduct himself as to incur either of these penalties, and this position is to be deduced both from general principles and from the authority of cases decided on those principles. Therefore, the question I have to decide is, whether he has misconducted himself at all, and has thereby incurred a forfeiture of wages, and to what amount, or whether he is entitled to the entire sum he claims. The defence contend that there has been a forfeiture of wages in whole or in part, upon three grounds; first, on

ADM.]

THE ROEBUCK.

[ADM.]

the ground of disobedience to orders; secondly, on the ground that the plaintiff deserted his vessel; and, thirdly, on the ground that he was guilty of drunkenness.

On the 30th Sept. the vessel arrived at Monte Video, and there commenced delivery of the coals she had on board, and had not finished the delivery when Macdonald arrived, about a month afterwards. There seems to be a doubt as to the exact time he actually did arrive on the first occasion at Monte Video; but I think the evidence shows it was about a month after the ship; at any rate, when he did arrive, it appears that he went to Buenos Ayres, and then returned to Monte Video before the ship sailed. It does not appear from the pleadings that he went on a visit to Buenos Ayres and returned; but the fact that he did so was shown by the evidence. In connection with this fact it is material to observe that, with regard to the question of forfeiture of wages by reason of disobedience, Mr. Macdonald admitted that up to the time of his second arrival at Monte Video there was not any blame attaching to the plaintiff.

Some time after Mr. Macdonald's arrival at Monte Video, and whilst the coals were still being finally delivered, an important conversation took place between Mr. Macdonald and the plaintiff. It was to this effect: Capt. Gordon having heard rumours of belligerent relations arising between the Chilean Government and the Argentine Confederation, told Mr. Macdonald that it was considered dangerous, in the opinion of persons whom he had consulted, to take the ship to Port Gallagos, and also that he had received information that there was very bad harbourage at that place, and upon that ground also it would be imprudent to go there. Now I see no reason to doubt Mr. Macdonald's evidence on this important point, which was to the effect that he told Gordon in answer, that he had considered both these matters, and that he must, nevertheless, give him positive and precise orders to take the goods to Port Gallagos, according to his original instructions given to him at Liverpool. There can be no doubt whatever that those instructions were perfectly plain, precise, and explicit on that point, so far as the written document goes, and that they were confirmed by the oral instructions given in the conversation, to which I have referred, at Monte Video.

The next event of importance is the letter of the 30th Oct., from Mr. Macdonald to Capt. Gordon. This letter is written from Buenos Ayres; when Mr. Macdonald left Monte Video I do not exactly know:

210, Calle de la Filanda, Buenos Ayres,
30th Oct. 1871.

Dear Capt. Gordon,—I enjoy the society of my dear nephew so much, and he says, that I shall not leave for a few days yet. I also heard from Capt. Louis Piedra Buena, of Sandy Point, who is not at home. His wife, who could not write or read English, got my letter interpreted and wrote her brother here who I saw to-day; he had her letter with him; he lives in this country, or rather out of town; he invited me to go out with him this afternoon, but, as I had another engagement to meet other friends to-night, I deferred my visit till to-morrow, when he is coming to town again, and will bring Mrs. Piedra's letter. The guano is waiting, and all secured for me. I will explain this more fully when I go down to see you. Make all possible efforts to get Wilson to send plenty of lighters to get the cargo discharged with all despatch. I hope, as he did nothing last week, he will give you plenty of lighters now. I send you this by Capt. Coal, who will hand it to you. Tell Capt. Louis I will give him 50s. for nitrate from the West Coast to the

U. K. in case he does not get better in the Plata. Write to me to-morrow.—I am, dear Sir, yours truly,
DOMCAN MACDONALD.

And here it is not wholly unnecessary to observe that this letter was sent to Gordon on the 30th Oct., showing clearly that at that date the instructions were still considered as holding good. On the 30th Nov. the *Roebuck* left Monte Video, but instead of going to Port Gallagos, five months were occupied in different voyages. According to the statement of Capt. Gordon, these voyages were as follows:—The *Roebuck* arrived at Buenos Ayres on the 1st Dec. 1871; left that port again on the 23rd Jan. 1872; arrived at Santa Cruz on the 15th Feb. 1872; left there on the 22nd March 1872, and arrived at Sandy Point about the end of March. In the meanwhile the ship was earning freight, but did not go to Port Gallagos at all. The statement on behalf of Mr. Macdonald was, that he was in pursuit of his ship for nearly five months, and could learn nothing of her. It is an admitted fact that she did not go to Port Gallagos for those five months, and that during that time she was earning about as described; at the same time there is no doubt that she was during those months carrying freight, as I understand, for her owner's benefit.

The master set up as a defence for his conduct that he thought he was justified in so employing the ship by the danger of going to Port Gallagos, and the bad state of that port, and by—and here his excuse seems somewhat mysterious—his arrest and his being compelled by Don Louis to go to Buenos Ayres; and, in fact, by reason of his having no choice but to go on the voyages and not to Port Gallagos, owing to his having been consigned to and being in the power of Don Louis. Hence it appears that he was keeping away from his owner from the beginning of November till the beginning of April. And here, I must observe, that on being asked why he held no communication with his owner, he said he thought his owner was going to England when he left Monte Video, after his second visit to that place, and, accordingly, he wrote to him at Glasgow. This is obviously absurd, as was rightly observed by Mr. Butt, on the face of the ordinary course of navigation, because the master knew that his owner had gone in the first instance to Sandy Point, and the English steamers came from Sandy Point to Monte Video on their way to England. Indeed, there was no ground which would warrant such a supposition. Shepherd, the mate of the *Roebuck*, said that he had heard Mr. Macdonald give the orders to Capt. Gordon at Monte Video, and say that he was going down to Port Gallagos, and that Capt. Gordon was to proceed down after him, and that in answer to these instructions Gordon said that "he would be down there before him, or words to that effect." There is overwhelming evidence that Capt. Gordon must have known that he could have communicated with his owner if he deemed it necessary. The plain truth seems to be, that some intrigue was carried on between Don Louis and Capt. Gordon, which induced the latter to disobey his positive instructions, and to make these voyages and not to go to Port Gallagos. As a matter of fact, it must be observed that the goods which were entrusted to Capt. Gordon to deliver at Port Gallagos in exchange for guano, were actually delivered to Don Louis at Santa Cruz, and for these goods Mr. Macdonald has not received a farthing remuneration, either in money

[ADM.]

THE ROEBUCK.

[ADM.]

or goods. He was indebted to Don Louis in the sum of 50*l.*, but even if the debt had been cancelled, he would still have suffered a loss on these goods, not as to the goods themselves, but in other respects, because it must be remembered that the goods were not delivered at Port Gallagos, as ordered, but at Santa Cruz, where the owner could get no guano in exchange.

On the 5th April the *Roebuck* came into Sandy Point Harbour. Mr. Macdonald was there at the time the vessel arrived, and he says that he went on board and rebuked Capt. Gordon for his conduct, but that the latter defied him, as he expressed it. But it is not necessary to go into any further details on this point. Mr. Macdonald was asked why he did not dismiss Capt. Gordon at once, and he answered that, considering the position he was in and difficulty of supplying his place, he thought it better to make the best of bad circumstances, admitting for the time the master's excesses, namely, that he had been disappointed by Don Louis. From Sandy Point Macdonald proceeded in the ship with Don Louis to get guano on the coast of Patagonia.

I must now revert to two documents which would in historical order come before the above facts, but which came into the possession of the defendant owing to their having been left in his cabin after Capt. Gordon left the ship. The first is an agreement between Don Louis and Capt. Gordon as to the terms of loading the ship, and is as follows:

Monte Video, Nov. 30, 1871.

I, the undersigned, do hereby agree with Capt. James Gordon, commanding British barque *Roebuck*, now anchored in the port of Monte Video, to load the said vessel with a full and complete cargo of guano of the coast of Patagonia, for the sum of 2*l.* sterling per ton of 2240*lb.*; said Capt. Gordon also agrees to render all assistance possible with crew, boats, bags, wheelbarrows belonging to the said vessel, to facilitate the loading of the said ship. Should said Louis Piedra Buena require to ship horses, mules, men, or anything for the benefit of the said cargo, nothing in the shape of charges are to be made against the said Louis Piedra Buena.

Capt. James Gordon agrees to deliver Mr. Louis Piedra Buena all provisions on board to his consignment, in part payment of said cargo of guano.

LOUIS PIEDRA BUENA.

A similar document was given to Don Louis Piedra Buena, signed by Capt. Gordon. Now this was a contract which was entered into without the consent and in defiance of the instructions of Mr. Macdonald. Then comes another document of a very serious character, if it is to be considered as shown in the evidence that Gordon was a party to it. It is as follows:

Monte Video, 1st Dec. 1871.

I, the undersigned, do hereby certify that all business transactions carried on between me and the British barque *Roebuck*, now under the command of Capt. James Gordon, has nothing to do whatsoever with Mr. Duncan Macdonald, said person having broken his faith with me, leaving myself and family in a state of destitution, from supplying said Macdonald with provisions, said Macdonald having at the same time promised faithfully to remit said provisions per first steamer, according to requirement, but failed in so doing, leaving me destitute, having supplied him with surplus stores. Under the circumstances, I refuse having further business transactions with said gentleman, and only recognise the signature of Capt. Gordon, commanding said vessel.

LOUIS PIEDRA BUENA

Now this document was found among the papers in the captain's cabin. This is a very suspicious circumstance; but I do not think that

it is enough of itself to bring home complicity to Capt. Gordon, and I think it would be unfair to make him responsible for it, allowor it to affect the mind of the court, as there is no further evidence respecting it. I have thought it right to mention it, to show that it has not escaped my attention; but I must say that I do not attach any importance to it as affecting the decree I am about to make.

Now it appears that before leaving Sandy Point Mr. Macdonald thought it right to enter into another agreement, dated the 10th April, 1872, with Don Louis; and by that document it was agreed that all previously existing contracts between the parties thereto, and between Don Louis and Capt. Gordon, should be cancelled; that, Mr. Macdonald having purchased from Don Louis, which purchase the latter agreed to, for the price of one pound sterling per English ton, the guano situated near Santa Cruz River, on the coast of Patagonia, as then pointed out to each of the parties on the Chart, Don Louis agreed to assist in loading the same, and was to receive for such assistance for himself and five men twenty patagones a month and food. Now this would lead to the observation that I had omitted—that among other distinct breaches of his instructions of which the master was accused, it was said that he had, although it was distinctly stated in those instructions that he was under no circumstances to give more than 1*l.* for guano per ton; and that he during five months, to which I have already referred, entered into an agreement to give Don Louis 2*l.* per ton.

Now the vessel leaves Sandy Point on the 15th April, and arrives at Santa Cruz River on the 25th April; and then the history of the case shows that Don Louis having a settlement about 25 miles from that river, went ashore, and sent some men with a message to request that some person should go from the ship to see the guano which was to be found on Mount Lion Island, which lay a little to the south of Santa Cruz River. This island was described as being separated from the main land by the tide during a portion of the day, but perfectly accessible at low water. Now Mr. Macdonald declined to go, and, according to his statement, Capt. Gordon offered to go, and there is no doubt that he did go with the full sanction and permission of his owner. And this brings me to the second charge, which is that of desertion. But before I enter upon the question of desertion, I am bound to say that with respect to the breach of orders, I consider that so far as relates to the five months during which the ship was going from port to port without the consent and against the orders of the owner, disobedience has been fully established; and as to that I must hold, looking at decided cases and principles to be deduced from them, Capt. Gordon has forfeited his wages for those five months, unless there are other facts which take this case out of those principles.

Then I come to the charge of desertion from the ship, which originates in the fact that Capt. Gordon went ashore in the Santa Cruz River to see Don Louis. There can be no doubt that he went with full consent of the owner in the first instance. Capt. Gordon went on shore, and, it appears, was not seen till four days had elapsed, although he had promised to return not on any particular day as alleged, but as soon as possible, the question of his return being left to his dis-

ADM.]

THE ROEBUCK.

[ADM.]

cretion. On the fourth day, the ship having in the meantime gone down to Mount Lion Island, Capt. Gordon was seen on the shore near that island. A boat's crew went off from the ship to the island, and there was no difficulty in traversing the space between the mainland and the island for three or four hours on that day. Then the story told is very strange on both sides; but the upshot of it all is, that, having been seen talking with the boatswain, Capt. Gordon did not, as might have been expected, go on board his ship. He could have done so if he had wished, and it was his duty to have done so, if he believed, as he said he did, that she was in a dangerous position, but he rode away back again with Don Louis. This state of facts is supported by the evidence of the witness Shepherd, and by the statement of the plaintiff himself. I do not think it necessary to give the details of the circumstances which occurred whilst the vessel remained at Mount Lion Island, but I will state the conclusion at which I have arrived after a careful consideration of the evidence on this second point of the defence, namely, that the plaintiff's wages are not forfeited by desertion.

There can be no doubt that wages may be forfeited by desertion, but the conclusion to which I have come with regard to the second defence to this suit is that the evidence does not establish what the law would call desertion on the part of Capt. Gordon. I agree with the opinion given by my predecessor in the case of *The Two Sisters* (2 W. Rob. 125, 138), where that learned judge said: "The facts pleaded are that the mariner quitted the ship, and remained absent for nine or ten consecutive days. The facts, if established, might, I think, constitute a legal desertion, provided an intention really to quit can be inferred from the *res gestæ* of the case. Without such an intention on the part of the mariner there can be no absolute desertion. If there be an absence from the vessel *animus revertendi*, whatever its duration, it would not be a desertion forfeiting the whole of the wages." It is possible, I think, that this principle in the passage I have just read may be too largely stated, but I substantially agree that there can be no absolute desertion where there is an *animus revertendi*, and I am of opinion that the evidence rather preponderates in favour of there being an *animus revertendi* on the part of Capt. Gordon.

There is one circumstance that ought to be considered at this point of the case, viz., that Capt. Gordon left every article of clothing he possessed except what he was actually wearing on board the ship.

The narrative then goes on to show that the ship lay off Mount Lion Island for three or four days, but Capt. Gordon made no attempt to return on board. The vessel went there under the charge of the mate; and he said that as the anchorage was bad, and the weather became stormy, they were then obliged to leave. The ship then returned to the Santa Cruz River, and after staying there a short time proceeded to Buenos Ayres. Mr. Macdonald did not see Capt. Gordon again until he was at Buenos Ayres two months afterwards, when his conduct was certainly not that of a deserter. He went before the Consul and claimed to be restored to his position as master. It is not necessary to state what passed at the Consulate, but it ended in Mr. Macdonald

being satisfied that he ought not to take Capt. Gordon back, but ought rather to take another master. Capt. Gordon went back to England in another vessel a few months later.

I pointed out to counsel that there were two questions on the point of desertion: first, whether the captain deserted his ship; and secondly, whether the owner deserted the captain. The evidence does not show that Mr. Macdonald intentionally deserted Capt. Gordon with the intention of preventing him from resuming command of the ship, but I consider that the acts of Capt. Gordon to be so suspicious that they naturally led to the supposition in the mind of Mr. Macdonald that Capt. Gordon did not intend to return; and in coming to this conclusion I cannot forget his former unjustifiable conduct, and his taking the ship on different voyages for five months without the consent, and against the instructions, of his owner; and I have no doubt that this greatly influenced Mr. Macdonald in his estimate of Capt. Gordon's conduct. Looking to all the circumstances, while I acquit Capt. Gordon of desertion of his ship, I also acquit Mr. Macdonald of any intention to wrongfully desert Capt. Gordon.

Then there is one more question to be considered which was set up in defence, namely, the charge of drunkenness made against Capt. Gordon, incapacitating him from his command. Now there is a very early case in which the specified charges were disobedience, neglect of duty, and drunkenness, against the mate of a ship; and there Lord Stowell, with his usual clearness and knowledge of law, stated his opinion. It was the case of the *Essex*, and it is there said: "Upon the matter of drunkenness, the court will be no apologist for that; it is an offence peculiarly noxious on board ship, where the sober and vigilant attention of every man, and particularly of officers, is required. At the same time the court cannot entirely forget that in a mode of life peculiarly exposed to severe peril and exertion, and, therefore, admitting in seasons of repose something of indulgence and refreshment, that indulgence and refreshment is naturally enough sought by such persons in grosser pleasures of that kind, and, therefore, that the proof of a single act of intemperance committed in part is no conclusive proof of disability for general maritime employment. Another rule would, I fear, disable many useful men from the maritime service of the country": (*The Essex* 2 C. Rob. 261, 269.) It is true that in that case Lord Stowell was considering the offence of a mate, and not of a master. But in the more recent case of *The Thomas Worthington* (3 W. Rob. 128, 133), decided by my learned predecessor, I see he says: "Cases, indeed, may occur even in this court where the misconduct may be of such a gross description that, independently of any loss sustained by the owners, the entire forfeiture of wages would ensue; as, for instance, if a master had attempted to commit barratry; or if throughout a voyage he had shown gross incapacity, or had been constantly drunk. In either of these cases would this court be justified in pronouncing for any part of his wages under the contract? Unquestionably not; and if any such case should come before me I should not hesitate for a single moment in rejecting his claim *in toto*." But I do not think that the evidence in this case brings it within the scope of these observations. It is true, unfortunately, and cannot be denied (and, indeed,

[ADM.]

LAING v. ZEDEN.

[CHAN.]

I must do Capt. Gordon the justice to say he did not deny it) that he occasionally took more ardent liquor than he ought, and it affected him, but not in the way to disqualify him from the discharge of his duties as master. I do not mean to say that if constant drunkenness had been proved, although there had been a failure to show that that drunkenness had resulted in the bad navigation of the vessel, or loss to the owner, he could not by that means have forfeited part, or whole, of his wages, but I do not think that the evidence here comes up to that mark; and although it was proved that he was, as is vulgarly said, sometimes worse for liquor, there is no evidence to sustain the argument in the defence that he was guilty of constant drunkenness, which would incapacitate him from attending to the business or navigation of his ship.

Having arrived at these conclusions on the different points of the case, the question is, what the judgment of the court must be. First I am of opinion that the captain is certainly entitled to his wages up to the time of the second visit of Mr. Macdonald to Monte Video, shortly after which the master ought to have proceeded to Port Gallagos. I think that from that time, and during the time that he was navigating the ship against orders for five months, he is not entitled to any wages. During the short time that elapsed from the period when he left Sandy Point with the ship until the vessel sailed away from Santa Cruz without him after the transactions at Mount Lion Island, he is entitled to his wages. But I do not think that after that time he is entitled to any wages. Looking to all the circumstances, I think that Mr. Macdonald was justified, as I have already stated, in taking the ship away from Mount Lion Island and returning to Liverpool, and taking the vessel out of command of Capt. Gordon on her homeward voyage.

There is one other point that I have omitted to notice, which I have not failed, however, carefully to consider. I suggested myself that it might possibly be found by this court that however much to blame Capt. Gordon might be for disobeying the instructions of his owner during those five months so often alluded to, the conduct of Mr. Macdonald in putting the vessel again under his command, and going with him from Sandy Point to Santa Cruz, might be held to be a condonation of Capt. Gordon's former misconduct. But I think that, looking to all the circumstances of the case, it cannot be so considered. Considering the position in which the owner then was as to obtaining another master, I think it must be taken that he only intended to act under the circumstances as was best for all concerned, without reference to the master's past conduct, and without prejudice to any course he might afterwards choose to adopt with regard to the master's future dismissal.

I shall make an order that the master is entitled to one part, and disintituled to the other part of his wages, as I have expressed above. Of course I shall order a reference to show whether he is indebted to Macdonald, and to settle the balance of accounts, a part of the case I have carefully refrained from entering upon. I shall make no order as to costs.

Solicitor for plaintiff, J. H. E. GILL.

Solicitors for defendant, Bateson and Co.

COURT OF APPEAL IN CHANCERY

Reported by E. STEWART ROOPE and H. FRAY, Esqrs.,
Barristers-at-Law.

Tuesday, April 28, 1874.

(Before the LORDS JUSTICES.)

LAING v. ZEDEN.

Shipowner as stakeholder—Shipper claiming lien—Holder of bill of lading—Interpleader—Parties—Costs—Undertaking as to damages—Inquiry.

Where there are two or more claimants of goods in the hands of a stakeholder, the only way in which he can protect himself is by filing a bill of interpleader. If, instead of doing so, he litigates with the claimants separately, he must pay the costs of the successful claimant.

Goods in the hands of a shipowner were claimed by the shipper under an alleged lien, and also by the holder of the bills of lading. The shipper filed a bill to restrain the shipowner from parting with the goods, and the other claimant brought an action on his bills of lading against the shipowner. To restrain this action the shipowner filed a bill, to which he did not make the shipper a party, and an injunction was granted on the usual undertaking as to damages. The shipper's bill was dismissed with costs.

Held (reversing the decision of Bacon, V.C.) that the bill of the stakeholder to restrain the action brought by the holder of the bills of lading must be dismissed with costs, and that the defendant to that bill was entitled to an inquiry as to damages under the undertaking.

THIS was an appeal from a decision of Bacon, V.C.

The facts of the case were as follows:

A suit of *Hathesing v. Laing* (ante, p. 170; L. Rep. 17 Eq. 92) was instituted by a firm of cotton brokers claiming an alleged equity on certain bales of cotton, shipped from Bombay on board the steamship *Alabama*, to restrain the shipowners, James Laing and Mary Gourey, from delivering the bales of cotton to the Comptoir d'Escompte de Paris, the holders of the bills of lading.

To that suit the Comptoir d'Escompte de Paris were not made parties, but on the 11th Oct., 1870, the solicitor for the plaintiffs in that suit wrote them a letter inquiring whether they claimed the cotton, and expressing their readiness to enter into any arrangement for the sale of the cotton and the payment of the purchase money into court, until it should be decided who was entitled to it, and requesting an early answer, as it would be better if the Comptoir d'Escompte de Paris claimed the cotton, to make them parties to the suit.

Notwithstanding this letter, the Comptoir d'Escompte de Paris on the 29th Oct. 1870, commenced an action on the bills of lading against the shipowners.

Thereupon the shipowners filed their bill in the present suit to restrain the action at law, making Zeden, the ship's agent and the Comptoir d'Escompte de Paris defendants, but the plaintiffs in the suit of *Hathesing v. Laing* were not made parties.

Subsequently the Comptoir d'Escompte were, under an order obtained on the 11th Oct. 1870, made defendants by amendment to the suit of *Hathesing v. Laing*, the bill in which was ultimately dismissed with costs: (See ante, p. 170.)

Immediately after the decision of *Hathesing v.*

CHAN.]

ASHCROFT v. CROW ORCHARD COLLIERY COMPANY.

[Q. B.]

Laing, the present suit, in which an injunction had been granted, came on for hearing on the question of costs.

The Vice Chancellor held that the plaintiffs, as stakeholders, were entitled to their costs out of the fund.

From this decision the Comptoir d'Escompte de Paris appealed.

Key, Q.C. and B. B. Rogers, for the appellants.—The bill ought to have been dismissed with costs. [Lord Justice JAMES—We do not entertain appeals on mere questions of costs. Is not this an appeal for costs?] When the injunction was granted, it was on the terms that the plaintiffs should give an undertaking against damages; and it is open to us now to get an inquiry what damages we have sustained by reason of our money having been locked up for over three years. In *Nesby v. Harrison* (5 L. T. Rep. N. S. 12; 3 De G. F. & G. 287) it was decided that such an undertaking as to damages remains in force, notwithstanding the dismissal of the bill. This suit was purely one to restrain an action which we had a perfect right to bring, and was not at all in the nature of an interpleader suit. The plaintiffs ought therefore to have had their bill dismissed with costs.

Miller, Q.C. and E. Beaumont, for the respondents.—We never opposed the defendants' claim, and our solicitor's letter of the 11th Oct. 1870 shows that we were disposed to do what was right. After receiving that letter the defendants brought their action, while the whole dispute might have been settled in the suit of *Huthersing v. Laing*. This suit is virtually an interpleader suit, and by the Comptoir d'Escompte being made parties by amendment to the other suit all the parties were brought together. We are mere stakeholders, and should not be put to any expense in consequence of a dispute between two parties as to the goods in our hands. They cited *Nelson v. Burt* (2 H. & M. 334; 10 L. Rep. N. S. 743.)

Without calling for a reply.

Lord Justice JAMES said: I am of opinion that the decision of the Vice Chancellor cannot be sustained in this case. The Comptoir d'Escompte de Paris had a clear legal right to a quantity of cotton not affected by any equity whatever. Having that legal and equitable right, they brought an action against the plaintiffs in the present suit, to which the latter had no defence. Thereupon the bill in the present suit was filed, on which it has been shown that there was no equity. It appears to me that the Comptoir d'Escompte have sustained damages by reason of that proceeding, and that they are entitled to have those damages ascertained. It is said that the plaintiffs in the present suit were mere stakeholders, and that they were therefore entitled to their costs against the Comptoir d'Escompte. The latter have, however, done no wrong. It is said that they ought not to have brought their action after the injunction had been granted in the first suit. But there was no injunction against them, and I do not quite understand how the injunction was granted. It is said, however, that *Laing* and his co-plaintiff were stakeholders, and that it was perfectly immaterial to them whether they delivered the goods to the Comptoir d'Escompte or to the other claimants. But the only way in which a man can avail himself of such a plea is by a bill of interpleader. The bill of interpleader is not a merely formal thing. It is not a thing equivalent to a bill of

interpleader that is required; he must file a bill of interpleader. Such a bill does not always work complete justice, but it does so as far as possible. It gives relief between the two claimants, and it stops other litigation. It gives the stakeholder his costs out of the fund, and the other party is there to indemnify the defendant who is entitled. Here the plaintiffs have not given the Comptoir d'Escompte any chance of getting their costs out of the other party. The costs should come out of the fund, with a remedy over against the wrongful claimant. But it is said that the Comptoir d'Escompte ought not to have brought the action after an injunction was granted. In this suit, however, we know nothing about that injunction. The bill must be dismissed, and dismissed with costs. And we must direct an inquiry as to damages.

Lord Justice MELLISH.—I am of the same opinion. I am quite clear that at law the remedy of the Comptoir d'Escompte was solely against the plaintiffs in the present suit. The defendants had a clear title on the bills of lading against the plaintiffs, who, however, would not deliver the goods to them because a third party, who had no real title, asserted a claim to the goods. The only remedy of a person in the plaintiff's position under those circumstances is by a bill of interpleader. If he does not choose to file such a bill, but litigates with both the claimants separately, he is liable to bear the costs of the party who establishes his claim. But it is said that this suit was as good as an interpleader bill. That is not so, for it did not bring the parties together, and it left the defendants no remedy over against the other claimant for costs. I am, therefore, of opinion that the decision of the Vice-Chancellor cannot be upheld, and that this appeal must be allowed.

Solicitors for the appellants, *Lynne and Holman*.

Solicitors for the respondents, *Lowless, Nelson, and Jones*.

COURT OF QUEEN'S BENCH.

Reported by J. SHOOTY and M. W. McKELLAR, Esqrs.,
Barristers-at-Law.

June 11 and July 6, 1874.

ASHCROFT v. CROW ORCHARD COLLIERY COMPANY.

Charter-party—Demurrage—Dock regulations—

Usual despatch of the port.

Where by a charter-party it is mutually agreed between shipowner and charterer that the shipowner's ship is "to be loaded with the usual despatch of the port, or if longer detained to be paid 40s. demurrage," and that the ship is to be loaded at a named dock, by the regulations of which no shipper could have more than three vessels loading in dock at the same time, and, by reason of the charterer having more than three vessels entered in their books which had to be loaded in the dock before that ship, the ship is delayed an unreasonable time, the contract to load with the usual despatch of the port must be considered as an absolute contract to load with that despatch and within a reasonable time, independently of any other engagements of the charterers, even if it can be shown that at the time of the making of the charter-party the shipowner knew that such persons' engagements existed, and the shipowner can recover demurrage.

Q. B.]

ASHCROFT v. CROW ORCHARD COLLIERY COMPANY.

[Q. B.]

Tapscott v. Balfour, ante, vol. 1, p. 501, distinguished.

This was an action by a shipowner against charterers tried before Quain, J., at the Liverpool Summer Assizes, 1873, when a verdict of 60*l.* was entered for the plaintiff, leave to move being reserved to the defendants. A rule nisi was obtained in pursuance of the leave reserved, on the ground that the facts proved did not, on the true construction of the charter-party, disclose any liability on the part of the defendants.

The first count of the declaration set out the charter-party, which provided, amongst other things, that the defendants should load the plaintiff's ship "with the usual despatch of the port" of Liverpool. It detained, the plaintiff "to be paid 40*s.* per day demurrage." The alleged breach was not loading with the usual despatch.

The second count was framed upon a memorandum at the foot of the charter-party, by which the vessel was to "load in the Bramley Moore or Wellington Docks, High Level Railway." The breach was not giving, or procuring, within a reasonable time an order entitling the plaintiff's vessel to enter the said docks.

There were also money counts for demurrage.

The pleas merely denied the contracts, the breaches, and the debt.

The judgment of the court contains a full statement of the facts and arguments.

Aspinall, Q.C. and *Brenauer* showed cause against the rule, and

Russell, Q.C. and *Lupton* supported it.

The cases cited and disapproved were

Tapscott v. Balfour, ante, vol. 1, p. 501; 27 L. T. Rep.

N. S. 719; L. Rep. S. C. P. 46;

Kail v. Anderson, 10 M. & W. 498;

Keaton v. Pearson, 7 H. & N. 386;

Ford v. Cotesworth, 19 L. T. Rep. N. S. 634; L. Rep.

4 Q. B. 127;

Harris v. Dreeman, 9 Ex. 485;

Robertson v. Jackson, 2 C. B. 412;

Shadforth v. Cory, 32 L. J., 79 Q. B.; in error, 379.

Cur. adv. vult.

July 6.—*LUSH*, J. delivered the judgment of the court (Mellor, Lush, Quain, and Archibald, JJ.). This was an action for demurrage tried before my brother Quain at Liverpool, when a verdict was entered for the plaintiff for 60*l.*, being for 30 days' demurrage, with leave to the defendants to move to enter a nonsuit, the court being empowered to draw all inferences of fact, and to amend the pleadings if necessary. All questions of reasonableness were to be for the court.

By the charter-party, dated Liverpool, the 22nd Jan. 1873, the master engaged to receive and load on board his vessel the *Christiana Davies*, of Barrow, a full and complete cargo of coal, about 140 tons, and proceed to Belfast and deliver the same as per bills of lading at certain specified freight, &c. "To be loaded with the usual despatch of the port, and discharged 25 tons working days, or if longer detained to be paid 40*s.* per day demurrage." The defendants thereby engaged to load the vessel "on the above terms." By a memorandum at the foot of the vessel was to load in the Bramley Moore, or Wellington Docks, High Level Railway. By the published dock regulations, which it must be taken were known to both parties, it is ordered, amongst other things, that "no vessel is to be allowed to enter the Bramley Moore, or Wellington Docks, to load coal from the High Level Railway, except upon the production of a

jerque note, or a certificate from the master of the dock in which the vessel is lying at the time, showing that she is ready to commence loading, and also a certificate from the coal agent that she is to load coal at the High Level. No coal agent is to be allowed to load more than two flats at the cranes at the same time, nor to have more than three vessels in the Bramley Moore, or Wellington Docks (both inclusive), loading, and to load at the cranes at one time." "No vessel to be entered in the application or berthing book before she is in either the Bramley Moore, or the Wellington Dock: each vessel to be berthed in regular turn as entered, if the specified quantity of coal is at the Sandhills Station; if not, the next vessel in turn having sufficient coal ready to take the berth. Any vessel losing her turn in consequence of coal for her not being ready at the Sandhills Station, to be considered first on turn when the coals are ready. Flats and vessels to follow the same order as to turn for loading, whether entered for the cranes or the shoot." It was admitted that the master obtained in proper time the requisite certificate from the dock master in which the vessel was lying, and that the defendants gave their certificate in proper time; also that the vessel was regularly put on the dock books, and would have been loaded without delay, had it not been for the fact, which fact was unknown to the master at the time he entered into the charter-party, that the defendants acted as their own coal agents, and that they had at the time three ships loading in the dock, and ten other charters in their books which had priority over the plaintiff. In consequence of these engagements the vessel was not allowed to go into dock till the 5th March, a period of thirty days after she was ready to do so. The loading was commenced and completed on the following day.

It was conceded that thirty days was an unusual period of detention, and that the delay was caused, not by the pressure of business in the dock, or any inability on the part of the dock company to facilitate the despatch of the vessel, for vessels booked after the *Christiana Davies* by other coal agents were loaded and despatched before her, but solely by the incapacity, which the defendants had placed themselves under by their previous engagements, of getting a berth for her at an earlier period. On the other hand it was conceded that the defendants were guilty of no delay which it was in their power to avoid consistently with their previous engagements.

The question is, then, what is the contract which the defendants entered into by the charter-party? The words are not that the vessel is to be "loaded in turn according to the charterer's books or engagements," or to be loaded "next after a particular vessel," or in any other prescribed order, but "to be loaded with the usual despatch of the port."

The defendants' counsel contended that these words apply only to a delay in the process of loading when the vessel has arrived at the berth, and that they have no reference to a detention outside the loading place, though caused by the act or default of the charterer, and he relied upon the ease of *Keaton v. Pearson* (7 H. & N. 386) in support of that position. That case, however, by no means justifies the argument based upon it. The words of the charter there were in substance the same as here, namely, "to be loaded with usual despatch." The facts were that the loading

Q. B.]

RODOCANACHI AND OTHERS v. ELLIOTT.

[EX. CH.]

was, after it had commenced, interrupted by a severe frost, which closed the canal through which the coals were to be brought from the pit, and thus prevented the charterer from getting them to the loading place; and the court held the meaning of the clause to be that the vessel should be loaded with the usual despatch of persons who had a cargo in readiness at the dock for the purpose of loading, and therefore that the charterer was responsible for the delay occasioned by the frost. So far from supporting the argument that the charterer is not liable for delay occasioned by his own act or default, that case establishes that the engagement to load "with the usual despatch" is absolute, and admits of no qualification so as to dispense with performance, even where the performance was hindered by a casualty which the charterer could not prevent. It is true the delay in that case occurred during the process of loading, and the court had not to consider what would have been the effect of a detention at the dock's mouth; but we see no reason for limiting the obligation to the mere process of loading. It undoubtedly includes that process, and requires it to be done with the usual despatch; but we are of opinion that it goes further, and covers the whole period from the time when the vessel is at the port and is placed at the disposal of the charterer there in a condition to receive the cargo. The object is to provide against unusual delay on the part of the charterer in putting the cargo on board, and whether the delay occurs in the course of loading or before the loading commences, whether it consists in keeping the vessel outside or inside the dock, is obviously immaterial. The question is whether the vessel is at his disposal, and whether the detention is his act. If so, the contract is broken as much in the one case as in the other.

It was further contended that the vessel could not be said to have been ready to receive cargo so long as she lay outside the dock, that it is the duty of the shipowner to find his way into the dock, and that he takes the risk of any obstacles which occur to prevent his getting there; and *Tapscott v. Balfour* (ubi sup.) was relied on in support of this argument.

In the case of *Tapscott v. Balfour* there was a charter under which the ship was ordered to load in one of the docks mentioned in this charter—the Wellington Dock—which was governed by the same regulations as the Bramley Moore Dock. The vessel was detained there as in this case outside the dock, and for a similar reason, namely, because the coal agent who had the loading for the charterer had not only three vessels in the dock at the time, but two others booked to come in before the plaintiff's. The Court held that the lay days commenced only from the time when the vessel was admitted into the dock, the loss arising from being kept outside by virtue of the dock regulations being a loss, the risk of which was undertaken by the shipowner. At first sight that case appears to bear a close resemblance to the present case, and it is not to be wondered at that the defendants' counsel strongly relied upon it as an authority in his favor. But when examined the supposed resemblance disappears. The words of that charter were "the vessel shall proceed direct to any Liverpool or Birkenhead dock as ordered by charterer, and there load in the usual and customary manner a full and complete cargo of coals." The court held

that this stipulation applied to the mode, and not to the time of loading. "There is," says Bovill, C. J., "no express stipulation with respect to the time at which the loading is to commence, except that it is not to commence before the 1st July. Then what is the ordinary rule under such circumstances where the port, but no particular place in the port, to which the vessel is to proceed is named? It means that the time is to commence from the arrival of the vessel at the usual place of loading in that port. The stipulation is in effect that the vessel shall proceed to the Wellington Dock, and there load her cargo. Therefore the lay days do not commence till she has got into the Wellington Dock. If, by reason of the dock regulations, she cannot enter into that dock before a certain time, the loss by such delay must fall on the ship-owners."

Assuming this construction of the clause in that charter to be the correct one, the grounds of the judgment are inapplicable to the present case. The intention of the parties here was evidently that the charterer should not, and the words bind him that he will not, detain the vessel, for want of cargo, beyond the usual and ordinary period of delay at the dock. Evidence was given to show that the plaintiff might, if he had chosen, have obtained information from the dock master before he entered into the contract as to the number of vessels which the defendants had in the dock and on their books, but he was under no obligation to do so, and it would have been immaterial if he had, and if it were shown that he knew these facts. We construe the stipulation as a contract by the charterer that he will load with the usual despatch, and it is no answer to say that he was unable to do so; nor would it be any more an answer to say that the plaintiff knew it.

The ground on which leave was reserved having failed, the verdict stands for the amount agreed on at the trial.

Rule discharged.

Attorneys for plaintiff, Gregory and Co., for H. Brenner, Liverpool.

Attorneys for defendants, Venn and Son.

EXCHEQUER CHAMBER.

APPEAL FROM THE COURT OF COMMON PLEAS.

Reported by JOHN BOCK, Esq., Barrister-at-Law.

Feb. 6 and June 16, 1874.

RODOCANACHI AND OTHERS v. ELLIOTT.

Marine policy—Terrene risk—Goods in besieged town—"Restraint of princes"—Notice of abandonment—Total loss.

A marine policy in the ordinary Lloyd's form against the usual perils, including "arrests, restraints, and detentions of princes," on goods which are expressed in the policy to be carried by a route, which is (within the knowledge of the underwriters) partly by sea and partly by land, covers the risk of transit both by land and water, and if the goods are lost by the perils insured against whilst upon land, the assured are entitled to recover.

Where goods insured under a policy covering terrene risks, and against (inter alia) "arrests, restraints, and detentions of princes," are in course of their transit detained in a town by

EX. CH.]

RODOCANOCHI AND OTHERS v. ELLIOTT.

[EX. CH.]

reason of that town being regularly besieged, the detention is a "restraint of princes" within the meaning of the policy, which will give the assured the right to abandon and claim as for a total loss. Plaintiffs effected an insurance with the defendant by a Lloyd's policy in the ordinary form, "lost or not lost, at and from Japan and Shanghai to Marseilles and Leghorn and London, via Marseilles and Southampton, and whilst remaining there for transit," on silks, against the usual perils—"arrests, restraints, and detention of princes," &c., and it was agreed that the silks should be shipped by any of three named lines of steamers, one of which was the *Messageries Impériales*. That company, as was well known to underwriters, always sent such goods overland through France, i.e., by the Lyons Railway from Marseilles to Paris, and thence by the Northern Railway to Boulogne, and thence to London.

The silks were shipped at Shanghai, for London, on board a steamer of the *Messageries Impériales*, and reached Marseilles on the 27th Aug. 1870. There was then, and from the 15th July previously had been, war between France and Germany. The silks were despatched by the Lyons Railway, and arrived in Paris on or before the 13th Sept. The German armies, which were at that time advancing upon and gradually surrounding Paris, on the 19th completely invested it, held military possession of all the roads leading out of Paris, and prevented communication between it and all other places, by reason whereof it was impossible to remove the silk from Paris.

This state of siege continued, and on the 29th Sept., while the silks were detained in Paris, the plaintiffs gave notice of abandonment to the underwriters:

Held (affirming the judgment of the court below (ante, p. 21), that the policy covered the terrene risk of the land transit, that the goods were lost by the perils insured against, viz., restraint of princes; that notice of abandonment was given in reasonable time; and that, therefore, the plaintiffs were entitled to recover the sum insured from the underwriters as for a total loss.

ERSON from a decision of the Court of Common Pleas in favour of the plaintiffs upon a special case, which is set out, with the arguments, in the report below (ante, p. 21).

DUG, Q.C. (with him J. C. Mathews), for the defendants.—The doctrine of abandonment in insurance law is that the person abandoning must be in a position to abandon. The plaintiffs, however, had no property in the silks at the time of the so-called abandonment, for they had previously sold the goods to arrive in London, and therefore could not pass the property in them to the underwriters. [QUAIN, J.—But the sub-vendees were interested in the policy which was no doubt made for their benefit.] The sale of the goods "to arrive" was indeed contingent, and did not pass the property in them until their arrival. But when they did arrive they became the property of the purchasers, who, although not bound to take them when they arrived so late, were yet entitled to do so if they chose. [BRANWELL, B.—This point, which was not made below, divides itself into two: First, could the plaintiffs abandon? secondly, assuming that they could, would the fact of the vendees subsequently taking possession alter the effect of the

abandonment?] On the 7th Oct. 1870, when the notice of abandonment was given, the vendees were entitled to the silks. In *Jardine v. Leathley* (7 L. T. Rep. N. S. 783; 3 B. & S. 700), it was held that the deposit of a policy of insurance on a ship at sea, which is afterwards injured by perils insured against and condemned, does not invest the depositary with implied authority to give notice to the underwriters of abandonment as for a total loss. *Quere*, if there were a mortgage of the ship. But here the plaintiffs, having given the whole interest to the sub-vendees, even although the property had not passed, cannot give notice of abandonment. Secondly, the policy did not apply to the goods in Paris. *Prima facie*, a policy of marine insurance contemplates sea and not land risks: (*Harrison v. Ellis*, 7 E. & B. 465.) The temporary deposit of the goods on a land bank, in the case of *Petty v. The Royal Exchange Insurance Company* (1 Burr. 341) was a usual course of proceeding well known to the underwriters. [BRANWELL, B.—Your general proposition may be correct. Indeed, it is a truism to say that a maritime policy is limited to sea risks, but regard must be had to the words of this particular policy.] (The argument below on the terms of the policy was repeated.) Thirdly, there was no loss; (1), within the terms of the policy; (2), by restraint of princes; (3), entitling the assured to give notice of abandonment. As to *Gripel v. Smith* (ante vol. 1, p. 268; 20 L. T. Rep. N. S. 361; L. Rep. 7 Q.B. 404), relied on *contra*, it is distinguishable upon the plain ground of the wide distinction between an event operating as an excuse for nonperformance of a charter, and one creating a total loss as against an underwriter. He cited also *Hudkinson v. Robinson* (3 Bos. & P. 382). [QUAIN, J., referred to *Anbert v. Gray* (3 B. & S. 163).] There the vessel was actually taken possession of by the sovereign, and the goods compulsorily put ashore. So long as the goods are under the control of their owner there is no loss; there must be an exercise of the restraining power *in viâ*.

Field, Q.C. (with him *Theisiger*, Q.C.) for the plaintiffs.—[BRANWELL, B.—We need not trouble you upon the question as to the goods being covered by the policy during transit through France, nor upon the point as to whether the plaintiffs were competent to abandon them.] Then, first, there was a restraint of princes of an uncertain and indefinite duration; secondly, there was a loss thereby. [QUAIN, J.—Do you maintain that *Hudkinson v. Robinson* (sup.) is wrong?] If necessary; but we need not. It is obsolete, and moreover in *Schmidt v. United Insurance Company* (1 Johns. 249, §. 896), Kent, C.J., says, "As to whether a blockade of the port of destination be a peril within the policy, the only case in the English books that appears to have a bearing on the question is that of *Hudkinson v. Robinson* (3 Bos. & Pall. 389). The court there considered that the port of destination being shut, was a peril acting collaterally only, and not directly upon the subject. But that case arose upon the special memorandum in the policy, which required a peril operating to the total destruction of the article insured. It is not an authority beyond the question arising upon that memorandum; for with respect to the loss of the voyage, by reason of a blockade of the port of discharge, the peril operates as directly as any other restraint or detention" (p. 264). That was a blockade at the port of destine-

EX. CH.]

RODOCANACHI AND OTHERS v. ELLIOTT.

[EX. CH.]

tion. He cited also the authorities relied on below:

Salvus v. United Insurance Company, 15 Johns. 525;
Oliveira v. The Union Insurance Company, 3 Wheat. 183; 4 Curt. 193;
Ross v. Salvador, 3 Bing. N. C. 266;
Barker v. Blake, 9 East, 283;
Bird v. Jones, 7 Q. B. 743;
Gripel v. Smith, ante, vol. 1, p. 298; 25 L. T. Rep. N. S. 361; L. Rep. 7 Q. B. 404.

And also

1 Duer on Insurance, 111-114;
 2 Parsons on Insurance, 185;
 Webster on International Law, 819;
The Express, ante, vol. 1, p. 335; 26 L. T. Rep. N. S. 956; L. Rep. 3 Adm. 597;
The San Roman, ante, vol. 1, pp. 347, 609; 26 L. T. Rep. N. S. 948; L. Rep. 3 Adm. 588.

Doy, Q.C., in reply.—*Gripel v. Smith* (sup.) made a distinction between a restraint of princes likely to last so long as to entitle the shipowner to say, "I cannot complete my contract," and restraint which would entitle an owner of goods to claim insurance money for a constructive total loss. The American cases cited have now become disused; and, in America, the courts hold that a blockade, whether by blocking a vessel in or out of a port is restraint of princes; but if those were decided by analogy between a blockade and an embargo, there is a wide difference, for an embargo is in the nature of a preliminary declaration of quasi war, whereas blockade, on the contrary, no doubt interferes with the liberty of the ship, but not with the goods. [QUAIN, J.—The enemy would interfere with the goods also if they were going away.] The mere declaration of a blockade is no declaration of war against neutral ships. [QUAIN, J.—From p. 656 of 1 Duer on Marine Insurance, the author seems to think that there is more force in a siege than in a blockade.] In *Ross v. Salvador* (3 Bing. N. C. 246), Abinger, C.B., says, at p. 256: "There may be a forcible detention which may speedily terminate, or may last so long as to end in the impossibility of bringing the ship or the goods to their destination," when . . . "if a prudent man, not insured, would decline any further expense in prosecuting an adventure the termination of which will probably never be successfully accomplished, a party insured may for his own benefit, as well as that of the underwriter, treat the case as one of total loss, and demand the full sum insured." Here there were no such circumstances as justified abandonment. In 1 Arnould on Marine Insurance, p. 676, the difference between the continental law and our own as to abandonment is pointed out, and it is said that "In this country, however, it has been repeatedly decided, and must now be taken as clear insurance law, that neither interdiction of trade at the port of destination after risk commenced, nor interception of the voyage by blockade, or by the imminent and palpable danger of capture or seizure, amounts to a risk for which English underwriters are answerable under the common form of policy, either as an 'arrest, restraint, and detention,' or in any other way whatever." *Cur. adv. vult.*

June 16.—Judgment of the court (Bramwell and Pigott, BB., Quain and Archibald, JJ., and Amphlett, B.) was now delivered by

BRAMWELL, B.—The first point made by the defendant in the argument before us very faintly, and not at all in the court below, was that, supposing there was a loss within the policy, there

was no right of abandonment, the plaintiffs having sold the goods insured, and the vendees having claimed them on their arrival. The answer is, that if the plaintiffs had the right of abandonment they did abandon, and the abandonees, the underwriters, thereby acquired all the rights of the assured, including their right to the price of the goods from the vendees.

The second point made by the defendant was, that the policy was limited to marine risks. What was in contemplation of the parties does not matter, though we do not doubt that the assured must have had the whole journey in view. We must see what the policy says. It seems to us that it very clearly, in words, includes the whole transit by land as well as by sea. The words are: "At and from Shanghai to Marseilles and London, *via* Marseilles." The slovenly mode of saying, "*and*," if the words were critically examined, might make a difficulty, though not on this question; but bearing in mind the course of carriage and transit found in the case, there can be no doubt that the voyage or journey described includes a land passage through France. No doubt many of the perils are sea perils exclusively; "perils of the seas" are named, but many are common to land and sea, as "fire" and "thieves." With respect to the argument that, as all risks of craft are mentioned, it follows that while inland there is no insurance, the answer is, that those words are necessary to cover the risk of the original embarkation and final landing, which would not be included in the words "at and from," and "shall be arrived at." We see nothing to make us limit the plain words of the policy to the sea part of the transit.

There remains the question of whether there has been a loss from a peril within the policy. For, if so, it seems to us there was a right to abandon, there being a loss of the goods; the assured having lost all control over them for an indefinite time, which might extend to such a period as to cause at least a loss or failure of the particular adventure, and possibly a total loss of the goods, or more or less damage to them. In such a case the assured has a right to throw the risk on the underwriter: (*Phillips on Insurance*, p. 1620.)

Now the facts found are, that the goods safely arrived at Paris; that on the 10th Sept. carriage by railway from Paris to Boulogne became, and till after the commencement of this suit continued, impossible, in consequence of the German armies having taken possession of parts of the railway and intercepted all communications thereby between Paris and Boulogne. This was the usual way in which such goods were sent from Marseilles, en route to London. It was not said that they could not have been sent to Havre or other ports, but we think this immaterial. For, supposing they could and ought to have been, but were not, supposing that in this the carriers were guilty of a breach of duty, that would not make the loss the less a loss to the assured. It is afterwards found that while the silks remained at Paris, on the 19th Sept. the German armies completely invested Paris, and that from that day until the commencement of the action they completely surrounded and besieged Paris, and held military possession of all roads leading out of Paris, and prevented communication between Paris and all other places, by reason whereof it was impossible to remove the silks from Paris. The result of this state of things undoubtedly

was, that the goods were prevented from leaving Paris, and the whole adventure broken up, and so continued at the time when the notice of abandonment was given, and up to the commencement of the action.

We are of opinion that this amounts to a constructive total loss of the goods by restraint of kings and princes, within the terms of the policy. This is not a mere temporary retardation of the voyage, but a breaking up of the whole adventure.

It is well established that there may be a loss of the goods by a loss of the voyage in which the goods are being transported, if it amounts, to use the words of Lord Ellenborough, "to a destruction of the contemplated adventure:" (*Anderson v. Wallis*, 2 M. & S. 240; *Barker v. Blakes*, 9 East, 283.)

But it is said that there has been no loss of the goods by restraint of kings and princes in this case, because there has been no specific action on the goods themselves. It is true that there was no actual seizure or arrest of the goods, nor was there any specific or public order prohibiting the transport of goods from the besieged city; but the city in which the goods were was besieged and completely invested, all commerce was stopped, and the goods were as effectually prevented from coming out as if they were actually seized by the German army. What we have to look at is whether, by the immediate and direct pressure of the German army, the goods were prevented from reaching their destination. A siege like the present, which was intended to reduce the besieged place by famine, is a prohibition of all commerce and intercourse with the besieged place. Neutrals would have no right to cross the German lines in order to bring out their goods, or for any other purpose that would or might in the least interfere with the military operations. In the case of a maritime blockade, neither the ships nor the goods on board of them within the port, and which are prevented from coming out, are seized or arrested, or in the actual possession of the blockading force; there is no specific action on the ships or goods beyond the prohibition against leaving the port. But surely they are "restrained" from coming out, and the prosecution of the adventure is thereby effectually impeded. We quite agree with the opinion expressed on this subject by the Supreme Court of the United States, in *Oliveira v. Union Insurance Company* (3 Wheat. 183), and which was quoted before us, that the inhabitants of a besieged town, or the ships in a blockaded port, may be properly said to be "restrained" from coming out by the action of the besieged army or blockading force. A siege, where the place is completely surrounded and invested, is a stronger case than a mere maritime blockade. In the latter case, the land communications are unaffected, and the commerce by sea only is interdicted. But we are unable to draw any material or substantial distinction between the two, so far as they operate to prevent or restrain all intercourse or commerce, or the entry into or exit of any goods from the besieged or blockaded places. Grotius, Book 3, l. 5, places *oppidum obsessum vel portus clausus*, exactly on the same footing as regards the right of neutrals to hold commerce with the belligerents; and Lord Stowell's definition of a blockade is still more applicable to a siege like the siege of Paris than to a blockade merely maritime. "A blockade," he says, "is a sort of circumvallation round a place

by which all foreign connection and correspondence is, as far as human force can effect it, to be entirely cut off. It is intended to suspend the entire commerce of that place, and a neutral is no more at liberty to assist the traffic of exportation than importation:" (*The Vron Judith*, 1 C. Rob. 152.)

If, therefore, the effect of the siege of Paris was to cut off entirely all foreign connection and correspondence, we think that the goods in this case were restrained or prevented from leaving Paris by the operation of that siege. It appears to us that the words, "restraint and detentions of all kings, princes, and people of what nation, condition, or quality soever," are wider and more comprehensive words than those which precede them, and that they include and cover the case now under consideration. And, as a verbal matter, we may observe that "restraint" is a word more properly applicable to persons than to goods, so that a restraint of goods means a restraint of those having the custody of goods. We cannot help thinking that the doubt arises through the speedy arrival of these goods uninjured. Had they been perishable goods destroyed by the delay, it would be difficult to say their loss was not caused by restraint of princes.

For these reasons we are of opinion that the goods insured by the present policy were either restrained from leaving Paris, or were detained within Paris by the immediate and direct action of the German army, and were therefore so lost by one of the perils insured against, as to entitle the assured to abandon them to the underwriters and claim for a total loss. We think, therefore, that the judgment of the court below ought to be affirmed.

Judgment affirmed.

Attorneys for plaintiffs, Maribby and Terry.

Attorneys for defendant, Wattons, Bull, and Walton.

COURT OF ADMIRALTY

Reported by J. F. ASHMEAD, Esq., Barrister-at-Law.

Thursday, June 4, 1874.

THE MERLE.

Collision—Damage to pier by ship—Harbours, Docks, and Piers Clauses Act 1847—Liability of ship for inevitable accident—Rights of undertakers—Transfer by liquidator under Companies' Act 1862.

The owners of a pier, who are undertakers within the meaning of the Harbours, Docks, and Piers Clauses Act 1847, acquire, under sect. 74 of that Act, a maritime lien in respect of any damages done to their pier by a ship, and may proceed in rem to recover that damage in the High Court of Admiralty, and the shipowners are debarred by sect. 74, from setting up the defence of inevitable accident.

Dennis v. Tovell (27 L. T. Rep. N. S. 482; L. Rep. 8 Q. B. 110) followed.(a)

(a) COURT OF QUEEN'S BENCH.

Nov. 13, 1872.

DENNIS (app.) v. TOVELL (resp.)

This was a case stated by the Justices of Suffolk under 20 & 21 Vict. c. 43. A complaint was preferred before the magistrates against the appellant by the respondent under sects. 74 and 75 of 10 Vict. c. 27 charging that the appellant was owner of a certain vessel called the *Ada*, which said vessel on the 27th Sept. 1871 did damage to the pier and works of the Harwich

ADM.]

THE MERLE.

[ADM.]

Where a limited company, duly constituted by provisional order made under the General Piers and Harbours Act 1861 and 1862, as the undertakers of a pier, within the meaning of the Harbours, Docks, and Piers Clauses Act 1847, is voluntarily wound-up, and its property sold by the liquidator, a purchaser of the pier has transferred to him both the property and the rights of the original undertaker, becomes the undertaker, within the meaning of the last-mentioned Act, and can recover against a ship for damage done to his pier by that ship, although such damage be the result of inevitable accident.

This was a cause of damage, instituted on behalf of David Laidlaw and Robert Laidlaw, of London, engineers and ironfounders, owners of the Deal Pier, in the county of Kent, against the barque

Harbour Conservancy Board to the amount of 50*l*. by striking violently against the pier and works and breaking parts of the same, the vessel not being under the charge of a licensed pilot.

Upon the hearing of the complaint it was proved on the part of the respondent that the appellant's vessel did the damage alleged, that the vessel was not in charge of a licensed pilot; and on the part of the appellant it was proved that the damage was the result of inevitable accident caused by stress of weather, and did not arise from any wilful act or negligence of the master or other persons in the said vessel; it was contended, therefore, on the part of the appellant that he was not liable to pay to the said Harwich Harbour Conservancy Board the amount claimed for the damage so done.

The justices were of opinion that the appellant became liable under sect. 74 of the above Act to pay the amount of damage, whether the damage was the result of inevitable or unavoidable accident or otherwise, and ordered the appellant to pay the 50*l*. accordingly, subject to the opinion of the Court of Queen's Bench upon this case.

The question for the opinion of the court was whether the damage to the pier and works being the result of an inevitable accident, caused by stress of weather, and not arising from any wilful act or negligence of the master or other persons in the vessel, the appellant became liable to pay the amount claimed for the damage done.

Graintham for the appellant.—No doubt the first part of sect. 74 is sufficiently general to cover cases of inevitable accident, but it could not have been the intention of the Legislature to make owners liable for inevitable accident. This is indicated by the second part of the section showing the real intention was only to make liability follow upon negligence, because it makes those in charge liable if the damage occur through their "wilful act or negligence." (Cockburn, C.J.—It may seem strange, but the Legislature has said that the owner of the ship shall be liable for the accident, however occurring. It may have been supposed that such a case would seldom occur.) The proviso of the section strengthens my contention; if the owner is not liable when he has a pilot on board, why should he be liable in all other cases, even for the act of God?

Phillbrick (H. Tindal Atkinson with him), for the respondents, was not called upon.

BLACKBURN, J.—The Chief Justice, who has just left the court, has already intimated his opinion, and he agrees with me that it is clear that the Legislature, whether intentionally or not, has said that the owner of any vessel shall be answerable for any damage done by his vessel to a dock, harbor, or pier. The Legislature has put the owner in the same position as a man who keeps a dangerous animal, who must do so at his peril and be answerable for any injury the animal may do. It enacts simply that the owner shall be liable for any damage the vessel may occasion, whether caused by negligence or wilful neglect, or by inevitable accident from stress of weather. It appears to me that the Legislature has clearly said so, whether it intended it or not.

QUAIN, J.—I am of the same opinion.

Attorneys for the appellant, *Baily and Whitehouse*, for Chapman, Ipswich.

Attorneys for the respondent, *J. L. Morris*, for *Phillbrick and Son*, Colchester.

Merle, her tackle, apparel, and furniture, and the freight due for the transportation of the cargo now or lately laden therein, and against the owners of the *Merle*, defendants intervening.

The plaintiff's petition was as follows:—

1. At the time of the happening of the collision herein-after stated, the plaintiffe were possessed of a certain pier at Deal, in the county of Kent, called or known as Deal Pier, and of certain works connected therewith, and were at such time the undertakers of the said pier within the true intent and meaning of the Harbours, Docks, and Piers Clauses Act 1847, and sect. 74 of that Act.

2. About between 3 a.m. and 4 a.m. on the 19th Jan. 1873, the above-named vessel *Merle* came into collision with and did damage to the said pier, and the works connected therewith, to an amount far exceeding the sum of 50*l*. The *Merle* was not at such time in charge of a duly licensed pilot, whom her master or owner was bound to employ or put her in charge of.

3. By virtue of the provisions of sect. 74 of the said Act, the owners of the *Merle* are answerable to the plaintiffe for the said damage done to the said pier and works by the *Merle*.

4. Before, and at the time of the said collision, a light was burning on the head of the said pier, and the plaintiffe allege that the said collision and damage were occasioned by some neglect or default on the part of the defendants, or on the part of those on board and in charge of the *Merle*, in not sending her to sea in a proper and manageable condition, or in not supplying her with proper ground tackle, or in not taking proper measures and exercising proper care and skill with regard to tending her, bringing her up, sailing her, and managing her so as to keep her clear of the said pier.

The defendants in their answer pleaded that the *Merle*, whilst on a voyage from London to the West Indies, cast anchor in the Downs; that the weather becoming worse, she bore up for Dungeness to obtain shelter; that whilst anchored off Dungeness, she parted from her cables, and was compelled to run for the Downs, before a hurricane from the S.W. by W.; when off Deal her master again cast anchor, but by reason of the violence of the weather the chain again parted, and the barque was driven ashore to windward of the pier, and then became unmanageable, drifted along the beach, and was forced between the columns of the pier. The answer then continued as follows:

5. Those on board the *Merle* took proper measures and exercised proper care and skill with regard to tending the *Merle*, and bringing her up and sailing her and managing her; and everything was done that could be due by them to avoid the said disaster, and to keep the vessel clear of the said pier and to prevent damage to the same.

6. The damage complained of was not occasioned by any negligence on the part of the defendants, or those on board the *Merle*, but was, so far as they were concerned, the result of inevitable accident.

7. The defendants deny that the plaintiffe were possessed of the said pier at Deal and of the works connected therewith, and that they were at such time the undertakers of the said pier as alleged; and the defendants further deny the several allegations in the said petition, save such as are admitted by this answer.

8. The defendants further say that they are not answerable to the plaintiffe for the said damage, as alleged in the third article of the said petition; and that the Harbours, Docks, and Piers Clauses Act 1847, does not confer any right upon the plaintiffe to proceed in *rem* against the *Merle*, and does not confer any right upon the plaintiffe to proceed in this suit for damage resulting from inevitable accident.

The pleadings were thereupon concluded.

At the hearing, evidence was called by plaintiff to establish negligence on the part of the defendants; but the learned judge, assisted by two Elder Brethren of the Trinity House, ruled that the collision with the pier was occasioned by the *Merle* becoming unmanageable through stress of weather, and was the result of inevitable accident.

[ADM.]

THE MERLE.

[ADM.]

Thereupon the following facts were proved by the plaintiffs, or admitted by the defendants :

The Deal Pier had been constructed under a provisional order of the Board of Trade, made in pursuance of the General Piers and Harbours Act 1861 (25 & 26 Vict. c. 57). The provisional order authorising the formation of the pier is the second order set out in the schedule to the latter Act. The pier was duly constructed under the provisional order by the promoters named therein, the Deal and Walmer Pier Company (Limited), who were registered as a company in 1861, and was worked by them until the 11th May 1866, when the company, by resolution of the shareholders, went into liquidation and was voluntarily wound-up by a liquidator duly appointed under the Companies' Act 1862 (25 & 26 Vict. c. 89). The pier, and all the property and goods appertaining thereto, were sold at public auction by the liquidator, by virtue of the powers given by the last-mentioned Act, and were purchased by and duly transferred to the plaintiffs by deed, dated the 23rd Aug. 1866, and made between the liquidator of the first part, the company of the second part, and the plaintiffs of the third part; and the pier and works thereof became the property of the plaintiffs, in whose possession and under whose management they were at the time of the damage done. Except the provisional order above mentioned, no provisional order or Act of Parliament authorising the plaintiffs to become promoters or undertakers of the pier had been obtained, and their title to the pier was entirely derived from the sale to them by the liquidator of the company.

On these points two questions were raised; first, whether the Harbour, Docks, and Piers Clauses Act 1847 (10 & 11 Vict. c. 27), gives undertakers of a pier the right to recover for damage done to their pier by collision resulting from inevitable accident; secondly, whether the plaintiffs were undertakers within the meaning of that Act.

By the Harbour, Piers, and Docks Clauses Act 1847, it is enacted that

2. The expression "the special Act," used in this Act, shall be construed to mean any Act which shall hereafter be passed authorising the construction or improving of an harbour, dock, or pier, and with which this Act shall be incorporated; . . . and the expression, "the undertakers" shall mean the persons by the special Act authorised to construct the harbour, dock, or pier, or otherwise carry into effect the purposes of the special Act with reference thereto.

74. The owner of every vessel or float of timber shall be answerable to the undertakers for any damage done by such vessel or float of timber, or by any person employed about the same, to the harbour, dock, or pier, or the quays or works connected therewith, and the master or person having the charge of such vessel or float of timber through whose wilful act or negligence any such damage is done, shall also be liable to make good the same; and the undertaker may detain any such vessel or float of timber until sufficient security has been given for the amount of damage done by the same. Provided always, that nothing herein contained shall extend to impose any liability for any such damage upon the owner of any vessel where such vessel shall, at the time when such damage is caused be in charge of a duly licensed pilot, whom such owner or master is bound by law to employ and put his vessel in charge of.

By the General Piers and Harbours Act 1861, it is enacted that

Whereas it is expedient to encourage and facilitate the formation, management, and maintenance of piers and harbours in Great Britain and Ireland; and whereas, in certain cases where it is now necessary for Parliament to special local Acts, the expense of obtaining such special

Acts serves to prevent many necessary works being undertaken; be it enacted, &c.

3. Persons desirous of obtaining authority to construct any works under this Act, or to levy rates at any existing or at any new works, may make application by memorial to the Board of Trade to grant provisional orders as hereinafter mentioned.

15. After such inquiries as the Board of Trade may think expedient, and after the consent of the Admiralty, &c., shall have been obtained, and the same shall have been certified to the Board of Trade in such manner as they may require, the Board of Trade may settle and make a provisional order; and every such order shall be made and take effect subject and according to the following provisions: It shall specify who are to be the undertakers of the works. . . . It may incorporate by reference The Commissioners Clauses Act 1847, The Companies Clauses Act 1845, The Companies Clauses (Scotland) Act 1845, The Harbour, Docks, and Piers Clauses Act 1847, The Land Clauses Consolidation Act 1845, The Land Clauses Consolidation (Scotland) Act 1845, or any part of such Acts, except so much of the said two last-mentioned Acts as relate to the purchase of land otherwise than by agreement; the expression "the special Act," used in such incorporated Acts, shall be deemed to apply to such provisional order.

16. After the making of any order under this Act the promoters shall deposit a copy of the same at the office of the clerk of the peace of any county, riding, or division in England or Ireland, or in the office of the principal sheriff clerk of any county, district, or division in Scotland in which the proposed works referred to in such order are situate; and notice of such deposit shall be given by advertisement once in the London, Edinburgh, or Dublin Gazette, and in some newspaper circulated in the county as aforesaid, and after it shall have been certified to the Board of Trade by the promoters that such deposit and advertisement as last aforesaid have been made, and that fourteen days have elapsed from the date of such advertisement, the Board of Trade shall, within three calendar months from the beginning of the session of Parliament in any year, cause a Bill to be introduced into either House of Parliament for the purpose of obtaining an Act for the confirmation of such order, and the order to be confirmed shall be specified in a schedule to the Bill introduced for confirming the same, and shall be set out at length therein, and until such confirmation, no provisional order shall be of any validity or force whatever; and every Act of Parliament confirming such order shall be deemed a Public General Act.

By the General Pier and Harbour Act 1861 Amendment Act (25 Vict. c. 19), certain other provisions as to advertisement are enacted, and it is further provided that

19. Subject to the provisions of the Principal Act, and this Act and any provisional order, the Harbours, Docks, and Piers Clauses Act 1847 shall be deemed to be incorporated with every provisional order.

By the provisional order relating to Deal Pier, set out in the schedule to the Piers and Harbours Confirmation Act 1862, and by that Act confirmed, it is provided:

1. The Deal and Walmer Pier Company (Limited), hereinafter called the Company, shall be the undertakers of the works authorised by this order.

Mileward, Q.C. and E. C. Clarkson, for the plaintiffs.—First, even though the collision was an inevitable accident, the defendants are liable therefor. By the Harbours, Dock, and Piers Clauses Act 1847, the owners of vessels are liable to make good to the undertakers of a pier any damage done by their vessel, even if it be occasioned by an inevitable accident. This has been decided by a court of common law, and is binding upon this court: *Dennis v. Torrell*, see note ante, p. 402; 27 L. T. Rep. N. S. 482; L. Rep. 5 Q. B. 10. *Einer Wear Commissioners v. Adamson*, ante p. 145, 29 L. T. Rep. N. S. 530.

[*Sir R. Phillimore*.—These cases seem to be hindering decisions on the construction of a statute, and

ADM.]

THE MERLE.

[ADM.]

I must rule in accordance with them, unless the defendants can distinguish them in any way.]

Secondly, the plaintiffs are "undertakers," within the meaning of the Harbours, Docks, and Piers Clauses Act 1847. The Deal and Walmer Pier Company having been duly constituted an undertaking by the provisional order made under the General Pier and Harbour Act 1861, and under the confirming Act of 1862, and having duly made their pier under the powers conferred upon them, were capable of transferring their property and rights in the pier to other persons. This was effected by the official liquidator, acting under the Companies' Act 1862. The liquidator is empowered by that Act (sect. 85) to transfer to the purchaser all the real and personal, and hereditible and movable property, effects, and things in action of the company. This has been done, and the transfer must be taken to carry with it all rights of the company. The words, "things in action," alone show that not merely the rights existing at the time of the transfer, but also those which will come into operation at a future time, pass with the property. Among these rights are the privileges of undertakers, and we submit that with the transfer of the property the rights of undertakers to recover against a ship doing damage to their property, without any exemption in the case of inevitable accident, are transferred.

Bull, Q.C. and Gainsford Bruce, for the defendants.—Assuming that the defendants would be personally liable, upon the authorities cited, to the undertakers of this pier, two questions arise in the case; first, whether the plaintiffs are undertakers within the meaning of the Harbours, Piers, and Docks Clauses Act 1847, and the subsequent Acts; secondly, whether those Acts apply so as to render the ship liable in this court, this being a proceeding *in rem*, the damage having been found to be the result of inevitable accident.

First, are the plaintiffs undertakers? The Harbours, Docks, and Piers Clauses Act 1847, defines the persons who are or may be undertakers, and the special Act and the provisional order therein appoint the Deal and Walmer Pier Company (Limited), as the undertakers to make this pier. The transfer took place in 1866, and although the plaintiffs would acquire any rights of action then existing, they cannot be said to have become possessed of a right which has arisen since, and which belongs only to undertakers, unless by the transfer they have become undertakers. This cause of action did not arise until after the transfer. We submit that the plaintiffs are not undertakers, within the meaning of the Act, and cannot recover without showing negligence on the part of the defendants. The only persons appointed undertakers by the provisional order, are the company; even the words, "or their assigns," are not inserted. It is unreasonable to suppose that by parting with their property the company are able to transfer the exceptional rights which they themselves possess. [Sir R. PHILLIMORE.—Suppose the original undertakers die? Do their rights as undertakers die with them, or do their successors take them?] That question cannot arise in the case of a corporation which need not be dissolved; it might very well be arranged that the shares only should be transferred. If it is dissolved, and the grant of the Board of Trade is to it alone, then no person or persons remain who can be called undertakers. The purchasers of the

undertaking do not become undertakers. [Sir R. PHILLIMORE.—The joint operation of the General Piers and Harbours Act 1861, and the Companies' Act 1862, enables the original undertakers to part with their property to purchasers, but do the purchasers in taking the property parted with take also all the rights of the original undertakers?] We submit that the purchasers take none of the rights of the original undertakers, *qua* undertakers, but only such rights as belonged to them in their ordinary capacity as owners of property. [Sir R. PHILLIMORE.—By the Companies' Act 1862, sect. 85, the liquidator may sell all a company's property, and "things in action." What is the meaning of "things in action," as there used? Does it not indicate that all rights of action are transferred by the sale?] We submit that it passes only the rights of action existing at the time of the transfer, not rights of action which accrue thereafter; the latter rights must be founded upon something possessed by the holders of the property themselves. The term "undertakers," only includes such persons as are expressly authorised, by the words of their Act or provisional order, to construct or maintain a pier or harbour: (see the Harbours, Docks, and Piers Clauses Act 1847, sect. 2; the General Piers and Harbour Act 1861, sect. 15; and the General Pier and Harbour Act Amendment Act 1862, sect. 19.) The power to construct or maintain a pier is given under those Acts by the Board of Trade, in the first instance, and by Parliament confirming the act of the Board of Trade; without that confirmation the order of the Board of Trade would be of no effect. The Board of Trade have to exercise a judgment in the matter, and to determine whether it is a proper thing that a pier should be constructed, and whether the promoters of the scheme are proper persons to be undertakers. No doubt undertakers may part with their property, and if they form a company and are wound-up, they will part with it under the Companies Act 1862, but this will not create the purchasers undertakers. The purchasers are not authorised by the Board of Trade to construct or maintain the pier; their qualifications have never been submitted to the Board of Trade. We contend that before the plaintiffs can become "undertakers," they must apply to the Board of Trade for a provisional order, authorising them to maintain this pier, and this order, when obtained, must be confirmed by Parliament. Under the Piers and Harbours Acts of 1861 and 1862, the Board of Trade must necessarily inquire into the persons who are to be undertakers, and the right of petition against confirmation of the order is expressly preserved by the 17th section of the former Act. In *The North-Eastern Railway Company v. The Leasing Local Board* (L. Rep. 5 Q.B. 157), a railway, originally constructed without Parliamentary powers, and afterwards sold to a railway company under an Act of Parliament, and enlarged and used for traffic under the provisions of that Act, was rated to a general district rate under the Local Government Act 1868, and the railway company objected to be rated on the ground that the railway must be considered as "a railway constructed within the powers of an Act of Parliament for public conveyance," within the meaning of sect. 55 of the latter Act, and, consequently, rateable only at one-fourth the annual value; the Court of Queen's Bench, however, held that although the Legislature might have provided for such a case, if it had

[ADM.]

THE MERLE.

[ADM.]

been brought before it, the words of the Act did not exempt the railway; it could not be said to have been "constructed" under any Act of Parliament. So in this case, the plaintiffs cannot be said to be "persons by the special Act (provisional order), authorised to construct" this pier. They have derived no authority from the provisional order, and are, consequently, not undertakers. Undertakers are, by the Act of 1847, entitled to make bye-laws and to enforce them before magistrates: (sects. 83, *et seq.*) We submit that the plaintiffs could not make bye-laws which would be enforceable by magistrates, and are, consequently, not undertakers.

Secondly, a ship cannot be made liable in this court in a proceeding *in rem*, if it is proved that the damage done was the result of inevitable accident. The Harbours, Docks, and Piers Clauses Act gives in strictness no right of action at all, except the right of recovery before magistrates; it is not intended to give the right of proceeding *in rem* in this court. That depends upon the 7th and 35th sections of the Admiralty Court Act 1861, and if that right is exercised, it can only be exercised subject to the rules of law prevalent in this court, and by those rules proof of inevitable accident entitles a ship to dismissal from the suit. An action *in rem* only lies for a collision where there has been a maritime tort creating a maritime lien. The Harbours, Docks, and Piers Clauses Act, sect. 74, cannot be said to create such a maritime tort. [Sir R. PHILLIMORE.—Has not the Legislature enacted that such an act as this shall be treated as a tort?] Not as a maritime tort creating a lien. If this had been a suit *in personam*, other considerations might arise, but in a suit *in rem*, there can be no liability, unless the ship itself is liable, and that is not the case where the defence of inevitable accident is established.

Mitward, Q.C., in reply.—In the case of *The North-Eastern Railway Company v. The Leadgate Local Board* (*ubi sup.*), it was contended that the words, "used as a railway constructed under the powers of an Act of Parliament," could be construed so as to mean "used under an Act of Parliament," only without having been so constructed, but the court held that they must give effect to the word "constructed." In this case, however, there is a great difference; there is good reason for this special right being given to any person or persons who shall undertake to construct or maintain a pier; it is for the public benefit that piers should be erected on dangerous shores. [Sir R. PHILLIMORE.—But the argument is, that the Act meant to give the privilege only after the Board of Trade had had the opportunity of examining the qualifications of the persons promoting the undertaking.] In such a case as this it would not be possible for the Board of Trade to get the plaintiffs before them; no order to construct a thing already constructed could be made. The Deal and Walmer Pier Company (Limited) are the only undertakers named in this order; but suppose a number of individuals had been named, and they were to die without assigning their rights, would the undertaking and the rights under it come to an end? If such were the case, there would be no power to take tolls or even to block up the foreshore with the pier, if its removal were demanded. The pier might be treated as an abandoned undertaking, under sect. 8 of the Piers and Harbours Act 1861,

Amendment Act 1862, and be removed by the Lords of the Admiralty. Such a result would be absolutely unreasonable, and would stultify the provisional order.

Secondly, as to this being a proceeding *in rem*. The 74th section of the Harbours, Docks, and Piers Clauses Act 1847, gives the undertakers a lien for damage done to their works, and they may detain a ship till security is given. Clearly the right court to enforce such a lien is this court, which by the Admiralty Court Act 1861 (24 Vict. c. 10), sect. 7, has "jurisdiction over any claim for damage done by any ship." And by sect. 35, this jurisdiction may be exercised *in rem*.

Sir R. PHILLIMORE.—In this case there are two questions before the court: first, whether the present plaintiffs, supposing them to be entitled to proceed as undertakers can recover the damages sustained by their property, although caused by an inevitable accident; secondly, whether the plaintiffs, if the defendant's vessel is so liable under the Act, represent the undertakers within the meaning of the Acts which have been cited to-day, so as to acquire undertakers' rights and privileges. Arising in connection with the first point there was a third contention, that even if the plaintiffs could recover at common law, this is a proceeding *in rem*, and the words of the statute do not apply to a proceeding of that nature.

The first statute referred to was the Harbours, Docks, and Piers Clauses Act 1847 (10 Vict. c. 27), and the 74th section of that Act is as follows: "The owner of every vessel or float of timber shall be answerable to the undertakers for any damage done by such vessel, &c." [His Lordship read the whole of the section, as given above:] The next statute referred to was the 24 & 25 Vict. c. 45, entitled, "An Act to facilitate the formation, management, and maintenance of Piers and Harbours in Great Britain and Ireland;" and that Act recites that "whereas, it is expedient to encourage and facilitate the formation, management, and maintenance of piers and harbours in Great Britain and Ireland; and whereas, in certain cases where it is now necessary to apply to Parliament for special local Acts, the expense of obtaining such special Acts serves to prevent many necessary works being undertaken;" and then enacts a number of clauses, the substance of these new provisions being that the Board of Trade shall have power to make orders which, after approval by statute, shall be binding in law.

Now, before I consider the effect of this latter statute, I must deal with the first question, viz., whether the original undertakers had a right of action against a vessel injuring their property, although that injury might have been found to be the result of inevitable accident. The words of the Act itself seem to be quite plain, and make a vessel liable under such circumstances. Moreover, there are two decided cases to which I have already referred during the argument; one is *Dennis v. Todd* (27 L. T. Rep. N. S. 482; L. Rep. 8 Q.B. 10), in which the Lord Chief Justice and Blackburn and Quain, JJ., concurred, saying that the Legislature, whether intentionally or not, has made the owners of ships liable for all damage, whether caused by stress of weather or otherwise. The same doctrine seems to have been laid down in another similar case following the previous decision, *River Wear Commissioners v. Adamson* (29 L. T. Rep. N. S. 520; 2 Asp. Mar.

[ADM.]

THE MERLE.

[ADM.]

Law Cas. 145). The effect of these decisions is to make a ship injuring a pier or harbour, within the meaning of the Act under consideration, liable to make good all such injury. In a recent case I laid down that it is the duty of this court to follow the decisions of the courts of common law on the construction of a statute. I therefore pronounce that, according to the construction of this section, so far as I am compelled to put a construction upon it, it does mean that the vessel is liable to the undertakers for the damage which by inevitable accident she has inflicted.

Now, the second question arises out of the contention that the plaintiffs are not undertakers within the meaning of the Acts of 1847 and 1861, and the question whether the plaintiff has or has not succeeded to the right of the original undertakers, depends upon the construction to be put upon that Act, and subsequent statutes establishing and regulating the undertakings.

I should state here that the original company has been dissolved—it was admitted by the defendants—and that the property has, subject to the construction to be put upon these Acts, devolved upon the plaintiffs.

It has been contended that the right of recovery in cases of inevitable accident vests only in original undertakers, or in such persons as have duly obtained a second order of the Board of Trade, duly confirmed by statute.

The next statute to which I must refer is the Companies Act 1862 (25 & 26 Vict. c. 89), sect. 95, by which it is enacted that the official liquidator, in the case of a company being wound-up in court, shall have power, by the sanction of the Court of Chancery, to do the following things: "to sell the real and personal property and heritable and movable property, effects, and things in action of the company, by public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels." In the present case these powers have been exercised by a voluntary liquidator winding-up the original company out of court, and that case is provided for by sect. 133 of the Companies' Act, which provides that, among the consequences ensuing upon the voluntary winding-up of the company, "the liquidators may, without the sanction of the court, exercise all the powers by this Act given to the official liquidator."

Now the 25 & 26 Vict. c. 51 has been referred to to show that the persons who originally undertook the erection of this pier had proceeded regularly, and had had conferred upon them all the rights of undertakers under the Harbours, Docks, and Piers' Clauses Act 1847. That was an Act to confirm certain provisional orders made under the Act of 1861, and it provides that the provisional orders in the schedule thereto should be confirmed. The second of the provisional orders set out in the schedule relate to the construction and maintenance and regulation of a pier at Deal by the Deal and Walmer Pier Company. Now there is no doubt at all that upon the construction of the various statutes, and upon the facts admitted before me to-day, the present plaintiffs are, under and by reason of the transfer effected by the liquidator of that company, in possession of all the property effects and choses in action of the Deal and Walmer Pier Company, and consequently of the pier damaged by the defendant's ship; but it is said that, as they are not the original undertakers,

and as they have not obtained from the Board of Trade a provisional order confirming them in their possession, and establishing them as the actual undertakers, they must be considered as proprietors of the property and choses in action of the pier company, without being clothed with the rights of undertakers, and that, consequently, they cannot claim the right of recovery in this case against the owner of a vessel damaging the pier, under sect. 74 of the Harbours, Docks, and Piers Clauses Act 1847.

The construction of these Acts is by no means easy, and I have had considerable difficulty in coming to a decision upon them, but I have arrived at a conclusion in which I am justified by the consideration of the preamble of the General Piers and Harbours Act 1861, which I have before quoted. I consider that it must have been the intention of the Legislature that the privileges of the original undertakers have been, by the act of transfer of the liquidator before described, conferred upon the present plaintiffs, and that they have in consequence the same right as the original undertakers to proceed against a ship doing injury to their property under the 74th section of the Harbours, Docks, and Piers Clauses Act 1847. There remains one other point to be considered.

It is said, however, that the original undertakers would have had no right to institute a suit *in rem* in this court, and at the same time seek to avail themselves in such a suit of the provisions of this section. The material words of the section are, that "the owner of every vessel, &c., shall be answerable to the undertakers for any damage done by such vessel, &c. . . . and the undertakers may detain any such vessel, &c. . . . until sufficient security has been given for the amount of damage done by the same." Now it is said, as I understand Mr. Butt's argument, that no maritime tort has been committed in this case, and that there is no lien upon the vessel for the damage done, because the collision, having been found to be the result of inevitable accident, no lien attaches, according to the rule of this court; the reason for this rule being that a lien is only consequent upon some wrongful act done by the shipowner or his servants. It was further contended that, even if a lien was created by the words of the statute, it was not a maritime lien, and would not travel with the transfer of the property to the plaintiffs. This objection has been partly answered by what I have already observed, but I must express my opinion, however, that the section does place such damage as this, even where resulting from inevitable accident, in the category of damage giving a maritime lien upon the ship inflicting it; and more especially I say so when I read the words by which it is provided that the undertakers shall have the security of the ship, and may detain it for the payment of the damage.

I have arrived at the conclusion that all the objections of the defendants have failed, and I must pronounce that the plaintiffs are entitled to recover.

Solicitors for the plaintiffs, Gregory, Rowcliffe, and Co.

Solicitor for the defendants, Thomas Cooper.

ADM.]

THE C. S. BUTLER.

[ADM.]

July 16 and 22, and Aug. 6, 1874.

THE C. S. BUTLER.

Collision—Lights—"Ship"—Trinity House lighter—Vessel employed exclusively in river navigation, propelled by sails and oars—Regulations for preventing collisions at sea—Thames Conservancy byelaws.

A Trinity House lighter, which is a vessel propelled by sails as well as oars, but is exclusively employed in the navigation of the river Thames and never goes to sea, is not a "ship" within the meaning of the Merchant Shipping Acts, and is not bound to carry, when under weigh in the Thames, the lights prescribed by the Regulations for preventing Collisions at Sea to be carried by all sailing vessels; and, as the existing byelaws made under the Thames Conservancy Acts 1857 and 1864 (20 & 21 Vict. c. cxxii; 27 & 28 Vict. c. 113) contain no provision as to the lights to be carried by sailing vessels navigating the Thames, Trinity House lighters are under no obligation to carry lights when under weigh in that river. (a)

THIS was an appeal from a decree of the City of London Court (Admiralty Jurisdiction) in a cause of collision instituted on behalf of the Corporation of the Trinity House of Deptford Strond, the owners of the barge or lighter No. 34, against the owners of the steamship *C. S. Butler*. The cause was dismissed by the City of London Court with costs, and from this decree the Corporation of the Trinity House appealed.

The ground of the judgment in the court below was that the Trinity House lighter did not, at the time of the collision, carry a light. No shorthand writer was employed in the court below, and the

(a) The consequence of this decision has been that the Thames Conservancy Board have made by-laws providing that all vessels navigating the river Thames, whether propelled by sails or oars only, shall exhibit lights between sunset and sunrise.

[There were only two questions in the case. First, whether the barge was a "ship" within the meaning of the Merchant Shipping Acts; secondly, whether there was any Conservancy rule requiring her to carry lights. These being the only questions, it is, perhaps, to be regretted that the learned judge thought it necessary to express an opinion as to the extent of the jurisdiction of the Conservancy Board. To hold that the Conservancy Board have no jurisdiction to regulate the navigation of the Thames, so far as seagoing vessels are concerned, if their rules conflict with the regulations for preventing collisions at sea, is to rule that no regulations made by harbour or river authorities are binding upon seagoing vessels unless they are in conformity with the regulations for preventing collisions at sea. Yet it is expressly provided by the Merchant Shipping Act 1862, sects. 31 and 32, that rules properly made by harbour authorities shall be binding notwithstanding anything in this Act, or in the schedule thereto contained. If this ruling is to be given its full effect, it may have the effect of declaring that a rule which has now been in existence for many years in the river Mersey is not binding—namely, the rule which requires every vessel at anchor to carry two anchor lights. It is true that this rule is made under the Merchant Shipping Act by Her Majesty in Council, but so are the Thames Conservancy rules. The effect of having these rules approved by the same authority as that which makes the general rules is to take away the difficulty as to conflict of jurisdictions. If the Board of Trade, as Her Majesty's Privy Council, see fit to approve a rule for inland navigation different from that which prevails at sea, there is probably some good reason for the difference, and the attempt to reconcile the two sets of rules is scarcely necessary. The dictum of the learned judge in the present case is more likely to encourage litigation than put a final end to all doubt on the matter, more especially as the new Conservancy rules as to lights expressly cover all vessels.—Ed.]

case, therefore, came before the Court of Appeal without any notes of the evidence or judgment. The appellants applied to the High Court of Admiralty to decide, as a preliminary question, the question of law as to the obligation of Trinity House lighters to carry lights, and for that purpose to hear sufficient evidence to lay the necessary facts before it. The respondents objected to any evidence being heard by the Court of Appeal, on the ground that an appeal is not a rehearing, but should be heard only on the facts and evidence produced in the court below, and that the appellants, having neglected to employ a shorthand writer, under the 32nd Rule of the County Court General Orders for Admiralty Practice, they were precluded from producing any evidence on the appeal. The court, however, ruled that it had power to hear evidence so as to bring the facts before it, but that it would only hear such witnesses as had been produced in the court below. Thereupon the following facts were admitted or were proved by a witness called by the plaintiff:

The collision occurred at about 4.30 a.m. on the 27th Jan. 1874, in Galleon's Reach, near Woolwich, in the river Thames. The lighter No. 34 was coming up the river, and the steamer was going down. This lighter (like all the other Trinity House lighters) is a barge with a fixed mast and fore and aft sails, employed exclusively in carrying ballast up and down the Thames, and never going below Gravesend; she is propelled by sails, and is regularly worked like a sailing vessel of similar rig when there is sufficient wind; when there is no wind she is worked by means of oars or sweeps. At the time of the collision she was under sail. She had no lights burning at the time of collision, nor do the Trinity House lighters ever carry lights whilst under weigh.

It was admitted by the appellants that if these lighters were bound to carry lights under weigh, they were to blame for the collision.

Butt, Q.C. and Dixon, for the appellants.—The question for the consideration of the court is, whether these lighters are within any regulations as to lights; if they are not bound to carry lights by any regulation, the view of the Trinity House is that they are not entitled to do so. First, do the Regulations for preventing Collisions at Sea apply? The only rule, if any, applicable is Art. 5, which provides that sailing ships under weigh, or being towed, shall carry the same lights as steamships under weigh, except the white mast-head light. But we submit that a Trinity House lighter is not a sailing ship within the meaning of that rule, which applies only to seagoing ships. By the 2nd section of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), the term "ship," in construing that Act, is defined to "include every description of vessel used in navigation not propelled by oars." The Merchant Shipping Act Amendment Act 1862 (25 & 26 Vict. c. 63) is to be construed with and as part of the former Act (sect. 1), and, consequently, any regulations made under the second Act, and affecting "ships," only affect such vessels as are "ships" within the meaning of the Act of 1854. The Regulations for preventing Collisions at Sea are in force by the virtue of sect. 25 of the Act of 1862, and the Order in Council of the 9th Jan. 1863, and these Regulations themselves show that they are intended to apply only to seagoing vessels—they are headed as "Regulations for preventing Collisions at Sea." The

ADM.]

THE O. S. BUTLER.

[ADM.]

3rd article of these regulations applies expressly only to seagoing steamships; and, moreover, the power which is given by sect. 30 of the Act to enforce these regulations, clearly points to a vessel proceeding to sea. (a) It has been held that a "ship" within the meaning of those Acts is a vessel whose habitual business it is to go to sea: (*Ex parte Ferguson and Hutchinson*, 24 L. T. Rep. N. S. 96; L. Rep. 6 Q. B. 200; 1 Asp. Mar. Law Cas. 8.) Moreover, we submit that these regulations apply only to vessels when at sea, and not even to seagoing vessels when navigating rivers or harbours; they are not binding in rivers. This is shown, not only by the regulations themselves, but also by the 31st and 32nd sections of the Merchant Shipping Act Amendment Act 1862, which provide for the making of rules for harbours, rivers, and inland navigations. (b) If the schedule rules were intended to be binding in rivers, there would be no necessity for these two sections. Consequently we say that these regulations do not apply, and that there is no obligation under them upon a Trinity House lighter to carry lights when under weigh.

Secondly.—Are there any other regulations binding upon these lighters, and are they bound, under these regulations, to carry lights? There are regulations made to govern the navigation of the Thames, within the meaning of sects. 31 and 32

(a) The Merchant Shipping Act Amendment Act 1862, sect. 30. The following steps may be taken in order to enforce compliance with the said Regulations, that is to say:—

(1.) The surveyors appointed under the third part of the principal Act, or such other persons as the Board of Trade may appoint for the purpose, may inspect any ships, for the purpose of seeing that such ships are properly provided with lights, &c.

(2.) If any such surveyor or person finds that any ship is not so provided, he shall give to the master or owner, notice in writing, pointing out the deficiency, and also what is, in his opinion, requisite in order to remedy the same.

(3.) Every notice so given shall be communicated in such manner as the Board of Trade may direct to the collector or collectors of Customs at any port or ports from which such ship may seek to clear, or at which her transire is to be obtained; and no collector to whom such communication is made, shall clear such ship onwards or grant her a transire or allow her to proceed to sea, without a certificate under the hand of one of the said surveyors or other persons appointed by the Board of Trade as aforesaid, to the effect that the said ship is properly provided with lights, &c.

(b) Sect. 31.—Any rules concerning the lights and signals to be carried by vessels navigating the waters of any harbour, river, or other inland navigation, or concerning the steps for avoiding collision to be taken by such vessels, which have been or are hereafter made by or under the authority of any local Act, shall continue and be of full force and effect, notwithstanding anything in this Act or in the schedule thereto contained.

Sect. 32.—In the case of any harbour, river, or other inland navigation for which such rules are not and cannot be made by or under the authority of any local Act, it shall be lawful for Her Majesty in Council, upon application from the harbour trust or body corporate, if any, owning or exercising jurisdiction upon the waters of such harbour, river, or inland navigation; or, if there be no such harbour, trust, or body corporate, upon application from persons interested in the navigation of such waters, to make rules concerning the lights or signals to be carried, and concerning the steps for avoiding collision to be taken by vessels navigating such waters; and such rules, when so made, shall, so far as regards vessels navigating such waters, have the same effect as if they were regulations contained in Table (C) in the schedule to this Act, notwithstanding anything in this Act, or in the schedule thereto contained.

of the Merchant Shipping Act Amendment Act 1862; the Thames Conservancy have the control of the navigation of the Thames, and they have made, under their local Acts (The Thames Conservancy Acts 1857 and 1864, 20 & 21 Vict. c. cxlvii and 27 & 28 Vict. c. 113), byelaws concerning the lights to be carried by vessels navigating the Thames. These byelaws are entitled "Rules and Byelaws for the Regulation of the Navigation of the River Thames," and were approved in accordance with sect. 31 of the Thames Conservancy Act 1864, by an Order in Council dated the 5th Feb. 1872. These byelaws differ in essential points from the Regulations for preventing Collisions at Sea; as, for instance, the masthead light to be carried by a steamship under weigh, and only be visible for one mile, according to the Conservancy Byelaws, whilst by the Regulations for preventing Collisions at Sea it should be visible for five miles. It could not be contended that a vessel would be to blame for carrying in the Thames a masthead light shining only one mile, and if a vessel could not be so condemned, it is clear that, in matters relating to the navigation of the Thames, the Conservancy Byelaws do, and the Regulations for preventing Collisions at Sea do not, apply. If, then, there were any rule of the Thames Conservancy, requiring a sailing vessel or lighter, such as this, to carry lights, it would be binding upon us, but there is no such rule among the byelaws. There being no such rule, it would be wrong for Trinity House lighters to carry any lights, as it would only tend to create confusion.

The *Owen Wallis*, ante p. 295; 30 L. T. Rep. N. S. 41; L. Rep. 4 Adm. & Ecc. 173.

E. C. Clarkson, for the respondent.—The Regulations for preventing Collisions at Sea, made under the Merchant Shipping Act Amendment Act 1862 were intended to be substituted for the rules contained in the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104). The rules in the latter Act undoubtedly applied to inland navigation, as was shown in *The Velocity* (21 L. T. Rep. N. S. 686; L. Rep. 3 P. C. 44; 3 Mar. Law Cas. O. S. 308). If the present regulations were substituted for the former ones, it is reasonable to suppose that the Legislature intended the present regulations to apply equally to inland navigation. Again, there can be no doubt that, before making these Conservancy rules, the regulations under the Merchant Shipping Acts were held to apply to all vessels navigating the Thames. [Sir R. PHILLIMORE.—The tacitly received construction of those Acts must have been that they applied only to seagoing vessels, and not to vessels wholly navigating within the river. The conflict between the Regulations and the Conservancy Byelaws might be avoided if it were held that the latter rules applied only to vessels wholly navigating within the river.] Up to the time of the passing of the Conservancy rules, all vessels above Yantlett Creek were governed by the regulations in respect of the lights they were to carry. [Sir R. PHILLIMORE.—The Conservancy Byelaws (Arts. 29 and 32) apply steering and sailing rules, and rules as to lights for steam vessels, to vessels "navigating the river Thames." Most not these be applied to vessels never moving out of the Thames?] No doubt, but coupled with the general regulations; and if it happens that the Conservancy Rules do not provide for any particular case, the general regulations must be taken to be binding in that case.

ADM.

THE C. S. BUTLER.

ADM.

Secondly, is this lighter a "ship" within the meaning of the Merchant Shipping Acts, and as such bound to carry lights. A ship is defined by these Acts (Merchant Shipping Act 1854, sect. 2) to "include every description of vessel used in navigation not propelled by oars." There is nothing in these Acts which requires a vessel to be sea-going before she is a "ship." This vessel has a mast and sails, and is not propelled by oars only, which I submit is the meaning of the definition. [Sir R. PHILLIMORE.—I understand Blackburn, J., in *Ex parte Ferguson v. Hutchinson* (*ubi sup.*) to define a ship within the meaning of those Acts to be a vessel the habitual business of which is to go to sea.] But it was never decided in that case that a vessel which did not go to sea might not be a ship, and such a vessel as this is clearly within the apparent meaning of the definitions; that decision was only as to the meaning of the word "ship" for the particular purposes of that case and not for general purposes. Assuming that the Conservancy Rules do not apply, the Regulations for preventing Collisions clearly cover this case, as this is a ship although never going to sea; a yacht never going out of the Thames could not be said to be other than a "ship," and there is no essential difference for this purpose between this lighter and a yacht. The decision in *The Owen Wallis* (*ubi sup.*) was in respect of a dumb barge, which falls entirely outside all rules, because it is propelled by oars only. So long as the regulations are not altered by the Conservancy Rules the rules as to side lights in Art. 5 of the Regulations, is binding upon all sailing vessels in the Thames. [Sir R. PHILLIMORE.—Before I can say that, I must hold that this lighter is a "ship" and she is clearly not a sea-going vessel.] In *Ex parte Ferguson v. Hutchinson* (*ubi sup.*), Blackburn, J., expressly says that the definition in the Merchant Shipping Acts is not exclusive, but that if a vessel is a ship, although not included within the definition, the Acts would apply. [Sir R. PHILLIMORE.—But that learned judge says that the criterion by which a vessel is to be judged a ship is, whether she goes to sea.] It is enough if she is capable of going to sea. But even if the regulations do not apply, she still ought to have carried lights, by reason of the general obligation upon all vessels navigating narrow waters, and for this proposition I cite the Thames Conservancy Rules, Art. 29 (j), where it is laid down that nothing in the rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, &c. [Sir R. PHILLIMORE.—It does seem a reasonable contention that on general principles, and for the interests of navigation, such vessels ought to carry lights.] It being an admitted fact that the absence of lights on board the lighter contributed to the collision, and there being an obligation upon her to do so, either by regulations which apply when the Conservancy Byelaws do not override them, or by the general maritime law which is expressly kept alive by the byelaws, I submit that the lighter was to blame for not carrying a light.

Butt, Q.C., in reply.—There is not, nor has there ever been, any obligation by the general maritime law upon vessels under weigh to carry lights, and if there is no express provision in the Conservancy Byelaws, nor in the regulations, binding upon this vessel, she cannot be condemned for not carrying a light. Art. 29 (j) of the Byelaws only applies where there is an obligation by law to carry lights.

July 22.—Sir R. PHILLIMORE.—This case comes before the court in a strange and unusual manner, without evidence or a judgment from the court below. A witness has been examined here, and in his examination, questions of law were raised upon which I was asked to decide, as preliminary to any question on the merits.

The first question is, whether the Trinity lighters are bound to carry the usual regulation lights prescribed by the Order in Council, made in accordance with the Merchant Shipping Act 1862 (24 & 25 Vict. c. 63), to be carried by each vessel. In the definition clause of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), incorporated in the later Act, it is provided that a "ship shall include every description of vessel used in navigation not propelled by oars." That definition is copied into the Admiralty Court Act 1861 (24 Vict. c. 10), sect. 2. An Act for Extending the Jurisdiction of the Admiralty Court. Taking into consideration the terms used in the 3rd sub-section of sect. 30 of the Merchant Shipping Act 1862, "to proceed to sea," the judgment in *Ex parte Ferguson v. Hutchinson* (24 L. T. Rep. N. S. 86; L. Rep. 6 Q. B. 200; 1 Asp. Mar. Law Cas. 8), delivered in the Queen's Bench, I am of opinion that the criterion as to whether a vessel falls under the category of a "ship," mentioned in the Merchant Shipping Act, is, that it should be a vessel whose habitual business it is to go to sea; and if so, though propelled by oars as well as sails, it is, I think, a ship within the meaning of those Acts. Upon the evidence before me, it does not appear that this vessel goes to sea at all, though it has sails as well as oars, and, therefore, does not come in, in my opinion, within the meaning of the term "ship" in the statutes.

The next question is, whether a vessel of this kind be subject to the rules laid down by the Thames Conservancy, if there be any rule laid down by that body which renders the carrying of lights obligatory by law on this vessel. There is certainly considerable difficulty in reconciling the statutable authority conferred by the Rules and Byelaws of the Conservators with the statutable authority conferred in the Regulations for Avoiding Collisions at Sea. The jurisdiction of the Thames Conservancy extends to Yantlett Creek, and it never could have been the intention of the Legislature, considering the conflicting authorities, to apply it only to sea-going vessels. It cannot be, for instance, that the Thames Conservators should have the power, if they choose to exercise it, to order a port light to be carried on the starboard side of a sea-going ship coming within the port of London. The difficulties of construction are great, but I think the only approach to a reasonable solution of these difficulties is to consider "vessels navigating the river Thames" to mean vessels whose navigation is confined to the river, and which do not go to sea.

I am of opinion that a Trinity lighter, being a vessel of the latter class, is subject to the Conservancy Rules, but I cannot find any rule which orders her to carry a light. I pronounce the appellants' vessel not to blame for not carrying lights; and, therefore, on this ground she cannot be legally said to have contributed to the collision.

Ans. 6.—The case was heard on the merits, and the decision of the court below was reversed with costs.

AMERICAN REFS.]

MERCHANTS' MUTUAL INSURANCE CO. V. BARINO.

[AMERICAN REFS.]

Solicitors for the appellants, *Symes, Sandilands, and Humphreys*.

Solicitor for the respondent, *Thomas Cooper*.

AMERICAN REPORTS.

Collected by F. O. CUNNY, Esq., Barrister-at-Law.

UNITED STATES SUPREME COURT.

IN ERROR.

THE MERCHANTS' MUTUAL INSURANCE CO. V. BARINO AND OTHERS.

Marine insurance—Insurable interest—Advances on ship—Maritime lien—Bottomry.

B. and Co. lent money to a ship's captain to provide necessities for his ship at a foreign port. They received a bottomry bond, and insured the ship. On an adjustment of average B. and Co. were awarded a sum as due to them under the policy from the underwriters. Payment being refused, B. and Co. brought an action to recover the amount found due by the adjustment. The bottomry bond was not given in evidence at the trial.

Held, that B. and Co. had an insurable interest, and were entitled to recover the amount found due by the adjustment.

OPINION by CLIFFORD, J.—Advances were made by the plaintiffs, as alleged in the declaration, to the master and owners of the bark, for the purposes of her equipment and to procure a cargo for the vessel, in a voyage from Cadix, in Spain, to the port of New Orleans; and the plaintiffs also allege that they, through their agents, obtained a policy of insurance, dated 6th Dec. 1867, and executed by the corporation defendants, insuring the hull of the barque in the sum of 9000 dols., in the name of their agents, containing the clauses, "on account of whom it concern" and "lost or not lost," for the protection of those advances. They also allege that the barque, though well officered, manned, and equipped, suffered so much on the voyage, from the violence of the winds and the force of the sea, that the master, with a view to the safety of the officers and crew, and for the preservation of the cargo, found it necessary to put into the port of Saint Jago de Cuba for such repairs as would enable him to prosecute the voyage; that their agents gave due notice of those facts to the president of the insurance company; that the secretary of the company subsequently informed the agents of the plaintiffs that the insurance company had decided to send an agent to the port of refuge to take charge of the interests of all concerned, and the plaintiffs aver that from the moment the agent of the insurance company arrived there he took exclusive charge of the repairs of the vessel, and caused such work to be performed as he, the agent, thought to be necessary, and that he obtained from their agent there the funds necessary to pay for all such repairs. All necessary repairs were made and the barque completed her voyage, and the further allegation is, that after her arrival at the port of destination an adjustment of averages was made by the adjusters of averages in that port, for costs, charges, and damages in making such repairs, and that in the said adjustment they, the plaintiffs, were awarded the sum of 3507 dols. on the said policy of insurance.

Demand of payment having been made, and payment having been refused the plaintiffs commenced the present suit. Service was

made and the defendants appeared and filed an answer, which is equivalent to the general issue in an action of assumpsit, and a special plea that the bark, at the time of her departure and throughout both the outward and return voyages, was unworthy, contrary to the stipulations of the policy and in violation of its express and implied warranties. Subsequently the parties went to trial and the verdict and judgment were for the plaintiffs, for the amount awarded by the average adjusters. Exceptions were taken by the defendants to the rulings of the court in refusing to instruct the jury as they requested. Three prayers for instruction were presented by the defendants, all of which were refused: first, that if the evidence shows that the insurable interest of the plaintiffs was a bottomry bond on the barque and that the vessel arrived in safety at the port of destination, the jury should find for the defendants; secondly, that it is only when the vessel insured is lost that the assured on a bottomry bond can recover, and that if the proof is that there was no loss or destruction of the barque, the jury should find for the defendants, if the plaintiffs had insured on a bottomry bond; thirdly, that the defendants were not bound to tender back the premiums of insurance before availing themselves of any defence against the validity of the policy of insurance, or for its avoidance by a subsequent cause.

Nothing appears in the record except the declaration, the answer, the verdict and judgment, the three bills of exceptions to the rulings of the court in refusing to instruct the jury as requested, neither of which contains any report of the evidence, and the motion for new trial, which merely states that the verdict of the jury is contrary to law and the evidence, without giving any statement whatever of the evidence which was submitted to the jury. Evidence to show that the action was founded upon a bottomry bond, or that such a bond was offered in evidence, or introduced at the trial, is entirely wanting; nor is there the slightest evidence, direct or circumstantial, to show that any such question as that involved in the third prayer for instruction did or could have arisen in the case, or that the instruction was a proper one, in any view of the controversy, for the consideration of the jury. Viewed in the light of these suggestions, as the case should be, it is clear that the several rulings of the court in refusing to give the three prayers for instruction, may be considered together, as they involve but one question in an appellate court.

Correct instructions, if applicable to the case, the court, as a general rule, is required to give, unless the same are in substance and effect embodied in those previously given by the court to the jury; but the court is never required by law to give an instruction to the jury which is not applicable to the case, even though it be correct as an abstract principle or rule of law; and it may be added that no prayer for instruction, whether presented by the plaintiff or the defendant, can be regarded as applicable to the case when it is wholly unsupported by the evidence introduced to the jury. Competent evidence may be written or oral, direct or circumstantial, but when there is no legal evidence of any kind to support the theory of fact embodied in a prayer for instruction, whether presented by the plaintiff or the defendant, the in-

[AMERICAN REFS.]

MERCHANTS' MUTUAL INSURANCE CO. v. BAKING.

[AMERICAN REFS.]

struction should always be refused; and such a ruling can never become a good cause for reversing the judgment. It is clearly error in a court, said Taney, C.J., to charge a jury upon a supposed or conjectural state of facts, of which no evidence has been offered, as the instruction presupposes that there is some evidence before the jury which they may think sufficient to establish the fact hypothetically assumed in that way by the court, and if there is no evidence which they have a right to consider, then the charge does not aid them in coming to a correct conclusion, but its tendency is to embarrass and mislead them, as it may induce them to indulge in conjectures instead of weighing the testimony: (*U. S. v. Breitling*, 20 How. 254). When a prayer for instruction is presented to the court, and there is no evidence upon the subject in the case for the consideration of the jury, it ought always to be withheld, and if it is given under such circumstances, it will, as a general rule, be regarded as error in the court, for the reason that its tendency may be, and often is, to mislead the jury, by withdrawing their attention from the legitimate points of inquiry involved in the issue: (*Goodman v. Simond*, 20 How., p. 359.)

Attempt is made in argument to maintain that the plaintiffs had no insurable interest in the barque unless it be assumed that it was created by a bottomry bond, but the court is entirely of a different opinion, as it is alleged in the declaration that the advances were made to equip the vessel and to procure for her a cargo in the voyage from a foreign port to the port of destination. Founded as the declaration is upon the policy of insurance it must be construed in connection with the policy.

By the terms of the policy the insurance is upon the barque, her tackle and apparel, which is the proper language to be employed in a case where the assured had an interest in the vessel. Advances made on the credit of a ship for necessary repairs or supplies in a foreign port create a maritime lien upon the ship, and it is well settled law that a maritime lien is a *ius in re*, and that it constitutes an incumbrance on the property of the ship which is not divested by the death or insolvency of the owner: (*The Young Mechanic*, 2 Curt. 404; *s. c.*, Ware Adm. R. 535; 1 Pars. M. Law, 489; 3 Kent, Com. 170, 11th edit.; *General Smith*, 4 Wheat. 438.) Such a lien may be enforced by a process *in rem*, which is founded on a right in the thing, the object of the process being to obtain the thing itself, or a satisfaction out of it, for some claim resting on a real or quasi proprietary right in the thing: (*The Commerce*, 1 BL 580; *Buck et al. v. Ins. Co.*, 1 Pet. 165; *The Maggie Hammond*, 9 Wall. 456.) Liens of the kind constitute an insurable interest, and it is quite clear that enough is alleged in the declaration to warrant the conclusion that the advances made in this case are properly to be regarded as constituting a maritime lien upon the barque: (*Seamans v. Loring*, 1 Mas. 127; 1 Phil. on Ins., 5th edit., s. 204; *Hancock v. Ins. Co.*, 3 Samn. 132).

Contracts for repairs and supplies may be made by the master to enable the vessel to proceed on her voyage, and if it appears that they were necessary for the purpose, and that they were made and furnished to a foreign vessel or to a vessel of the United States in a port other than a port of the State to which the vessel belongs, the *prima facie*

presumption is that the repairs and supplies were made and furnished on the credit of the vessel, unless it appears that the master had funds in hand or at his command which he ought to have applied to the accomplishment of those objects, and that the material men knew that fact or that such facts and circumstances were known to them as were sufficient to put them upon inquiry and to show that if they had used due diligence in that behalf they might have ascertained that the master had no authority to contract for such repairs and supplies on the credit of the vessel: (*The Lulu*, 10 Wall. 197; *The Patapasco* 13 Wall. 333; 2 Pars. on Ship. 322 to 337).

Whenever the necessity for the repairs and supplies is once made out, it is incumbent upon the owners, if they allege that the funds could have been obtained upon their personal credit, to establish that fact by competent proof, and that the material men knew the same or were put upon inquiry, as before explained, unless those matters fully appear in the evidence introduced by the other party: (*The Grapesheet*, 9 Wall. 141; *Thomas v. Osborn*, 19 How. 22).

Apply those principles to the case, and it is clear that the objection that the plaintiffs had no insurable interest in the barque utterly fails, and it is not controverted that the advances were made to equip the vessel and to procure a cargo for her in the described voyage; and it is sufficient that such an allegation affords a *prima facie* presumption that the advances were made on the credit of the vessel, as the record fails to disclose any fact or circumstance to overcome that presumption. Such advances constitute a lien upon the ship, and such a lien gives the lender an insurable interest in the ship: (*Seamans v. Loring*, 1 Mas. 127; 1 Phil. on Insurance, 5th edit., sect. 204 *Godin v. Insurance Company*, 1 Barr 489; *Lacena v. Crawford*, 5 Bos. & P. 294; *Wells v. Ins. Co.*, 9 S. & R. 103).

Absolutely nothing appears in the record to support the theory that any such defences as those assumed in the prayers for instruction were in fact set up by the defendants in the subordinate court, except what is contained in the prayers for instruction presented to the court. They pleaded a general denial of the allegations of the declaration, and that the barque was unseaworthy at the inception of the risk and throughout the voyage, but no mention is made of any such defences as those implied in the prayers for instruction in any other part of the record, nor is there any evidence whatever upon the subject. Defences in avoidance of the claim made in the declaration must be proved in the court of original jurisdiction, and if not proved there they cannot be successfully set up in the appellate court to support an assignment of error. Other matters were discussed at the bar, but it is not necessary to examine any other of the propositions submitted, as these suggestions are sufficient to dispose of the case.

Judgment affirmed.

C. P.]

DANIELS v. HARRIS.

[C. P.]

COURT OF COMMON PLEAS.

Reported by ESTHERINGTON SMITH and J. M. LELY, Esqrs.
Barristers-at-Law.

April 29 and Nov. 2, 1874.

DANIELS v. HARRIS.

Marine insurance—Policy on cargo—Extent of implied warranty of seaworthiness—Deck cargo—Jettison to save ship—Risk to ship and cargo on an ordinary voyage.

The warranty of seaworthiness implied in a policy of marine insurance is to be considered with reference to each subject matter of insurance, and the ship can only be said to be seaworthy for the purposes of that warranty if it is seaworthy in respect of that subject-matter.

In a policy on cargo, the implied warranty that the ship is seaworthy, cannot be considered to contemplate the destruction, in order to save the ship on an ordinary voyage, of that very cargo which is the subject-matter of insurance.

Where a policy is effected on deck cargo, it is not a compliance with the warranty of seaworthiness that the ship can, without danger to herself, should she encounter ordinary rough weather, be made seaworthy by the jettison of the deck cargo, which is the subject-matter of the insurance.

Seemingly, that if the policy had been on the ship and under-deck cargo, and not on the deck cargo, the implied warranty of seaworthiness would have been satisfied by the safety of the ship and under-deck cargo, and would not have been affected by the peril to or loss of the deck cargo, provided that the latter, by reason of the facility with which it could have been got rid of, would have caused no danger to the ship, or subject-matter of insurance.

This was an action on a policy of insurance upon wine shipped on board the steamer *Murillo*, from San Lucar to London, and was tried before Brett, J., at the Guildhall.

The plaintiffs obtained the verdict, and a rule nisi was granted for a new trial, on the ground of misdirection, and also that the verdict was against the weight of evidence. The misdirection complained of was with reference to the meaning of seaworthiness.

One of the questions left to the jury was, Was the ship unseaworthy on leaving San Lucar? and the explanation the learned judge gave was to this effect: that although a deck cargo which could not be got rid of might render a ship unseaworthy, yet the jury might take into account the facility that existed of getting rid of wine by staving in the casks.

The facts, which are fully stated in the judgment of the court, were shortly, that the ship sailed from San Lucar in the month of February, having a considerable number of casks of wine stored on deck, and on encountering weather worse than the ordinary rough weather of that time of year in the Bay of Biscay, some of the casks got loose and endangered the safety of the ship so much that the whole of the deck cargo was jettisoned by means of staving in the casks.

The jury were asked: First, was there a concealment of the fact that all the cargo was on deck? secondly, was there a concealment of the number of casks in which the wine on deck was contained? and if yes, was it material? thirdly, was the ship unseaworthy on leaving San Lucar? To all these questions the answer was in the negative.

Benjamin, Q.C. (*C. Russell*, Q.C. and *W. G. Harrison*, with him), showed cause.—The terms of the policy were: "7000l. on wine in casks on or under deck, so valued at 10s. per cent., to return 4s. 4d. per cent. for interest under deck on arrival." This shows clearly that the underwriters were informed that most of the wine would be on deck. And so we say that the implied warranty as to seaworthiness is modified by the knowledge imparted to the underwriters. In *Arnould* on Marine Insurance, 4th edit., vol. 2, p. 766, it is said: "Goods carried on deck are *prima facie* not in their proper place; besides, it is nearly always true of them that they impede the navigation of the ship. On both grounds, it is a received rule that deck lading gives no occasion to general average. But an exception to this general rule may be created by custom, as where it is the custom in a particular trade to carry part of the cargo, or articles of a certain character on deck; for by the custom the deck becomes a proper place for the goods, and those who embark in that trade as merchants, shipowners, or insurers, accept the impediment of deck lading as another peril of the traffic, with the usual incident of general average in the case of deck cargo attaching to the adventure." Here we may similarly say that the casks of wine were in their proper place, because it was known to all parties that they would be carried there, and so the insurers accepted that as one of the risks. And they would know also that it was a risk to the cargo and not to the ship, and did not make the ship unseaworthy, though the goods were more exposed to loss. That this was contemplated is shown by the return of the rate of premium for all goods carried below deck. As the warranty of seaworthiness is only an implied warranty, it is modified by facts which show that the condition of the ship and the mode of loading were known to and in contemplation of the underwriters.

Then, as to the misdirection. What the learned judge said was, "Here again the burden of proof lies on the defendant," viz., with reference to the unseaworthiness of the ship. And, again, "There may be an extra risk to the goods, but if the ship is not risked there is not unseaworthiness." But surely this is a perfectly right direction; it is proper to leave to the jury the consideration of the character of the cargo in determining seaworthiness. In *Foley v. Tabor* (2 F. & F. 663), *Erle, C.J.*, says: "Seaworthiness is a word of which the import varies with the place, the voyage, the class of ship, or even the nature of the cargo. And you are to take this as the law on the subject, that a ship will be unseaworthy if the risk is materially increased by reason of difficulty in navigating the ship, caused either by overloading or by bad stowage of the cargo." This was in his summing up to the jury, and shows what may be left for their consideration. [*LORD COLERIDGE, C.J.*—Why are you not to consider the cargo in two ways? If the character of the cargo being heavy, and its being on deck makes her unseaworthy, why may not its being light or easily got rid of, restore her seaworthiness?] It seems only reasonable that it should; the consideration is, whether at the commencement of the voyage the ship was seaworthy with reference to her own safety, not as to the safety of the cargo. The case of *Burgess v. Wickham* (8 L. T. Rep. N. S. 47; 3 B. & S. 669),

C. P.]

DANIELS v. HARRIS.

[C. P.]

shows what limitation is to be fixed to the general and implied warranty of seaworthiness. Blackburn, J., says: "I think seaworthiness is relative to the nature of the adventure in every respect;" and Cockburn, C.J., says: "The authorities which bear upon the subject appear to me fully to establish that, while, by the law of England, there is in every voyage policy an implied warranty of seaworthiness, the term 'seaworthiness' is a relative and flexible term, the degree of seaworthiness depending on the position in which the vessel may be placed, or on the nature of the navigation or adventure on which it is about to embark." In that case a ship which, as was known to the defendants, had originally been only a river steamer, was strengthened as far as possible for an ocean voyage; but even when so strengthened, she was not as fit for the voyage as it would have been proper she should be if she had been an ordinary sea-going vessel. Yet it was held that, the facts being known, she was in a condition to satisfy the warranty of seaworthiness, it being limited to the capacity of the vessel. So here, this was a named ship, known to the defendants, with a named cargo, and a named mode of stowing it, all communicated to the defendants; and she was, therefore, within the above rule, seaworthy at the commencement of the voyage.

Sir John Karslake, Q.C., Butt, Q.C., and Cohen, Q.C., in support of the rule.—If the plaintiffs are right their argument goes to this, that as soon as the underwriters know that some cargo will be carried on deck, they must be taken to waive all questions of seaworthiness. The direction was in effect this: if the stowing of the vessel was such that if she encountered the ordinary weather of the time of year, the deck cargo would have to be jettisoned, but if she had only smooth weather she might have got safely home, then the circumstances which would make the cargo easily jettisoned would make her seaworthy, though otherwise she would not be so. Now it is admitted that there is a warranty of seaworthiness of some sort necessarily to be implied, and that being so, the direction amounts to this, that a vessel being unseaworthy may become seaworthy by the facility of getting rid of deck cargo if bad weather be encountered. The learned judge adopted the evidence of Bethel, the engineer, and founded his direction upon it. The witness said, "I should have thought she would labour very much, and probably we should have to throw it overboard in the Bay of Biscay, loaded in such a way." and he added that he would not have sailed in her if it had not been a cargo that could be got rid of. It is clear, however, from this evidence, that she would have been called unseaworthy at the time she left her moorings; and if the doctrine laid down be upheld, it must be carried to this extent, that if she had gone down she was still seaworthy. Supposing that they did not succeed in staving in the osaka which, in ordinary bad weather, was necessary to be done to save the ship, yet she would be seaworthy. Now, can it be said that the absolute necessity of throwing overboard that which is the subject-matter of the insurance, in the event of that occurring which must be anticipated, admits of the ship being nevertheless seaworthy? We may take another illustration to show the results if the doctrine be carried to its legitimate conclusions. The ship is exposed to have sailed with a sufficient crew. In bad weather the crews get

loose, and disable so many of the crew that the rest cannot start the masts and let out the wine. Yet it would have to be said that she was seaworthy, because the subject-matter of the insurance was such that if other things had not happened it might have been thrown overboard, and the immediate danger to the ship dispersed, and herself made competent to get to the end of the voyage. What is the true meaning of "ordinary perils of the sea?" Underwriters do not contract to provide against them: as Brett, J., said at the trial, "rough weather must be expected at the time of year." The term seaworthy must include ordinary bad weather, though not extraordinary, and when rough weather is to be anticipated, the vessel must be freighted accordingly. It is never a question whether a ship can encounter extraordinary bad weather, but ordinary perils of the seas. [Lord Coleridge, C.J.—Here the loss was occasioned by extraordinary weather.] Yes; and if the ship was seaworthy the underwriters are liable for loss by jettison; but the learned judge throughout told the jury that, in considering whether the ship was able to encounter ordinary perils, they were to take into account the facility of jettison; but it is contended that he ought to have asked them whether the ship, when she left Spain, was fit to carry the cargo as it was, and without alteration, that is, without jettison. The ship must be seaworthy at the commencement of the voyage, and it is not enough that she can be made so in the course of it. *The Quebec Marine Insurance Company v. The Commercial Bank of Canada* (3 Mar. Law Cas. O. S., 414; 22 L. T. Rep. N. S. 559; L. Rep. 3 P. C. App. 235) clearly establishes this: that if a ship start with a defect, although it be remedied before loss, yet the warranty of seaworthiness is not complied with, and the contrary doctrine which had been deduced from a dictum of Lord Tenterden, in *Weir v. Aberdeen* (2 B. & Ald. 320) is shown not to be correct, and certainly was not the *ratio decidendi*, even if Lord Tenterden be correctly reported. [Brett, J.—It does not follow that the jury may not say the defect is so small as not to amount to unseaworthiness. Suppose a ship starts with a leak, but the carpenter stops it in five minutes, is she unseaworthy?] Yes. In *Phillips on Insurance*, sect. 695, it is stated, "The assured is understood to warrant that the ship is, at the commencement of the voyage, seaworthy, viz., that the materials of which the ship is made, its construction, &c., and outfit generally, are such as to render it in every respect fit for the voyage insured." [Brett, J.—Look at the next paragraph; that says that if the deficiency be temporary, and admitting of a ready remedy, the insurance is not forfeited.] It is not enough to say that the ship can be made seaworthy after the commencement of the voyage; for she must at the time be fit to carry cargo and earn freight. Sect. 723 says that, if the cargo has to be relanded for making repairs, the warranty is not complied with.

So too, the ship must not be overloaded, and *Foley v. Tabor* (*sup. cit.*), cited by the other side, really shows that the ship is unseaworthy if the difficulty of navigating be increased by overloading. It becomes, then, a question whether it is usual for cargo to be stowed in such a way as this. In *Parsons on Marine Insurance*, vol. 1, p. 376, it is laid down that the ship must be adapted to the risk assumed, and must

C. P.]

DANIELS v. HARRIS.

[C. P.]

be properly loaded, not only as to the storage of the goods, but also as to weight and quantity: (see *Weir v. Aberdeen*, *ubi sup.*, and *Lidgett v. Secretan*, *ante*, vol. 1, p. 95; 24 L. T. Rep. N. S. 942; L. Rep. 6 C. P. 616). The judgment of Lord Wensleydale in *Biccard v. Shepherd* (14 Moo. P. C. 471), shows that a ship, being seaworthy, may become unseaworthy by being overloaded. There additional cargo was taken on board at an intermediate port, and as such additional cargo made the vessel unseaworthy, the assured were held not entitled to recover in respect of the second shipment. See also *Gibson v. Small* (4 H. of L. Cas. 353), and *Bouillon v. Lupton* (15 C. B. N. S., 113). But the direction of the learned judge in this case is directly opposed to all these authorities, for he would say that a ship may be overloaded and yet seaworthy, because of the facility of getting rid of the excess load. We contend that seaworthiness has reference to the cargo as well as to the ship, for the latter must be fit to carry the former safely in ordinary rough weather. The implied warranty of the shipowner is, in the words of Lord Ellenborough in *Lyon v. Mills* (5 East, 428), "that his vessel is tight and fit for the purpose or employment for which he offers and holds it forth to the public." As between the freighter and the shipowner, the undertaking of the latter is shown to be to have the ship fit to receive any reasonable cargo of the nature that he undertook to carry: (see *Stanton v. Richardson*, *ante*, vol. 1, p. 449; *ante*, p. 228; 27 L. T. Rep. N. S. 513; L. Rep. 7 C. P. 421.) No underwriter would insure at 10s. per cent. if the vessel could not carry her cargo through ordinary rough weather. But *Biccard v. Shepherd* (*ubi sup.*) is an authority that the underwriter is not liable to the assured if she could not; and in *Hare and Wallace's American Leading Cases*, vol. 2, p. 753, in the case of *Prescott v. The Union Insurance Company* (1 Whart. Penn. 399), the direction in the following terms was upheld: "The idea of seaworthiness is not limited to the sufficiency of the vessel merely to save the lives of the persons who may be on board, but extends also to her sufficiency for the safety of the property on board of her."

Curr. ads. vult.

Nov. 2.—The judgment of the court (Lord Coleridge, C.J., Brett and Denman, JJ.) was delivered by

BRETT, J.—In this case the action was brought on a policy of insurance to recover an alleged total loss by jettison of wine, valued at 7000*l.*, loaded on board the steamship *Merrillo*.

The policy was, "at and from San Lucar, on wine in casks or under deck." The wine insured was all on deck, so loaded at San Lucar, after the ship's hold had been filled with other cargo. The insured wine was jettisoned in bad weather by staving in the casks. The ship and underdeck cargo arrived safe.

The defendants pleaded, with other pleas, "that the said ship, at the commencement of the said insured voyage in the said policy mentioned, was not seaworthy."

In summing up the case to the jury upon this plea, Mr. Justice Brett commenced by telling them "that the question was, whether the defendant had proved that the ship was unseaworthy. But that means," he said, "not only whether the mere ship, as a built ship, was seaworthy, but whether loaded as she was, with the

cargo which she had on board stowed in the way it was, the ship was fit to undergo all the ordinary risks of the voyage upon which she was to sail at the time of year at which she was to sail. If the ship was not seaworthy in that sense, then the policy fails, because the assured of goods is taken to warrant that the ship is seaworthy. It signifies not whether he is innocent, whether it is not in the least degree his fault, if in point of fact the shipowner or the master makes the ship by stowage or otherwise unseaworthy; then in treating the case as between the two innocent parties, the assured and the underwriter, it is the assured and not the underwriter who has to lose. The question is, not whether the goods themselves were at more than ordinary risk; goods on deck are always assumed to be at more than ordinary risk. If the fact of their being on deck does not affect the safety of the ship, their own additional risk is immaterial; the question is, whether the putting the goods on deck did or did not make the ship unseaworthy. The question for you is, whether the ship, that is, including the cargo on and under deck, was in a fit condition on leaving San Lucar to encounter with safety the ordinary perils of an ordinary voyage from San Lucar to England at that time of the year. Your answer must depend upon the view you take of the evidence, and upon the exercise of your own knowledge and judgment."

The learned judge, in commenting on the evidence, said: "No one would be of opinion that, either for the cargo itself or for the ship, it is as good a way to load cargo on deck as to put it under deck, but does it or does it not make a great difference, in your judgment, what kind of deck cargo there is? If the deck cargo had been stiff machinery, heavy rigid machinery, which could not have been got rid of off the deck in bad weather, if the weight of such a cargo had been anything like the weight of this wine, you would probably say that with such a weight on deck, and the impossibility of getting rid of it, the state of things would have been very dangerous for the ship; but then the real point for you is, whether you think it makes a difference in that respect that the cargo could be dealt with as this cargo would be. The weight of it as weight was liquid, how would you get rid of wine encumbering the ship on deck? How long would it take the ship's carpenter and his men to stave the casks? What would be the effect on the ship of letting the wine run out? The question is, not of danger to the wine, but of danger to the ship. I apprehend, myself, that you will all be of opinion that having this deck cargo did add to the difficulties of the ship, and that unless it could have been got rid of, and with tolerable quickness, it would have been a danger to the ship to the extent of making her unseaworthy; but the question is, what is the effect, in your judgment, of the facility of staving the wine? I cannot help thinking that the effect of having a deck cargo does necessarily add to the danger of a ship; but the question is, whether it puts her into so much danger as to make her unseaworthy; that is to say, whether it puts her in danger of being unable to meet the ordinary rough weather of the voyage on which she is sailing."

Speaking of what would be an ordinary voyage in this case, the learned judge said: "It would not be right to say that for a ship coming across the Bay of Biscay in February, an ordinary voyage means a voyage without rough

C. P.]

DANIELLS v. HARRIS.

[C. P.]

weather. It is clear that coming across the Bay of Biscay and up the English Channel at that season, you must meet with rough weather. Therefore, it is not to be taken to be sufficient that the ship would be able to encounter without danger smooth or fair weather only, but the question is, whether she would be able to encounter without danger rough weather also. But there is at every season of the year some weather rougher than the ordinary rough weather of that season, and although the ship ought to be able to stand, not only the smooth but also the ordinary rough weather of the season in which she sails, yet the value of insurance is, that it insures against damage or loss, by reason of the rougher weather than the ordinary rough weather of the season. Therefore, you are not to consider whether this ship would have been safe without rough weather. She was bound, when she left San Lucar, to be in such a condition, with regard to herself and her cargo, as to be able to surmount the ordinary occurrences of an ordinary voyage in that season, including the rough weather which must be anticipated at that time of year; and the question for you is this—it being a fact clearly proved, as I think, that if the cargo could not have been got rid of, the ship would have been in great danger in a voyage with the ordinary rough weather of the season; the question is, whether your view of that state of things is modified by a consideration of what kind of cargo it was on deck, and the mode in which such a cargo could be got rid of. If you are of opinion that that kind of cargo, although it was too heavy for the comfort of the ship, and as long as it existed of that weight, was a danger to the ship, yet when ordinary danger came on, that is ordinary rough weather came on, it could be got rid of so quickly that practically it did not endanger the ship, although it endangered itself, then you may say that the ship was seaworthy, notwithstanding the weight of the cargo on deck; but if you think that the cargo was such that, with such weather as ought to have been anticipated on such a voyage, it could not have been got rid of before the ship would be in danger, then I think you would say that the ship was unseaworthy at starting. If you think the ship was not seaworthy at starting from San Lucar, within the definition I have given, you will find for the defendant, otherwise for the plaintiff."

The jury having found a verdict for the plaintiff, a rule was moved for and granted, on the ground of misdirection, and the case was argued in Easter Term last.

The first point to be considered is what would be the exact import conveyed to the jury by this summing up. In laying down the propositions of law, as such, we are of opinion that the direction was correct. The first proposition laid down as to seaworthiness seems to us to be entirely right. The terms of the proposition as to what is to be considered an ordinary voyage, seem to us to be right. The question is, what is the effect of the remarks made during the comment on facts. We are of opinion, upon consideration, that they would lead the jury to conclude that they were directed, as matter of law that although they should find, as matter of fact, that if the deck cargo were not got rid of, the ship, with the cargo under and on her decks, would be in danger of destruction in the ordinary rough weather of the voyage insured, yet if the deck cargo could in such weather be got

rid of so easily that, by reason of the facility of its destruction, the ship and the rest of the cargo were in no danger in an ordinary voyage, they might find that the warranty that the ship was seaworthy was satisfied in point of law. The real question, therefore, is, whether such a proposition is correct in point of law.

The stipulation as to seaworthiness is a warranty, not express but implied. It is, unless expressly or by necessary implication negatived, to be implied in every marine voyage policy of insurance, whether the subject-matter of insurance be ship, cargo, freight, profits, commission, or other. The warranty thus implied has always been stated in all decided cases, and in all works of authority, in the same terms. Those terms are: "That the assured warrants that at the time when the policy attached, or should have attached, the ship was seaworthy." It is not "that the subject-matter of insurance would be in no danger on an ordinary voyage;" the terms which have been used are not, in a policy on cargo, for example, that such cargo will be in no danger if the voyage be an ordinary voyage, but they have been that for such a voyage "the ship was seaworthy." The same terms being so used with regard to all policies, do they mean the same thing in all policies? If they were express words in the policy, being the same words used in documents *in pari materia*, it should seem that they should bear the same meaning in all. Is it different, because the warranty is an implied one, and the terms which have been used have not been the phraseology of the parties to the contracts, but of those who have declared or treated of the law?

When one asks whether the warranty has the same meaning in all the policies, the question is, whether the same warranty in extent and effect is to be implied in every policy. In considering this question, we must proceed, as in all the other questions which are for ever raised for judicial decision by the never ceasing variety of commercial transactions; we must proceed according to authority, so far as it goes, and then, if the case in hand be outside and beyond the authorities, by applying to it the principles to be extracted from the authorities, that is to say, the principles which were applied to them in their time.

First, then, according to the authorities, has the implied warranty been the same in extent and effect in all policies? It has not. With regard to policies on the same subject-matter, as on ships, the extent of the warranty, as to the condition of the ship, has been held to be different for different voyages, for the same voyage at different seasons, for the same voyage at the same season, according to whether the same ship was in ballast or loaded with one kind of cargo, or another. The required condition of the ship has been held to be different when the ship was to enter under policy in port from what it must be when going to sea under the same policy. It has been held to be different for a coasting voyage, or lake, or river, or canal voyage, from what it must be for an ocean voyage under the same policy. It is unnecessary to cite fully well known authorities. All are brought forward and discussed in Phillips on Insurance, §§ 695 to 723, inclusive. In § 719: "The warranty of seaworthiness varies in different places; a vessel considered seaworthy for a voyage in one

C. P.]

DANIELLS v. HARRIS.

[C. P.]

place may not be so considered in another; the standard of seaworthiness also varies from time to time in the same place." In § 720: "The requisites as to seaworthiness depend upon the intended use and service of the vessel. The requisites to satisfy this warranty for lying in port, or for temporary purposes, short coasting passages, or navigating a lake, river, or canal, are different from those demanded for navigating the open sea on long voyages." If, therefore, the warranty were set out in detailed terms, instead of in the comprehensive description, "that the ship must be seaworthy," it is obvious that the terms of the warranty as to each of the voyages, or as it were, parts of voyages, or conditions of things mentioned in these sections, would and must be different. If, then, the implied warranty is, as to its extent and effect, different in different policies with regard to the same subject matter, it might be not unreasonably predicated that it might be also different in different policies with regard to different subjects. It might be different with regard to the same voyage, to be made at the same season, if applied to two different subjects of insurance. There seems to be authority for saying that there is a difference. In Phillips on Insurance, § 721: "It follows, if we apply the same criterion, that there may be a compliance with this warranty in a policy on the ship while lying in port, and not one upon the cargo of the same ship. For circumstances may be readily imagined, and often occur, in which the vessel is in reasonable security in port, though goods on board would not be so." In § 723: "There are these two distinctions in the insurance on the ship, and that on cargo and freight, first, in respect of what is seaworthiness in port, and second, as to the time when the policy attaches: and these two distinctions have place, though all these interests are insured in the same policy made or having reference to the time before the cargo is on board." He then points out that, in two cases determined in Massachusetts, on a policy on ship, freight, and cargo at and from a port, the policy on the ship attached because the ship was seaworthy in port, but the policy did not attach as to the cargo or freight, because the ship was not seaworthy for the sea voyage, the warranty as to seaworthiness being as to all the risks, the warranty to be implied in the one policy. These are authorities for saying that there is a difference in extent and effect in the warranty of seaworthiness of the ship in different policies in which the subject-matter of insurance is different; but there is no authority which decides what is the extent and effect of that warranty in the case of a policy on goods.

The real question, therefore, is what is the principle to be applied; and upon this, first, what is the principle which governs the court in determining whether any terms are to be implied in contracts, and, if so, what those terms are to be. When and to what extent is a court of law bound to hold that there is an implied term in a contract? Whenever there is something not expressed which it is clear to all men of ordinary intelligence and knowledge of business must have been either latently or palpably present to the minds of both parties to the contract when it was made, for otherwise their contract would be, as a business transaction, insensible, or contrary to the universal course.

Applying the authorities so far as they go, and Vol. II., N. S.

this principle to the present case, it would seem that if the policy had been on the ship, it might well have been held that the extent and effect of the implied warranty would only have reached the safety of the ship. That is to say, if the cargo on deck would, however treated, have been a danger to the ship in an ordinary voyage, the warranty of seaworthiness would not have been satisfied, but if the deck cargo by reason of the facility with which it could have been got rid of, would have caused no danger to the ship, the warranty would have been satisfied. The same if the policy had been on cargo other than the deck cargo. For, in either case, upon the assumption, neither ship nor cargo insured would have been in any practical danger on an ordinary voyage. The only consideration against the affirmative of the proposition in either case is, that the safety of the subject insured is made to depend upon a breach of duty by the shipowner to the owner of the deck cargo. Yet that, as between the parties to the contract of insurance, would be as *inter alios acta*, and the underwriter would not be the legal defender of the owner of the deck cargo. Upon either of the policies thus suggested we should have thought the direction which was given in this case would have been correct. But then arises the final question, which is, can the same effect and extent be given to the warranty with regard to a cargo which is the subject-matter insured? Can it be supposed that the underwriter would insure at any premium cargo which, upon the assumption, must be jettisoned if the ordinary rough weather of the voyage should occur? or, on the contrary, may it not be said to be clear to every man of ordinary intelligence and knowledge of business, that neither the assured nor the underwriter on such a policy could have had in his mind, when the contract was made, the supposition that the underwriter would pay for the loss by inevitable jettison of the subject insured? In other words, must not the extent and effect of the warranty in such a policy on goods be, that the ship will be safe on an ordinary voyage without being put to sacrifice the insured cargo?

We are of opinion, upon consideration, that the extent and effect of the warranty that the ship is seaworthy in a policy on cargo can never be implied to be so great as to be considered to contemplate the destruction, in order to save the ship, on an ordinary voyage, of that very cargo which is the subject-matter of insurance. Such a supposition makes the contract, as a business transaction, insensible—the extra premium invariably paid in respect of a deck cargo applies to the extra danger to the cargo in case of weather more rough than the ordinary rough weather of the voyage insured.

We are, therefore, of opinion that the direction, in this case, was wrong, as applied to the policy before the court. It was right in saying that the question was not whether the cargo would be safe on an ordinary voyage, but whether the ship, including the cargo, would be safe. It was right in saying that, in considering that question, the jury should consider the nature of the cargo. But it was wrong in leading or leaving the jury to understand that if the ship could only be made safe for or in an ordinary voyage by the destruction of the insured cargo, they might, nevertheless, say that the ship was seaworthy.

EX. CH.]

THE IMPERIAL OTTOMAN BANK & COWAN.

[EX. CH.]

The rule must be made absolute for a new trial. *Rule absolute.*

Attorneys for the plaintiff, *Argles and Baseline.*

Attorneys for the defendant, *Hollins, Son, and Coscard.*

EXCHEQUER CHAMBER.

Reported by JOHN ROSS, Esq., Barrister-at-Law.

Feb. 5, 6, and 7, 1874.

ERROR FROM THE COURT OF COMMON PLEAS.

THE IMPERIAL OTTOMAN BANK & COWAN.

Sample of cargo to arrive—Supplementary cargo—One bill of lading including both—Waiver of objection to.

*Plaintiffs, a continental bank, having contracted to sell and ship to the defendants 1400 quarters of rye, to be paid for by an acceptance at three months, put the rye on board the *Agatha*. The vessel proved to be capable of containing from 200 to 300 quarters more grain than the quantity shipped, and therefore the plaintiffs filled up the vacant space with maize.*

One bill of lading only was given for the cargo, and the plaintiffs wrote on the 24th April to the defendants, with the invoices and drafts: "The maize is on the same bill of lading as the rye . . . as there would, no doubt, be a loss on the maize, we presume you will wish to leave it for account of shippers; but if you will accept the bill we will get an undertaking from the bank to hold you harmless for so doing."

*The defendants, who had made a sub-sale of the cargo, replied: "The drafts and invoices of this cargo are to hand, and we observe that the bills of lading are in the hands of the . . . bank. We think . . . we are entitled to ask a guarantee from the bank that the *Agatha* shall deliver the weight specified in the invoice. Would you have the kindness to ask the bank for this, and telegraph to us . . . their acquiescence, or the contrary. We would be obliged also by a copy, or the original, of the charter-party, and copy of the bill of lading for our Government. We leave, as you suggest, the maize to the shippers; the transaction in rye is a very bad one. We return you enclosed draft invoices of maize."*

On the 8th May the defendants refused to accept the bill of exchange for the rye, upon the ground that the plaintiffs had not given them a proper bill of lading. In an action for such non-acceptance:

Held (in error from the Court of Exchequer), that the defendants had, by a new agreement, waived any objection to the bill of lading in respect of the maize being included therein, and were therefore liable.

ERROR from a decision of the Court of Common Pleas, upon a special case (ante, p. 57), the substance of which sufficiently appears in the judgment, infra.

Field, Q.C. (with him Holt), for Messrs. Cowan.—The decision below was wrong. The contract was, that the bank should deliver the rye on board a suitable ship, which they would find, and, within a reasonable time after shipment, hand to the purchasers a clean bill of lading, giving them complete control over the goods, so that, in exchange for their acceptance of the bank's draft, the buyers might obtain the master's undertaking to deliver to their order, and be enabled to go into the market

*and effect a sub-sale. But the bank gave a bill of lading, including a shipment of maize, therefore, the buyers of the rye would not get their goods without first discharging the shipowners' lien on the maize. Whatever took place subsequently between the parties came too late. The bank had no right to encumber the rye with the maize. [QUAIN, J.—But they acted for your benefit; for had they not shipped the maize, you would have had to pay dead freight. Moreover, you retained both documents in your hands for ten days, having thereby all the benefit of the change of markets.] We did not avail ourselves of any such benefit, and were entitled to retain the documents for that period. Had we instantly rejected the cargo, we might have rendered ourselves liable to an action by the subvendees. Is a new contract to be inferred from our merely waiting ten days? A proper clean bill of lading for the rye should have been delivered to us forthwith [*Barber v. Taylor*, 5 M. & W. 527], or at least in reasonable time. [*Per curiam*.—If the vendor was bound to deliver the bill of lading in reasonable time, you on the other hand, were bound to reject it, if at all, in reasonable time. It is argued against you that there was an acquiescence amounting to an assent on your part to receive the bill of lading which was sent.] The bank never asserted that we had accepted the bill of lading, and they treated the transaction as still open.*

*J. C. Mathew (Bosanquet with him) for the bank.—The court below did not deem a bill of lading indispensable, but thought that the bank were bound to procure the delivery of these goods to us, and that in either of two ways, viz., by tendering a bill of lading to the very amount on the ship, or, without tendering the bill of lading, by delivering the rye at the port of destination. The bank performed their duty when they found a ship reasonably fit to carry 1400 quarters of rye, and they put that cargo on board. [BRAMWELL, B.—Can you contend that the bills of exchange were to be given months before either the goods or the bills of lading came to hand?] In the contract which is constituted by the letters [referred to there] there is no stipulation as to payment against a bill of lading. The giving of a bill of lading was not a condition precedent to the acceptance of the bill. Suppose the captain had refused to give a bill of lading, and the bank could only forward a mate's receipt, still the buyers of the goods would be bound to take and pay for them. [QUAIN, J.—It is somewhat strong for the bank to say to the vendees, "You shall be liable upon your bill of exchange for 2000*l.*, without having either cargo or documents." Such a contract might be made, but it would be unusual.] This contract was unusual. The danger of not possessing a bill of lading would be nil.*

Secondly, assuming it to be a condition precedent that the bill of lading should be forwarded, this bill was sufficient. A bill of lading is not a technical document like a bill of exchange, but is a mercantile instrument capable of much variation. The bank, as Cowan's agents, were bound to do the best they could for him, and did it. They chartered a ship of reasonable size for the rye, and in the ordinary course filled up the vacant space with maize, thereby saving dead freight, and gave Messrs. Cowan an option of taking the maize or of declining it, and in the latter case offered to take it themselves. Then

[EX. CH.]

THE IMPERIAL OTTOMAN BANK V. COWAN.

[EX. CH.]

their conduct with regard to the bill of lading was also reasonable, for the captain would naturally object to giving a separate bill of lading and say, "If I hand you a separate bill of lading for the rye, and the maize is left on board, so that demurrage is incurred, I shall not have a lien for it on the rye." It is a question of fact whether the conduct of the bank was or was not reasonable; and *Ireland v. Livingstone* (27 L. T. Rep. N. S. 79; L. Rep. 5 H. of L. Cas. 385) decides that when a principal puts a foreign agent into a difficulty, and the latter acts reasonably, the principal must abide by what is done on his behalf. (ARCHIBALD, J.—But what difficulty was there here? BRAMWELL, B.—In that case the House of Lords seem to have thought that the agent, to whom a letter of dubious meaning was sent, had only two courses to adopt. But with all reverence for the supreme tribunal, I venture to think that there was a third open to him, for he might have said to his principal, "You have sent me a letter which I cannot construe.") The document tendered was, under the circumstances, a reasonable one: (*Tomasco v. Lucas*, 1 Mar. Law Cas. O. S. 66, 231; 4 L. T. Rep. N. S. 400; 1 B. & S. 185.)

Thirdly, there has been a waiver of any objection to this bill of lading. And the position of the bank was altered by the non-repudiation by Messrs. Cowan, when the letter of the 24th April was sent to them (§ 15 of the case). There was no distinct repudiation until the 8th May: (§ 21.) [He referred to *Kreuger v. Blanck* (29 L. T. Rep. N. S. 128; L. Rep. 5 Ex. 179; 3 Mar. Law Cas. O. S. 470).]

Fourthly, assuming the bill of lading ought to have been corrected, that need not have been done at any earlier date. Messrs. Cowan give a had reason for refusing the bill of lading, viz., that the subvendees would not take the corn.

Held, in reply, was requested by the Court to address his argument to the question of waiver alone.—The circumstances show that it never was the intention of Messrs. Cowan to accept this bill of lading. They were reluctant, however, to reject it until they had satisfied themselves that their subvendees would not accept it, and only kept the matter open a reasonable time, in order to see if they would do so, and to obviate the necessity of acting on their strict rights. There are two material circumstances to be considered: first, that they had not the charter-party before them; secondly, that they had not seen the bill of lading. That appears from the correspondence. The letter of the 27th April 1868 was indeed written by our agents, but they were also agents of the bank. No acts appear to have been done on either side tending to show that either party considered that there had been an acceptance or waiver of the bill of lading.

Feb. 7.—BRAMWELL, B.—We are all of opinion that the judgment below must be affirmed.

The facts are, that the defendants bought, and the plaintiffs sold, 1400 quarters of rye, to be shipped at Salonica "free on board." The plaintiffs, charterers, were employed on behalf of the defendants, to ship and load the rye, and the plaintiffs were to accept in payment of the price a bill of exchange at three months, no doubt meaning three months from the time of shipment. That is clear, either from the original letters or those two which Mr. Mathew says constituted the contract,

which would be the same as from the date of the bill of lading, because the date of the bill of lading is the date of shipment. Now the rye was shipped, and the defendants might have received it if they had thought fit. Then the plaintiffs sue for the price, saying that everything had been done necessary for them to do to entitle them thereto, seeing that the rye had been shipped, and the defendants could have had it if they pleased. The defendants say: "We were bound to accept bills of exchange as against bills of lading for the rye only; you shipped rye and maize, and took one bill of lading for both, and we are not bound to take such shipment and such bill of lading." The plaintiffs reply: "You had no right to any bill of lading at all, there was no such stipulation in the contract, and you could have got the rye separate from the maize, by the arrangement which we tendered to you." To which the defendants rejoin that what was done was done in the way of specially indorsing the bill of lading, and tendering was too late, but afterwards: "Supposing you had a right to such a bill of lading as you say we ought to have got, we only were bound to get you such a bill of lading as we could; our conduct was reasonable. We have chartered a vessel which would hold more than 1400 quarters of rye; if we had sent it with rye only, you would have had to pay dead freight, so we, for your benefit, put maize also on board, which we did not ask you to take on your own account, but on ours, and our conduct was reasonable in getting such a bill of lading as we could; but even if it were not, it is incorrect to say that we did not ship rye, but shipped rye and maize. We made one shipment of rye and one of maize, and if we did not get you a proper bill of lading, that would only give a right of cross action, and not give a right to reject the rye and the maize, the property in the rye having vested in you on shipment, and not being divested by the subsequent shipment of the maize under the one bill of lading." And the plaintiffs further say: "Whatever may be the proper solution of all these questions on both sides, you agreed to the shipment as it was made and to the bill of lading as made out, and agreed to take to the rye and accept the bill of exchange, so that, supposing you had a right in the first instance to reject the goods and not pay for them, you had abandoned that right, and engaged to take the rye as shipped under the bill of lading, as made out." If that be so, it is unnecessary to determine the other questions. Then is that so? That depends on two or three letters.

But, first, what was the position of the parties? The ship had been chartered, no supposition existing that it had been unduly chartered, and that too large a vessel had been taken for the rye. It was too large, but it was to the interest of the defendants that something more should be put on board. It is clear, therefore, that in putting the maize on board, the plaintiffs did something, not for their own benefit, but for the benefit of the defendants. And, although I am not about to blame the defendants, whose case is rather unfortunate, for their cargo was rejected, probably if the rye had not gone down in price, there would have been no practical difficulty in delivery, under the bill of lading, of the rye to one person and the maize to another, and no practical difficulty in the bill of lading being so indorsed and so dealt with and such a guarantee taken from the plaintiffs that the defendants could have sold the rye as conve-

[EX. CH.]

THE IMPERIAL OTTOMAN BANK v. COWAN.

[EX. CH.]

niently as if the bill of lading were made out for rye only. Bearing these facts in mind, let us see what the letters are.

The first, to which I need here refer, is from Messrs. Horsley, Kibble, and Co., the agents of the bank, and is as follows:—*"Agatha*. Enclosed invoices and drafts for cash. The maize is on the same bill of lading as the rye, and dated the 7th April; as there would no doubt be a loss on the maize, we presume you will wish to leave it for account of shippers." That means, that although you take to the bill of lading, you will not take to the maize on your own account, "but if you will accept the bill we will get an undertaking from the bank to hold you harmless for so doing." Now, supposing the defendants had said, in as many words: "We agree, send us the indemnity. You have sent in the bill of exchange, and we will accept the bill, and then when the rye and maize are delivered, although we, on our side, may take the maize, it will be understood that it is taken, not on our own account, but on account of the shippers." That is their meaning. "The bill of lading is in the banker's hands; we have sent invoices of the rye only to the buyers." But what is in fact the answer. "*Agatha*. The drafts and invoices of this cargo are to hand, and we observe that the bills of lading are in the hands of the Imperial Ottoman Bank. We think, after what has happened with the *Charlotte Ida's* cargo, we are entitled to ask a guarantee from the bank that the *Agatha* shall deliver the weight specified in the invoice . . ." Does that mean. We are not going to take the rye or that we are? There can be but one answer given, viz., that "we are going to take the rye on the terms which you have offered." Then it proceeds: "Would you have the kindness to ask the bank for this, and telegraph to us on Monday their acquiescence or the contrary. We would be obliged also by a copy, or the original, of the charter-party, and copy of the bill of lading, for our government." That means, as we are going to take the rye, "we wish to have precise copies of the document, in order that we may know what our rights and obligations are." Then they say: "We leave, as you suggest, the maize to the shippers; the transaction in rye is a very bad one. We return you enclosed drafts and invoices of maize, 131*l.* 9*s.* 11*d.*" It is not said in words, but the implication is: "We keep the bill and the invoice for the rye, as we are going to take to them, notwithstanding the terms in which they are shipped."

Now that correspondence goes on, and for my own part I think that the matter was there concluded; I think that that was a new bargain. I do not know that it was so much a waiver as that it was a new bargain between the parties then concluded. But, however, if we are to look at the whole of the facts, the correspondence proceeds thus: We have your favour of the 25th, and have returned the documents of the maize, per *Agatha*, to the Imperial Ottoman Bank's agency here. We think it may be as well for you not to accept the bill for the rye for a few days at least, as we expect the buyers to take up the bill of lading, and thus save the trouble, under discount." Now it is manifest that the understanding of Horsley, Kibble, and Co. was, that the defendants were bound to take the rye as they suggest,—“The bill is still in the hands of the bankers; let it stay so, because until you get it with the special in-

dorsement and the undertaking, you are not bound to accept the bill of exchange, as the one is to be exchanged for the other”—that is to say, the bill of exchange for the bill of lading.—“do not you accept the bill of exchange for the present, and do not require the bank to give you the bill of lading for the present.” Then they go on to deal with the other matters, pointing out that “the bankers never undertake to deliver invoice weight, but only to ship it, and their agency here would make no undertaking of the kind you refer to.” That was the reply to the defendants' answer to Horsley, Kibble, and Co.'s first letter. Then the defendants remain silent, not making any objections that they had not got that guarantee from the bank or anything of the kind; they remain silent until the 8th May, when they return the bill for the rye unaccepted.

Now, under these circumstances, the defendants, knowing all that had been done had been not unreasonably done, unless it was in the particular of taking one bill of lading instead of two, that everything else had been properly and well done for their benefit—that there was not, as I have no doubt there would not have been, any practical difficulty in dealing with the bill of lading for the rye, with such an undertaking as was offered—or, looking at the terms of this correspondence, and being bound to draw conclusions of fact upon this matter, is it not the natural and proper conclusion of fact to come to that the defendants agreed to take to the rye as it had been shipped, under the circumstances in which it had been shipped, and to accept the bill of exchange? One difficulty arose from the bill of lading not being sent to the defendants. It is quite true that the plaintiffs would not be entitled to the acceptance of the bill of exchange if they had sent the bill of lading, notwithstanding the new agreement which was come to, as I say, between the parties; but the reason they did not send the bill of lading was, in the first instance, because it was deemed expedient that they should keep it, and the reason they did not send it after the parties were a little at arms' length with each other, was, because the defendants gave them notice that it was no use sending them the bill of lading with the undertaking mentioned in Horsley's letter of the 25th. The reason it was not sent in the first instance, was because it was not thought expedient that it should be sent to them, and the reason it was not sent afterwards, when the defendants refused to accept the bill, was because the defendants, in fact, dispensed with any tender of the bill of lading, and the undertaking to hold them harmless, by intimating that though it were tendered they would not accept it.

It seems to me, therefore, that supposing the defendants were right on all the other points, there is here a new agreement come to by which they were bound, and in respect of which they were liable in this action. It is suggested that the meaning of this expression in Horsley, Kibble, and Co.'s letter of the 25th April, “if you will accept the bill,” is “if you will accept the bill for the maize;” but I declare I do not think so. I think it means, “We presume you will not take to the maize; and if you will accept the bill for the rye you will be entitled to the bill of lading, and then we will get an undertaking from the bank to hold you harmless in respect of the maize.” However, I really do not

[ADM.]

THE ROYAL FAMILY.

[ADM.]

think it much matters, because either way it is an offer on the part of the bank to Horsley and Co., which is accepted either as it is made, or with a qualification by the defendants, because, if it means, "If you will accept the bill for the maize, we will get you an undertaking;" then they say, "We will not accept a bill for the maize, but merely for the rye"—and that is a qualification of the offer which has been made with the consent of the parties.

In either view it seems to me, therefore, to have been a good new agreement between the parties, and therefore the defendants are liable in this action. Of course the cross action will follow the fate of the other. Thinking, as we do, that this action by the bank against Cowan is maintainable, of course we think the cross action is not.

PIGOTT, B., QUAIN and ARCHIBALD JJ., and AMPHLETT, B., concurred.

Judgment affirmed.

Attorney for the plaintiffs, Clements.

Attorney for the defendants, Gedge.

COURT OF ADMIRALTY.

Reported by J. F. ASHALL, Esq., Barrister-at-Law.

Tuesday, Nov. 10, 1874.

THE ROYAL FAMILY.

Master—Wages—Costs—Detention money—Reviewing taxation.

In calculating, on taxation of costs in a cause for the recovery of a master's wages, the amount due to the master for detention money and board whilst detained ashore as a witness, the fact that he through his wife carries on a business will not deprive him of his right to be allowed detention money; but if he lives at his place of business during his detention, the fact that he can live more cheaply at home than elsewhere is to be taken into consideration in fixing the amount to be allowed for subsistence money.

THIS was a cause of wages instituted on the 25th April 1874 on behalf of the master of the ship *Royal Family* to recover his wages and disbursements. The owners disputed the claim, and made a counter claim against the plaintiff, and the accounts were referred to the Liverpool District Registrar, assisted by merchants. The presence of the master was required to give evidence on his own behalf, and he was detained on this business till 12th Sept. 1874. The registrar and merchants found that he was entitled to the sum of 304*l.* 19*s.* for wages and disbursements, and also to his costs of the reference; and a decree was made accordingly with costs. The costs were taxed by the district registrar, and the master was by the taxation allowed the sum of 100*l.* for the detention and for subsistence money during the time that he was detained ashore for the purposes of the suit. The time of his detention was computed by the registrar from 11th April, the date of the master's discharge, till 12th Sept. The sum allowed was equivalent to rather less than 1*l.* a day, to cover both board and loss of wages. To this taxation the defendants objected on the grounds, first, that it was in itself excessive, being above the rate usually allowed to masters in the plaintiff's position, his wages being only 15*s.* per month; secondly, that it ought not to be allowed at all in this particular case, because the plaintiff was the owner of a pub-

lie house, and during the time that he was ashore he had been living at this house, and had been exercising his trade as a publican, and had not, therefore, been deprived of his means of earning a livelihood. These facts appeared upon an affidavit of the defendants. In reply, the plaintiff filed an affidavit, from which he stated "that for some years past my wife has been carrying on the business of a licensed victualler at Chester for her own benefit and for the maintenance of herself and children while I have been at sea, and that she still continues to do so in the same manner. That during the time aforesaid I have carried on, and still intend to carry on, a seafaring life, and should some months ago have returned to sea as a master mariner had not my solicitors required my presence before the registrar and merchants to rebut the charges which were brought against me in the defendants' counter claim."

E. C. Clarkson, for the defendants, in objection to the taxation, contended that the amount was excessive, and ought not to be allowed. The time allowed was too long, and could not date from before the institution of the cause.

Bull, Q.C., for the plaintiff, submitted that the plaintiff was entitled to be compensated for any loss he might sustain by reason of his detention, and that, although his wife kept a public house, he sustained loss of wages, and was put to a certain expense for his keep during the time he was ashore. It must be taken that he could have got employment at once.

E. C. Clarkson in reply.
Sir R. PHILLIMORE.—This is an application to the court to review the taxation of the plaintiff's bill of costs, upon the grounds which I will presently state.

The plaintiff was a master mariner, and he claimed 315*l.* 18*s.* 1*d.* The claim was disputed by the owners, who claimed on the other hand 2500*l.* The matter went before the Liverpool District Registrar, assisted by merchants, and they determined that the matter required investigation; that 11*l.* 4*s.* 4*d.* only was due to the owners out of the 2500*l.*, and 304*l.* 19*s.* was due to the master, and they allowed him the costs of the reference. On the taxation of costs the district registrar allowed the master 100*l.* for "detention and board," and against this allowance this appeal is made.

Two questions appear to have been raised: first, whether, on principle, under the circumstances, any allowance at all ought to have been made to the master; the other whether the allowance made is not upon an excessive scale? It has been contended that, as the master kept a public-house, he does not fall within the principle upon which allowances are always made to witnesses detained to give evidence in a cause, inasmuch as he has not been debarred from earning his livelihood, but has been living by following his trade. I am satisfied upon the affidavit before me, which is not contradicted, that this was a trade carried on by the plaintiff's wife, and that as the plaintiff had been in the habit of earning his livelihood as a master mariner, there was every reasonable probability that, but for his being detained to give evidence in this cause, he would have been earning his livelihood in his usual manner. Therefore, upon principle, he is entitled to some allowance on account of his detention as a witness.

But then it is contended that the allowance

[NISI PRIUS.]

ACHARD AND OTHERS v. KING AND OTHERS.

[NISI PRIUS.]

made is upon too high a scale. The question is whether on the taxation of costs the 100l. is or is not an excessive taxation.

I am of opinion that the scale is excessive. In the first place the allowance was made to run from 11th April, about a fortnight before the suit was instituted, till 12th. Sept. The cause was instituted on 25th April, and he cannot claim before that date; but I think it reasonable to suppose that the plaintiff would have got a ship almost immediately after; and, therefore, if the time is made to run from 1st May, justice will be done. In the next place, the scale is larger than is allowed by this court, and larger than the circumstances required, because, although the fact of his being a licensed victualler does not deprive him of his right to the allowance, the fact that he can, if at home, sleep and live at a cheaper rate, is to be admitted.

I shall allow him 125 days at 10s. a day, and ten days at 15s. a day for extra expenses. That brings the amount allowed to 69l. 10s., and I shall reduce the taxation by 30l. 10s.

Solicitor for the plaintiff, W. W. Wynne.

Solicitors for the defendants, Sharpe, Parker, and Co.

NISI PRIUS.

COURT OF QUEEN'S BENCH, GUILDHALL.

Reported by F. OCTAVIUS CLARKE, Esq., Barrister-at-Law.

Saturday, Dec. 19, 1874.

Before COCKBURN, C.J., and a Special Jury.)

ACHARD AND OTHERS v. KING AND OTHERS.

Ship and shipping—Fire—Extinguishing by scuttling—General or particular average—Custom.

Damage to cargo by scuttling a ship to put out a fire is the subject of general average contribution. There is no valid custom excluding the loss from general average.

The plaintiff chartered a ship from the defendant, and by the charter-party it was provided, "all questions of general average to be settled according to the custom of the London underwriters at Lloyd's."

A fire broke out on board, the ship was scuttled to extinguish it, and the cargo was damaged thereby. The loss was adjusted as general average, and the plaintiff brought his action to recover from the defendant the ship's contribution.

The learned judge directed the jury that the loss was general average according to law, and the question was whether there was a valid custom excluding such loss from general average.

The jury found that no such custom existed, and the verdict was entered for the plaintiff.

See Stewart v. West India and Pacific Steamship Company, where a custom excluding damage to cargo by water poured down the hatches to extinguish a fire from general average was recognized, and held to govern the rights and liabilities of the parties: (ante, vol. 1, p. 528; ante, p. 32; L. Rep. 8 Q. B. 362). (a)

The dicta of text writers cannot be considered as any evidence of the existence of a custom.

Tax facts of the case were admitted, and the only question to be tried was whether a custom exists

(a) This practice has now been abandoned. See note, ante, p. 32.—Ed.

at Lloyd's excluding from general average damage to cargo by scuttling to put out a fire.

The ship *Cosmopolis* was chartered by the plaintiff from the defendant under a charter-party for a voyage from Akyab to London or Liverpool with a cargo of rice. There was a stipulation in the charter-party to this effect, "All questions of general average to be settled according to the custom of the London underwriters at Lloyd's."

In the course of discharging the cargo at Liverpool a fire broke out, and in order to extinguish it the ship was scuttled, and a large proportion of the cargo much damaged; the charterer claimed to recover from the shipowner a proportion of the loss adjusted as general average. The question was, did the clause in the charter-party protect the shipowner—in other words is there a custom at Lloyd's excluding such loss from general average?

Cohen, Q.C. and J. C. Mathew were counsel for the plaintiffs.

Benjamin, Q.C. and Baylis for the defendants.

A great deal of evidence was taken with reference to the alleged custom, the general purport of which, and of the arguments of counsel, appears from the summing-up of the Lord Chief Justice.

COCKBURN, C.J.—Gentlemen of the Jury: I think you thoroughly understand what is the issue you are to dispose of, namely, whether there is this custom among the underwriters at Lloyd's where a ship is scuttled with a view of extinguishing the fire that has broken out, and by reason of the water which the ship necessarily takes in when the ship is scuttled, the cargo is damaged, the loss accruing to the merchant shall be considered as particular average in respect of which he must have recourse to the underwriters, and not general average, in which case he would be entitled to come upon the shipowner. You are familiar with the doctrine that where a sacrifice of the cargo takes place for the preservation of the common venture of all concerned, owners of goods and owners of ship, that which is saved must contribute to make good the loss which he sustains whose ship or part of whose ship, whose goods or part of whose goods have been sacrificed for the common benefit.

Now, there is no doubt in this case the damage to these goods would be a loss which would come under the head of general average if it were not for this custom at Lloyd's, that is to say, supposing the custom to exist. Here, a fire having broken out in the ship, the ship was scuttled, and by reason of the ship being scuttled these goods were damaged. The ship is afterwards got up and is saved, but the goods, although still existing in specie, are so much deteriorated as to be of less value than the freight to be paid upon them; therefore there is a loss, and a very considerable loss, to the owner of the goods.

Now, does this custom exist which prevents him having recourse to the shipowner, as the plaintiff in this case seeks to do? It is quite clear that this custom is in opposition to, and in derogation of, the law of the land relating to insurance, and to the matter of average as between the shipowner and the owner of the goods. It would be general average according to the law of the land but for this custom, and therefore the custom militates against, and derogates from, the law of the land, and where a person sets up a custom of that sort in derogation of the law, he is bound to

[NISI PRIUS.]

AICHARD AND OTHERS v. RING AND OTHERS.

[NISI PRIUS.]

prove it, and prove it fully to the satisfaction of the jury. Where the law attaches certain consequences to any such act, it is competent to the parties by agreement between themselves to insist upon his foregoing the advantage the law gives him, and it is competent to the man to whom the law gives the advantage to waive it if he thinks proper. Therefore, if the parties chose to agree that that which was matter of general average should become matter of particular average, there would be nothing illegal in entering into such an arrangement, but where the law gives any advantage, and they are endeavouring to take away that advantage by reference to a particular custom, there that custom must be proved to the satisfaction of the tribunal which has to administer justice. The question is whether you are satisfied that this custom has been made out.

Now, a good deal of matter has been brought before you which, I think, strictly speaking, is inadmissible, and ought not to weigh in your decision. You have been told of a meeting, and some resolutions to which these average adjusters came (a). That is not at all hindering; that is not legitimate evidence in this case, neither were the passages read from certain authors upon this subject, who give you the result of their speculative opinions, in any way evidence, or admissible to bind you in your decision of this case. You must look to the evidence, and to the evidence alone.

Now, there is evidence certainly that where water has been admitted or thrown into the hold of a vessel for the purpose of extinguishing fire, and thereby damage has been occasioned to the goods contained in the vessel's hold, that has been excluded from matter of general average, and made matter of particular average; but it appears the average adjusters who come to tell you this was the practice do not apply it to the case of scuttling vessels, as regards past experience. Now, the first important witness, Mr. Lindley, whose experience ranges over a longer period than anybody else's, I think, cannot tell you a case of a ship that was scuttled, and so the learned counsel for the plaintiff says fairly enough, "If all that is proved is a custom that has reference to the admission of water into the hold, by its being thrown in, if that is the only case in which this custom is proved to have existed, you now seek to apply it to a new case, which is not identically the same; and, inasmuch as it is admitted on all hands that the custom is an irrational one, an objectionable one, an unjust one, do not extend it one hair's breadth beyond the limit to which it has already been carried." That is a fair argument, but I do not think that it is admissible to the extent that the learned counsel pushes it. I cannot help thinking that, although the second case may not be identical with the first, if the principle which applies to the first, and must be taken to be the foundation of the custom, applies in every point of view to the second, he must consider the second as concluded upon the principles of the first; and I cer-

tainly cannot see, nor has he been able to point out, any substantial difference between the case of water admitted into the hold for the purpose of extinguishing fire, and thereby doing damage to the goods; and the case of a ship being sunk into the water in order that the water may have precisely the same effect, that of extinguishing the fire. The water is admitted to the hold by artificial means, such as lifting it in buckets, or by the use of a steam engine, or in any way you think proper, or which your imagination can suggest; water is cast into the hold and puts out the fire, and so damages the goods. What does it matter whether you pour the water by artificial means into the ship's hold, or out a hole in the side of the ship, and let her down, and so let the water come in? Practically, it comes to the same, and I cannot help thinking that if a custom is shown to exist in one case, and a particular principle is resorted to, it should be resorted to in the other case.

That leaves open the question whether you are satisfied a custom does exist as to casting in water through the hold for the purpose of extinguishing fire. A custom does seem to exist among certain adjusters in London—I may say the majority, and there appears not only to have been an opinion in such cases as the one we are considering that the loss should be set down not to particular average, but to general average, but it appears to have been their practice to do so. How that practice originated appears to be matter of speculation, but I cannot help thinking that the true reason is the one that occurred to myself, and that is that it is so much more convenient. The person who goes to the average adjuster in the first instance is the man who has sustained the loss. The merchant whose goods have been damaged seeks an adjuster to settle his claim, that he may make his claim against whom he may be advised, and naturally enough it will occur to the adjuster, who is his adviser and friend, that it is the far more simple thing, if your policy will cover the loss, to go to the underwriter and say, "My goods have been damaged to such and such an extent. Be so good as to pay me." And inasmuch as it is quite clear that where there is this particular damage the underwriter must pay nineteen times out of twenty; the underwriter pays, and for aught we know, afterwards makes good his loss by representation to the goods owner, and getting the contribution to which the goods owner would have been entitled. I cannot help thinking that must have been the origin of this practice, but that the practice does appear to have been continued amongst average adjusters upon this evidence cannot be contradicted. The learned counsel for the plaintiffs says it may have existed among average adjusters, but by the terms of this contract the custom, not of the average adjusters, but of the underwriters as Lloyd's, is to be the test. The learned counsel for the defendants says, "Do you show it existed among underwriters at Lloyd's?" And he says fairly enough, "You have not called a single underwriter at Lloyd's or anyone connected with that institution, or familiar with its practice, to show the underwriters acquiesce in this principle." Well, I think what I threw out in the course of the discussion to a certain extent affords an answer, because if you are satisfied that this practice has prevailed uniformly and universally in the

(a) The meeting referred to was a meeting of the principal average adjusters who, in accordance with the decision in *Stewart v. The West India and Pacific Steamship Company* (ante vol. 1, p. 538), resolved to treat such a loss as this as a general average loss. (See ante, p. 32.—Ed.)

NISI PRIUS.]

ANDERSON v. MORICE.

[C. P.]

adjustment of averages by that useful class of persons, the average adjusters, and that underwriters have paid without difficulty and without resistance the claim as so adjusted and made out, it is very difficult indeed to suppose that the underwriters must not have been familiar with and acquainted with this practice. Therefore the learned counsel for the defendants was entitled to say, "it is enough for me to prove that the average adjusters had uniformly acted on this principle and practice to ask a jury to infer that that principle must have been known and acquiesced in by the underwriters. at Lloyd's in my case." The custom would be as much custom of the underwriters as Lloyd's as it would be a custom with the average adjusters. So the matter stood on the evidence adduced on the part of the defendants.

Then the learned counsel for the plaintiffs meets that by calling several underwriters or persons familiar with insurance matters at Lloyd's, who all say, "We never heard of such a practice." The counsel for the defendants says, "Though you may never have heard of it, never known of it, never dreamt of it, still, if I can show the practice has existed for a long time so as to become an established practice, it is not because particular individuals have never fallen in with cases of that description, and therefore never had experience of the practice, that the practice is not to be taken to exist." To a certain extent that argument is well founded; but it must be taken with this exception, that it must shake your confidence in the evidence which goes to show this practice, when gentlemen who have been for many years at Lloyd's never heard of it, because they would have been in this position if any one of them had been called upon to pay—suppose, for instance, he had been called upon to pay particular average, and he had refused, and he had been told "Aye, but although you knew nothing about it you are still liable, because of the existence of this custom," there would have been the evident hardship of making a man liable upon a custom, the existence of which is not universally known in the market or the body to which he individually belongs. Certainly, therefore, one would expect that where it is said and sought to be proved that a particular practice derogating from the ordinary law exists in a particular department of business, it would be so general and universal that the knowledge of it would have extended to all the members of that particular institution.

At the same time, if you are perfectly satisfied that this practice did exist, although it has now undergone a change, then although the fact that a certain number of the members of Lloyd's knew nothing about it, might very legitimately tend to shake your confidence in the evidence by which it is sought to establish the practice or the custom, yet if the evidence in favour of the custom so completely satisfies your minds of the existence of the custom, then the ignorance of a particular individual of its existence would not be an answer to the affirmative evidence if that affirmative evidence brought conviction to your mind. You must really upon this evidence apply your minds to the question whether this practice is established or not. It is admitted on all hands to be a bad practice, it is one the abrogation of which we must all be glad

of; but still, if the parties contracted on the assumption of its existence, that is to say, if the defendant was perfectly justified in saying, "I have stipulated for the settlement of any claim of general average, according to the custom of the underwriters at Lloyd's," he may say, "I am perfectly entitled to insist on that stipulation as the basis and condition of our contract; though that custom may be one which persons may think wrong, that is nothing to me, I can only conclude our bargain on the terms that that custom shall be part of the conditions of the contract." If he has stipulated for that he is entitled to the benefit of it, whatever you may think of the practice. The only question is, not whether the practice is good or bad, but whether it did in point of fact exist at the time this contract was entered into. The decision of the Court of Queen's Bench (*Stewart v. The West India and Pacific Steam Navigation Company*, ante vol. 1, p. 524; ante, p. 32) upon the case you have heard mentioned had the effect, and a very salutary effect it was, of leading those who were in the habit of making these adjustments upon the principle in question, to desist from so doing, but that does not in any way affect the question whether that practice existed before.

Now, all I would say in conclusion is, it is not enough to constitute a practice that a certain number of individuals should entertain a belief that that practice or custom exists, and act accordingly, because they may be mistaken; and in a great establishment like the commercial institutions of this country, a practice in derogation of the law, unless it is of general application in that particular department to which it is sought to be applied, ought not to be acted upon. If you believe that throughout the great mass of the average adjusters in London there was this particular practice established, that the matter we are now considering should be deemed matter of particular and not of general average, then the defendant is entitled to your verdict. If you think that custom has not been made out so as to apply to the underwriters at Lloyd's generally, as well as to the average adjusters, then the plaintiff is entitled to your verdict.

You need not trouble about the amount, because that will be settled out of court. The question is, did this practice exist at Lloyd's at the time this policy was effected? That no such practice exists now is certain, because all parties have agreed it shall not be acted upon. Whether it existed before is the question for you to determine.

The jury found for the plaintiff.

COCKBURN, C.J.—You are of opinion, gentlemen, the custom is not made out.

The Foreman.—Yes, my Lord.

COURT OF COMMON PLEAS.

Reported by ERNESTUS SMITH and J. M. LEST, Esqrs.
Barristers-at-Law.

April 20, May 1, 2, and 6, and Nov. 2, 1874.

ANDERSON v. MORICE.

Marine insurance—Seaworthiness—Perils of the sea—Loss from unascertained cause—Insurable interest—Cargo partly shipped—Appropriation of goods to contract—Passing of property.
A ship which had previously been to all appearances

C. P.]

ANDERSON v. MORICE.

[C. P.]

staunch and sound, and had recently been thoroughly repaired, and had a few days before been examined without any defects being discoverable, sank suddenly at her moorings, when she had taken in five-sixths of her cargo. No direct evidence could be given why she foundered, nor could any certain cause be assigned for her doing so:

Held, that these facts raised a presumption of unseaworthiness which were conjectures and suggestions of a cause could not displace; but that the evidence of the ship's excellent conduct up to the time immediately preceding the loss, of extensive repairs recently done, of careful surveys recently made, and of the localisation of the injury, was properly left to the jury on the questions as to seaworthiness and loss by a peril insured against, and was evidence on which they were justified in finding a loss from perils insured against, and were not bound to say that the vessel was unseaworthy.

The plaintiff had made a contract in these terms: "Bought the cargo of new crop rice per Sunbeam, at 1s. 1½d. per cwt., cost and freight . . . Payment by seller's draft on purchaser at six months' sight, with documents attached." He then effected an insurance "at and from Rangoon by the Sunbeam on rice, as interest may appear, amount of invoice to be deemed the value." When the Sunbeam sank at her moorings in the Rangoon river she had nearly finished loading; the rest of the rice necessary to complete the cargo was alongside in lighters. After she sank bills of lading for the rice which had been actually shipped were signed by the captain, and the sellers drew bills of exchange which were accepted and paid by the purchaser, the plaintiff, to whom the bills of lading had been indorsed.

Held, in an action on the policy, that there was no binding appropriation of the rice in the lighters to the contract, that the property had not passed, and the purchaser had no insurable interest in such rice.

Held, as to the rice which was on board the ship when she sank, that there was such an appropriation of the rice already loaded, the ship being named in the contract, as to prevent the seller from withdrawing it without the buyer's consent; that the buyer would have had an option of accepting or rejecting the incomplete cargo, had it arrived and been tendered to him, and that such option remained to him after the loss, in fact; that the property in a full cargo would have passed to him at once on the loading, and that his option of rejection could only arise from the cargo being deficient, and if he did not exercise such option, the terms of the contract were applicable to the lesser cargo, and it would, therefore, be at his risk, and the property would have passed to him from the loading; that the existence of this option, if he declined after the loss to exercise it, did not deprive the purchaser of his insurable interest in the rice to its full value; that here, therefore, the property was in the plaintiff at the time of the loss, and he had an insurable interest.

Held, further, that even if the property in the rice on board did not pass legally to the plaintiff, he had an insurable interest in it, because he had an existing contract with regard to it from the time of its being loaded, by virtue of which he had an expectancy of benefit depending on the safe arrival of the rice.

Held, that this was a valued policy.

THIS was an action on a policy of insurance on a cargo of goods and merchandise in a ship called the *Sunbeam*, at and from Rangoon to any port in the United Kingdom or Continent, and was to recover 6000*l.* for the loss of the cargo so insured.

The action was tried before Brett, J., at the Guildhall, during the sittings after Hilary Term 1873.

It appeared that on the 2nd Feb. 1871, the plaintiff, a London merchant, entered into a contract for the purchase of a cargo of Rangoon rice, in these terms:

2nd Feb. 1871.—Bought for account of Anderson and Co., of Bordeaux, Schiller, and Co., the cargo of new crop Rangoon rice, per *Sunbeam*, 707 tons register, No. 1254, in *veritas*, at 1s. 1½d. per cwt., cost and freight, expected to be March shipment, but contract to be void should vessel not arrive at Rangoon on or before the 1st April, on rice, as interest may appear. Amount of invoice to be deemed the value; average payable on every 500 bags. The said merchandise, &c., are and shall be valued at 5500*l.*, part of 6000*l.*

He then, on the 3rd Feb. 1871, effected an insurance with the defendant in these words:

At and from Rangoon to any port or place of discharge in the United Kingdom or Continent, by the *Sunbeam*, warranted to sail from Rangoon on or before the 1st April, on rice, as interest may appear. Amount of invoice to be deemed the value; average payable on every 500 bags. The said merchandise, &c., are and shall be valued at 5500*l.*, part of 6000*l.*

The ship sailed from Point de Galle in ballast and arrived in the Rangoon river on the 2nd March 1871, and anchored in the usual place at the mouth of the river Pegu where it runs into the Rangoon, about five miles below Rangoon itself. She was anchored by two anchors, sixty fathoms apart, one up and one down the river. Having discharged her ballast, she began to load rice on the 15th March, and continued loading till the 30th March, at which date there were 8875 bags of rice on board, and 1600 bags, which would have completed the cargo, in lighters lying alongside. The ship then suddenly began to leak very fast, and there was evidence that the water was heard rushing in near the stern; it was found impossible to get the water under, and it increased so rapidly that on the 31st March, the following day, she sank.

Evidence was given that the *Sunbeam* had been thoroughly overhauled and reclassified in 1869, that in several long voyages she had behaved very well, that she was quite tight and dry on the voyage from Point de Galle, and that while lying in the Rangoon river she had been examined by the captain and some of the seamen recalculated. There was also evidence that haws were sometimes formed in the river by vessels throwing ballast overboard, that the tide is strong, that the draught of the ship when loaded was 19ft. 6in., and the depth of water at her anchorage was 22ft. at low water.

After the ship sank, the captain signed bills of lading for the cargo which had been actually shipped, which were indorsed to the plaintiff. The sellers drew bills of exchange for the price, which the plaintiff duly accepted and met. A claim was then made upon the underwriters, all the facts being disclosed to them.

At the trial, the defendant contended that there was no evidence of loss by perils of the sea, that the ship was not proved conclusively to be seaworthy, and that the plaintiff had no insurable interest in the cargo.

Upon the above facts and evidence the jury found a verdict for the plaintiff, and leave was reserved to the defendant to move to enter a ver-

[C. P.]

ANDERSON v. MORICE.

[C. P.]

dict for him, if the court should be of opinion that there was no evidence of a loss by perils insured against, or if the evidence showed that the ship was not seaworthy, or if it showed that there was no insurable interest in the plaintiff.

Accordingly, a rule was obtained by Sir John Karslake, Q.C., in Easter Term 1873, upon these grounds, and also for a new trial, on the ground that the verdict was against the weight of evidence, or to redress the damages, against which, in Easter Term 1874.

Sir H. James, Q.C., Watkin Williams, Q.C., and J. C. Mathew, showed cause.—First, was this ship lost by perils insured against, that is, by perils of the sea? It is not necessary for the plaintiff to prove the cause of the loss; but in fact evidence was given suggesting several causes, any of which were consistent with the fact of the perfect seaworthiness of the ship at the inception of the risk, and which were, in the opinion of competent witnesses, probable causes of the ship sinking so suddenly as she did, and which were perils of the sea. To establish against this evidence that the loss was not within the perils insured against, the defendant must prove that the ship was unseaworthy, and so the two first points must be in effect argued together. It was suggested that the ship might at low water have taken the ground upon heaps of ballast, which it was proved were customarily thrown into the river; that she might have sat upon her anchors, or caught upon one as she swung with the tide, and so have damaged her bottom. Then there was direct evidence of seaworthiness given; it was proved that she had made several long voyages, and had always behaved very well; that she was always tight and dry; that in the immediately preceding voyage she was perfectly seaworthy, and did not leak at all then, nor while she was lying in the river waiting for this cargo, up to the 30th March, the day before she sank. She was overhauled while at Rangoon, and the caulking found to be in good order. The suggestion made by the defendant that her seams had opened, and that as she was loaded they came below the water line and caused the leak, is contradicted by the distinct evidence of the examination of the seams; and to make this available to the defence it would be necessary to show that on the 9th March, at the time when the loading began and the policy attached, she was unseaworthy. But the seams were examined, and where necessary recaulked before the 9th, and during the loading she did not leak at all, though when the sudden and violent leak began—too violent to be accounted for by gaping seams only—she had as much as five-sixths of her full cargo on board, and must have been well down in the water. [Brett, J.—Sir J. Karslake suggested that it was not the duty of the captain to go round and examine the ship, but of the carpenter, and you only produced the captain.] But if he did in fact examine, that is enough. [DENMAN, J.—May not the ship have been unseaworthy at the time she was lost, though not at the time she was insured?] If there were defects which would have been made good before her voyage she was seaworthy. The condition of her seams would not be an unseaworthiness to affect the policy. One contention of the defendant is, that the captain improperly loaded the ship too rapidly, that having a motive to complete by the 1st of April, he hurried the loading so that the seams had not time to take up as the vessel got

down lower in the water; but if this were so, it would be a loss for which the assured are entitled to recover, upon the authority of *Sadler v. Dixon* (8 M. & W. 895), where it was held that the underwriters are liable for the consequences of the wilful but not barratrous act of the master and crew in rendering the vessel unseaworthy before the end of the voyage, by throwing overboard a part of the ballast. Then, again, it is said, this, not being absolutely proved to be a loss caused by a specific cause capable of being assigned, is not a loss by perils of the sea. But Lord Ellenborough's judgment in *Cullen v. Butler* (5 M. & S. 461), shows that although the loss of a ship by being fired into by mistake was perhaps not a peril of the sea, yet it would come under the words in the policy, "all other perils and losses." There the cause assigned was expressly not a peril of the sea in the sense of its being *ex marinis tempestatis discrimine*; here no foreign cause can be assigned, and the presumption, therefore, is, that it was a peril of the sea. But, again, from the case cited, it would seem to be a material question to ask, was not this a peril within the policy, even if it be admitted not to be a peril of the sea, strictly so called.

Then, on the next point, the plaintiff might contend that the property in the rice passed by the appropriation of the goods and to be put on board, but it is enough to say that he had an insurable interest in that which was on board at the time of the loss. In *Joyce v. Swan* (17 C. B. N. S. 84), where the price had not been definitively agreed upon, it was held that the property in the goods passed by the contract, the goods having been shipped to order; and Willes, J., goes even beyond this, and says: "I am inclined to go further; for it appears to me that, if what was done by S. and Co. was, to put the goods on board with the intention of fulfilling M.'s order, even if, by reason of some special circumstances, the property did not pass on shipment, yet, by reason of the risk, the buyer might insure the cargo in respect of the interest he had in it. It is like the case I put of a tenant of a house bound by a covenant to insure; though he has no longer an interest in the house, yet by reason of his covenant, he has an interest in the insurance." See also

Ireland v. Livingston, ante, vol. 1, p. 389; 27 L. T. Rep. N. S. 79; L. Rep. 3 E. & L. App. 395; *Sengrave v. The Union Marine Insurance Company*, 14 L. T. Rep. N. S. 479; L. Rep. 1 C. P. 395; 2 Mar. Law Cas. O. S. 331.

In this case the plaintiff did incur a risk in relation to the non-arrival of the cargo. [Brett, J.—It is sufficient to say that he would have made profit upon arrival.] The cargo was sufficiently earmarked, because it was in the contract, "cargo per *Sunbeam*," and it is no valid argument that the whole cargo was not on board, because, suppose the captain had been compelled by bad weather to slip his cable and run to sea with only part on board, and the ship was lost at sea, would not that clearly be a loss of cargo? [Brett, J.—At what moment do you say the policy attaches?] At the time of shipment. *Ebworth v. The Alliance Marine Insurance Company* (ante, p. 125; 29 L. T. Rep. N. S. 479; L. Rep. 8 C. P. 596) gives the general test as to insurable interest; it is when there was an existing contract with regard to the goods by virtue of which the plaintiff had an expectancy of benefit and advantage

C. P.]

ANDERSON V. MOFFICE.

[C. P.]

arising out of or depending on their safe arrival. The date of the insurable interest accruing depends on the true construction of the contract, and in no way on the policy; it is a question of purchase and sale. The contract is an executory contract, made on the 2nd Feb. 1871, and it says, "Bought, &c., the cargo per *Sunbeam*." The cost and freight, but not the insurance, are included; it is, therefore, important to have a definition of cargo. As to its not necessarily meaning a whole cargo, and that the court will not take a mere dictionary definition, see *Houghton v. Gilbert* (7 C. & P. 701); it is a question for the jury to decide whether cargo in the contract is satisfied by such a shipment as was effected here. *Sargeant v. Reed* (2 Strange, 1227) was cited as the authority in that case, but it only goes so far as to say that cargo is an intelligible term as referred to a ship, and did not make a prescription to take three bushels out of a cargo had as being unreasonable or uncertain. [BRETT, J.—Your argument goes to the length that the "cargo of *Sunbeam*" can exist before a single bag is put on board.] Yes, it exists as soon as it is appropriated to or put into the custody of the ship. Here all but a few hundred bags was loaded, and the remainder was in lighters alongside the ship, and in the charge of the people of the ship. There was here an authority to appropriate the rice to the contract, and so the case comes within the rule in *Aldridge v. Johnson* (7 E. & B. 835), commented on in *Jenner v. Smith* (L. Rep. 4 C. P. 270). The vendor had sent down to the landing-place a cargo for the *Sunbeam*, and thereupon there was an insurable interest in the plaintiff in that cargo. So that we say that here there are all the elements necessary to create an insurable interest within the definition of Lawrence, J., in *Lucena v. Craufurd* (2 B. & P. N. R. 269), and in *Barclay v. Cousins* (2 East, 544). In favour of the plaintiff also is *Sparks v. Marshall* (3 Bing N. C. 761). Is not the meaning of the contract here that the risk of the shipment is to be the purchaser's? The cargo was at the purchaser's risk, although payment was to be made after arrival. The amount having to be ascertained by subsequent weighing on delivery does not make it less at buyer's risk: (see *Castle v. Playford*, ante, vol. 1, p. 225; 26 L. T. Rep. N. S. 315; L. Rep. 7 Ex. 98.) The purchaser here also would have been liable to pay for this cargo even if it had been lost. [BRETT, J.—Would the shipowner be liable for a loss if a barge had sunk?] The charterer is bound to load the ship, and here the whole cargo had been taken from the shore and brought to the ship, and the mate was directing the loading of the last of the bags from the lighters. *Jones v. The Neptune Insurance Company* (ante, vol. 1, p. 416; 27 L. T. Rep. N. S. 308; L. Rep. 7 Q. B. 702) will be cited on the other side, where "from the loading" was held to mean from the complete loading, but that was a policy on freight, and was distinctly limited as being "from the port of loading," not "at and from," and so had reference only to the voyage, and attached as soon as it commenced. So also *Kreuger v. Blane* (3 Mar. Law Cas. O. S. 470; 23 L. T. Rep. N. S. 128; L. Rep. 5 Ex. 179) which is quite distinguishable in principle from the present case. It was a contract of sale of a cargo, which was held (Martin, B., dissentient) not to be satisfied by the tender of a part of a cargo, even though the quantity corresponded with the order

in the contract. That case was also discussed in *Ireland v. Livingstone* (ubi sup.) in the House of Lords, and doubt thrown upon it in the judgment of Blackburn, J., so that the court will not be disposed to press it beyond its immediate application, and it is submitted it has no application to the very different circumstances of the present case. They referred also to

The Bank of Ireland v. Perry, 25 L. T. Rep. N. S. 845; L. Rep. 7 Ex. 14.

Sir J. B. Karslake, Q.C., Butt, Q.C., and Cohen, Q.C., for the defendant.—There are really only the two questions: First, whether the loss was by perils of the sea; and, secondly, whether the plaintiff had an insurable interest in the cargo at the time of the loss.

It must be admitted that the plaintiff had *prima facie* a case of seaworthiness, that is to say, if there had been no evidence, the defendant would have had to prove unseaworthiness. But there was evidence which rebutted the *prima facie* presumption, and the mere conjectural suggestions are valueless. The probability of a hole being knocked in the ship's bottom by a ballast heap is rendered nil by the evidence that there was an active police force at Rangoon, which prevented the discharge of ballast into the river, and it was admitted that such discharge was, as much as possible, prevented; then, the stream runs six to seven knots an hour, and no heap could accumulate. Besides this negative evidence, it was proved that ballast was a valuable article of sale. As to the anchors, the ship was anchored up and down stream, and was thirty fathoms from each anchor, and never nearer. But she was a wooden ship, and had not been in dry dock since March 1869, and a 1400-ton ship came into collision with her a few days before—the mate said, without damaging her. So, as far as the evidence goes, it is that she was lost without any cause. But peril of the sea means some cause from without. [BRETT, J.—If the evidence of seaworthiness was conclusive, and she sunk without any cause, how would it be?] The onus of proof would be shifted. It is true that a ship may be seaworthy at the commencement of the risk and become unseaworthy an hour afterwards; but in such case the presumption is that she really was unseaworthy before, and the *onus probandi* is on the assent to show that the inability arose from causes subsequent. This is Lord Eldon's language in *Watson v. Clarke* (1 Dow, 336). To the same effect is *Parker v. Polla* (3 Dow, 336), and even more strong is *Douglas v. Scougall* (4 Dow, 269), where in an insurance case Lord Eldon says that the honest belief of the owners and carpenters is no certain answer, for they may be mistaken in fact, and if a vessel sails and encounters a storm and is damaged, unless the damage done be such as can fairly be considered the effects of the storm, the implied warranty is not complied with. [BRETT, J., refers to *Prescott v. The Union Marine Insurance Company* (1 Wharton's Rep. Pennsylvania, 399.)] That is an authority that, upon facts similar to these, it ought not to be left to the jury to presume seaworthiness or otherwise. But even assuming seaworthiness, there is still the onus on the plaintiff to show a loss by the perils of the sea. The case of *Paterson v. Harris* (5 L. T. Rep. N. S. 53; 1 B. & S. 336; 1 Mar. Law Cas., O. S., 124) shows that the result of ordinary wear and tear is not a peril of the sea. Cock-

C. P.]

ASHERSON v. MORICE.

[C. P.]

burn, C.J., says: "The wear and tear of a ship, the decay of her sheathing, the action of worms on her bottom, have been properly held not to be included in the insurance against perils of the sea, as being the unavoidable consequences of the service to which the vessel is exposed." Then it becomes a question for the jury whether the loss in the particular case was caused by perils of the sea, or by the unseaworthiness of the ship: (see *Thompson v. Hopper*, 6 E. & B. 172; and 1 E. B. & E. 1038, and *Fauces v. Sarsfield*, 6 E. & B. 192.) In the latter case Lord Campbell says, "Although she was not seaworthy when she sailed, it must be taken, according to my view of the case, that the policy attached; but, unless this loss arose from perils insured against, it cannot be cast upon the underwriters." It would seem that a peril insured against must be the efficient cause or occasion of the loss: (see *Phillips on Insurance*, s. 1131.) They cited also

Bank v. The Royal Exchange Assurance Company, 2 B. & Ald. 73;

Ionides v. The Universal Marine Insurance Company, 1 Mar. Law Cas., O. S., 353; 8 L. T. Rep. N. S. 705; 14 C. B., N. S., 239;

Gibbs v. McMullen, 21 L. T. Rep. N. S. 214; L. Rep. 2 P. C. 317;

Davidson v. Burnard, 19 L. T. Rep. N. S. 782; L. Rep. 4 C. P. 117; 13 Mar. Law Cas., O. S., 207.

Next on the question of insurable interest. Did the property in the rice pass to the plaintiff? If not, he had no insurable interest. A contract of insurance is a contract of indemnity, and a man can only insure that which he has to lose. The plaintiff here bought "the cargo per Sunbeam"—this means the cargo which the ship carries, not an amount varying as each bag is put on board, but when the whole is shipped: the particular ship was named so as to give control to the person making the contract; she was a ship of a specified tonnage. The contract here could not be carried out in its entirety, and the loading of a portion was not a performance of the contract so as to bind the parties: (*Kreuger v. Blanc*, *ubi sup.*) The contract was for unspecified rice, to be put on board a specified ship, so that the appropriation was not a mere matter of volition, some act must be done, and it was not enough to mean to appropriate. [Lord COLERIDGE, C.J.—If the purchaser were present at the warehouse, would not that be enough, on the authority of *Aldridge v. Johnson* (*ubi sup.*)?] That is not this case, for the whole cargo was the thing bought, and the plaintiff never intended taking anything else. The drawing and accepting of the bills had no effect in passing the property. That was done after the loss, as was also the signing of the bills of lading. It is submitted that the property had not passed, because there was no cargo, therefore there was no liability. Then, if the property had not passed, did the assured stand in such relation to the goods as to have an insurable interest in them notwithstanding. In *Seagrave v. The Union Marine Insurance Company* (*ubi sup.*), Willes, J., says, "The general rule is clear that, to constitute interest insurable against a peril, it must be an interest such that the peril would by its proximate effect cause damage to the assured." And *Phillips*, sect. 174, says: "The peril or event insured against must be such that its happening might bring upon the insured a pecuniary loss." The case of *Warder v. Horton* (4 Bing. 529) is cited there as follows: "Where goods being ordered were consigned to the agent

of the consignee to be delivered to the party ordering them on payment of the price, and were lost in the transit, it was held that the party ordering them could not recover against his underwriters for their value, on the ground that he was not liable for the price, and so had sustained no loss;" and sect. 178, "A purchaser who is liable for the price has an insurable interest." This, therefore, is the test, and the plaintiff here was not liable for the price. Again, "It is an every day's practice to insure goods before they are bought, yet if one insures them on his own account, the property must pass to him before a loss happens, otherwise he can recover nothing under the policy." See also *Parsons on Marine Insurance*, p. 191, and the cases illustrating that the passing of the property is always a subject of intention:

Crowley v. Cohen, 3 B. & Ald. 478;

Sparkes v. Marshall (*ubi sup.*);

Brown v. Hart, 4 H. & N. 832;

The Calcutta and Burnaby Steam Navigation Com-

pany v. De Mattos, 10 L. T. Rep. N. S. 246; 33 L. J.

24, Q. B.; 2 Mar. Law Cas., O. S., 11.

It is submitted that *Ireland v. Livingstone* (*ubi sup.*) is not at all in point in reference to this case, being a question between principal and agent and not vendor and vendee. *Wait v. Baker* (2 Ex. 1) is expressly in favour of our contention that the property had not passed; Parke, B. says, in words which apply exactly to the circumstances of this case: "It is clear that the original contract between the parties was not for a specific chattel. That contract would be satisfied by the delivery of any 500 quarters of corn, provided the corn answered the character of that which was agreed to be delivered." To the same effect are *Tamara v. Lucas* (1 E. & E. 581); *Kreuger v. Blanc* (*ubi sup.*); *Vernede v. Weber* (1 H. & N. 11). *Aldridge v. Johnson* (*ubi sup.*), which has been relied upon on the other side, is not really an authority to the extent for which it has been cited. The ground of Lord Campbell's judgment was, that there was an *à priori* assent to the act of Knight on the part of the plaintiff; but that is very different from this case, where the vendor had absolute discretion as to providing the rice until he provided the cargo, which was the subject-matter of the contract of sale. Nor does this decision appear quite consistent with that in *Bryant v. Nix* (4 M. & W. 775). (See *Benjamin on Sale*, 2nd edit. 269; *Blackburn on the Contract of Sale*, pp. 127, 151, 152.) It cannot here be contended that as soon as each bag was filled with rice, *eo instanti* the property in the rice in the bags vested in the plaintiff; which are Lord Campbell's words in *Aldridge v. Johnson* (*ubi sup.*) There the sacks were the plaintiff's property, and were sent by him to be filled out of the bulk of the barley in Knight's warehouse, and it was held that when measured into the sacks the appropriation was complete, no subsequent assent being necessary. [BAXTER, J.—Suppose the insurance to be on profits, how could the plaintiff insure on profits unless he had an interest in the goods?] He could not, and *Chope v. Reynolds* (5 C. B., N. S., 642) is an authority that under a policy indorsed profit on goods by a particular named ship, the assured could not recover, the ship having been lost, but the goods having been saved and brought by other vessels, and not delivered to him. This case follows the principle in *M'Sweeney v. The Corporation of the Royal Exchange* (14 Q. B. 634). Another test is, whether a court of equity would decree the specific performance of the contract, or would in-

C. P.]

ANDERSON v. MORICE.

[C. P.]

terfere by injunction to restrain the breach of it. The cases are all collected in *Cuddeon v. Rutter* (White & Tudor's Lead. Cas. 709), and the Master of the *Bolls* in *Fothergill v. Rowland* (L. Rep. 17 Eq. 132), comments on them. This is not a contract for the sale of a specific chattel, and could not be enforced by decree. The remedy for any breach would be by action at law. The plaintiff here would not have been entitled to have the rice appropriated to him before the cargo was complete and the vessel had sailed. But the rule is, that the assured must have an interest amounting to property absolute or qualified; in other words, such interest as would in law or equity entitle him to have the property appropriated to his own use. A court of equity would not have interfered here to prevent the sellers from parting with this rice to any other persons than the plaintiff, and within the case cited he had therefore no equitable right to the specific rice to give him the necessary interest in it. The case of *Ebenworth v. The Alliance Marine Insurance Company* (*ubi sup.*), is in the defendant's favour in this view. They cited also *Stockdale v. Dunlop*, 1 M. & W. 224.

Cur. adv. vult.

Nov. 2.—The judgment of the court (Lord Coleridge, C.J., Brett and Denman, JJ.) was delivered by

BRETT, J.—In this case the action was brought to recover upon a policy of insurance signed by the defendant, an indemnity in respect of a cargo of rice alleged to have been lost by perils of the sea. The main defences were, that there had been no loss by perils of the sea, that the ship was unseaworthy when the policy attached, and that the plaintiff had no insurable interest in the cargo at the time of the loss.

The plaintiff, a merchant in London, entered on the 2nd Feb. 1871, into a contract with Borradaile, Schiller, and Co., of Calcutta and London, for the purchase of a cargo of Rangoon rice per *Sunbeam*, at 9s. 1½d. per cwt. The bought note was in the following terms:—"2nd Feb. 1871. Bought for account of Anderson and Co., of Borradaile, Schiller, and Co., the cargo of new crop Rangoon rice, per *Sunbeam*, 707 tons register, No. 1254, in *Veritas*, at 9s. 1½d. per cwt., cost and freight, expected to be March shipment, but contract to be void should vessel not arrive at Rangoon before April 1871. Payment by sellers' draft on purchasers at six months' sight, with documents attached." The *Sunbeam* did not belong either to the seller or the purchaser. She was chartered by the sellers' agents, "to proceed to Rangoon to ship and carry a cargo of rice to any port in the United Kingdom or Continent." On the 3rd Feb. 1871, the plaintiff effected insurance with the defendant "at and from Rangoon to any port or place of discharge in the United Kingdom or Continent, by the *Sunbeam*, warranted to sail from Rangoon on or before the 1st April, on rice, as interest may appear, amount of invoice to be deemed the value; average payable on every 500 bags. The said merchandises, &c., are and shall be valued at 55000l., part of 60000l." The *Sunbeam* arrived in the Rangoon river on the 3rd March 1871, and anchored in the usual anchorage at the junction of the rivers Rangoon and Pegu, about five miles below the town of Rangoon. She was anchored by two anchors in a somewhat peculiar way, much discussed in argument before the jury and afterwards before the

court. When the ship was first brought up, it was by one anchor with sixty fathoms of chain; the ship was, therefore, then, and when she swung with the next tide, sixty fathoms from her anchors. After she had thus swung, her second anchor was let go; it would at that moment have no effect; it would be under the bows of the ship, which would be held by her anchor with the sixty fathoms chain. But when the ship swung at the next tide she was checked by this second anchor, to which thirty fathoms of chain were then given, which stopped the ship at thirty fathoms from that anchor, and when she had gone thirty fathoms towards the first anchor, the chain of that first anchor was then taken in to thirty fathoms, so that the anchors were sixty fathoms apart, one being up and the other down the river, and the ship was held by her bows mid-way between them, that is to say, at thirty fathoms from each, held by one or the other, as the tide was on the ebb or flood. The draught of the ship when most loaded was 19ft. 6in.; the depth of water where she lay was 22ft. at low water; the bottom of the river generally was soft mud, of some feet in depth; the tide is strong in the Rangoon river. The ship discharged ballast and began to load rice early in March; the captain was anxious to complete loading by the 1st April, on account of the orders to do so, and to secure a gratuity due to him if he should do so; the rice was brought to the ship in lighters, from stores near the town of Rangoon, and was carried on board the *Sunbeam* and there stowed by coolies. On the 30th March the ship was nearly loaded—there were 8878 bags then on board; 1400 more bags would have completed the cargo, and they were in lighters alongside. The loading had been much accelerated during the latter days of loading. On the evening of the 30th March the ship suddenly made a great deal of water; this, in spite of every exertion, increased with great rapidity, so that in the course of the night the ship sank at her anchors and was totally lost, as was also all the cargo then on board.

After the ship had sunk, and after ship and cargo were lost, and in order to enable the plaintiff to claim on the policy, the captain signed bills of lading for the cargo which had been shipped, and the sellers drew bills of exchange for the price of such cargo, which were accepted and met by the plaintiff. The bills of lading were indorsed to him. All this was fully disclosed to the underwriters when the claim was made.

On the trial at Guildhall before Brett, J., in Feb. 1873, the plaintiff gave evidence that the ship was an American built ship of 707 tons register; that she was reclassified in New York in 1869; that she made several long voyages, behaving extremely well; that she carried a cargo of coals in the summer of 1870 from Liverpool to Point de Galle, being on that voyage perfectly dry and tight. She sailed from Point de Galle to Rangoon in ballast, light, and with her topsides out of the water. She sailed on a smooth voyage, with fine weather, but in the hottest and driest months of the year. She did not leak at all on that voyage, neither did she leak at all as she lay in the Rangoon river up to the 30th March. The captain and mate, examined and cross-examined on a commission, gave evidence that the caulking of the topsides of the ship was examined in the Rangoon river shortly before the 30th March, and was found to be in good order.

C. P.]

ANDERSON v. MORICE.

[C. P.]

The captain also gave evidence as to hearing, when the ship began to make water, a rush of water into the ship towards the stern of the ship, under the lazarette, in one place, and that he heard no sound of the coming in of the water in the forward parts of the ship. The only evidence given by any witnesses on board the ship, or who were at Rangoon at the time, either on behalf of the plaintiff or defendant, was that given by the captain and mate. But on the trial witnesses were called, both on behalf of the plaintiff and the defendant, who gave evidence as to the Rangoon river and the customs and habits therein, and who gave opinions as to how the loss of the ship and cargo might and might not have happened. It was suggested by the witnesses on behalf of the plaintiff, that the ship was perfectly sound, but that she might have sat upon one of her anchors, or have pricked herself in passing over one of her anchors, or might have struck on a ballast heap formed in the river by an illegal practice of ships to throw stone ballast overboard in the river, and by so striking have strained herself, or have displaced her rudder post. The jury suggested that she might have taken the shelving side of the river in swinging, and have so been strained. Evidence was given on behalf of the defendant that, in the opinion of the witnesses who gave the evidence, none of these things could have happened at all, and certainly not without the knowledge of those on board the ship who had never suggested any of them. On behalf of the defendant it was suggested by witnesses, that although the ship was perfectly tight and dry when she left Point de Galle, yet that the voyage in ballast thence to Rangoon, in the hot and dry weather, with her topides out of the water, might have caused the caulking of her topides to become dry and leave the seams open, that the caulking might not have been repaired at Rangoon, that the quick immersion of the topides by the quick loading of the later days might have caused the water to come through the dried-up seams before they could by the immersion take up, and that the insufficiency of the caulking of the seams might have been the real cause of the loss; they suggested that the opening of the seams existed at the time when the loading of ship commenced and the policy attached.

Upon these facts and this evidence the jury found a verdict for the plaintiff, leave being reserved to enter the verdict for the defendants, if there was no evidence of a loss by perils insured against, or if the evidence showed that the ship was not seaworthy, or if it showed that there was no insurable interest. On a motion made accordingly, and for a new trial, on the ground that the verdict was against the weight of evidence, or to reduce the damages, a rule was granted and cause was shown.

It was argued on behalf of the defendant that the fact of the ship sinking in smooth water so soon after the commencement of the risk, raised a presumption that the ship was unseaworthy when the policy attached, and that such presumption was not removed by speculative suggestions; and that, consequently, the jury ought to have been directed to find according to the legal presumption that the ship was unseaworthy. It was further contended that if the ship was seaworthy at the commencement of the risk, yet that there was no evidence that she was lost by any peril insured against, and that the

jury, therefore, ought to have been directed to find for the defendants that there was no loss by perils of the sea. It was further contended that there was no insurable interest; first, because no property passed in the rice which was lost, namely, the rice which was on board. The reasons given for this contention were, that the plaintiff had bought "the cargo" of the *Sunbeam*, and that until the ship had finished loading, "the cargo" did not exist; and if it did, yet that the cargo had not been weighed, and weighing was necessary in order to ascertain the price to be paid, and that the time of payment had not arrived, and that there was no appropriation of a cargo assented to by the purchaser before the loss. Another reason alleged against there being an insurable interest was, that at the time of the loss no liability to pay for the rice attached to the plaintiff, according to his contract with the sellers, and, therefore, he had nothing at risk, and he suffered no pecuniary loss by the destruction of the rice. It was contended that the damages ought to be reduced, on the ground that the policy was not a valued policy, and that the verdict included not only the invoice price of the rice, but 15 per cent. added to it.

It was contended on behalf of the plaintiff that there was more evidence as to seaworthiness than more suggestions, that there was evidence of facts fit to be left to the jury on which the jury might properly find that the ship was seaworthy. It was further contended, that if the jury should find that the ship was seaworthy, they were entitled to find that she was lost by a peril insured against, even though they could not determine what the accident was which caused the ship to sink. It was urged that there was evidence of facts which supported reasonable suggestions as to the cause of the ship sinking. As to the question of insurable interest, it was argued that the property in the rice on board had passed, that if not, it was not necessary that it should, that it was so appropriated to the contract that the plaintiff might properly be said to have an interest in a contract applicable to that rice, and that such interest was a sufficient insurable interest in the rice to enable him to insure it as rice. As to the amount of the verdict, it was contended that the policy was in legal effect a valued policy, properly valued at the amount of the invoice agreed upon between the buyer and seller.

Dealing first with the questions raised as to seaworthiness and loss by a peril insured against, we think that where the only evidence of fact as to either of those questions is, that the ship sank in smooth water very soon after the attaching of the policy, the significance of such a fact cannot be displaced by mere opinion founded on mere conjecture. We think that the true significance of such evidence is to be termed a presumption and a shifting of the burden of proof, and that where such a fact is the only fact in evidence, there being no other evidence as to the condition of the ship or as to a cause of loss, it is evidence on which a jury ought to find, and should therefore be directed to find, if they believe the evidence, that the ship was unseaworthy at the inception of the risk. But where there is other evidence of the condition of the ship, or of a cause of the loss, then the fact of the ship sinking in smooth water becomes one of several facts which must all be left to the jury. If from other facts, such as a large amount of repairs recently done, careful surveys recently made, ex-

C. P.]

ANDERSON v. MORICE.

[U. P.]

cellent conduct of the ship up to a time immediately preceding the loss or otherwise, a jury conclude that the ship was seaworthy at the inception of the risk, then the jury may further find that the loss was occasioned by a peril insured against, though they are unable to ascertain or safely conjecture what it was which caused the ship to sink. The immediate visible cause of the loss in such a case, is the foundering of the ship. If that was not the result of unseaworthiness existing at the inception of the risk, it is difficult to see upon the assumption, which is, that there is no other evidence as to the loss than the fact of the foundering of the ship, how that could have been caused by anything but some extraordinary though invisible and unascertained accident of the sea. We do not consider that the direction of Lush, J., upheld by the Court of Common Pleas, in the case of *The Merchants' Trading Company (a)*

(a) COURT OF COMMON PLEAS.

Nov. 25, 1870.

THE MERCHANTS' TRADING COMPANY v. THE UNIVERSAL MARINE INSURANCE COMPANY.

THIS was an action on a policy of insurance for 2000*l*. effected by the plaintiffs upon the steam ship *Golden Fleets* at and from the river Mersey and thence to Cardiff, whilst there, and thence to Alexandria, whilst there, and thence home to a port in the United Kingdom, &c., and the plaintiffs sought to recover for the total loss of the ship. The defendants pleaded, amongst other pleas, that the ship was not seaworthy at the commencement of the risk, and that the loss did not arise from the perils insured against.

The action was tried at the Liverpool Summer Assizes 1870 before Lush, J. It then appeared that the ship in pursuance of her charter-party loaded some cargo (coals) in the Mersey, and left that place and arrived at Cardiff without anything remarkable occurring. Evidence was given that the ship before leaving the Mersey had been thoroughly repaired. On her arrival at Cardiff she shipped over 2000 tons of coal for Alexandria. She left Cardiff docks on the morning of 10th Sept., 1869 with a full cargo in board, in charge of her master and a licensed pilot. The ship came out of dock apparently unharmed and without touching the quay. As she rounded Penarth Point her master thought that the weather was threatening and he consequently directed the pilot to bring the ship to an anchor near Barry island, where there is a very safe anchorage. She steamed to a point between Barry and Sully islands, and anchored there. The weather cleared up in the afternoon; there was not any bad weather during the day. The ship had her steam up ready for going on. The pilot left her at 4.30 p.m. and all was then well. At 9.30 p.m. the master, who had made up his mind to stay in his anchorage till the next morning, had a report brought to him that the water was coming in somewhere about the starboard bunker. He looked into the bunker, and saw that the water was coming in rapidly, but could not ascertain where it was coming from. There was a sound inside the bunker as if of running iron. Her master tried to get steam on the ship so as to work her pumps. This was done for a short time, but the water rose so rapidly that it put the crew out, and listed the ship over to starboard, and in 35 minutes from the time the alarm was given the master and crew had to take to their boats, and in about half an hour afterwards the ship went down. No collision had occurred or other violence been done to the ship, so far as was known to her master and crew, which would account for the water rushing in as it did.

Upon these facts Lush, J. directed the jury as appears by the judgment of the court and they found a verdict for the defendants.

In Michaelmas Term 1870, execution having been in the mean while stayed.

Milward, Q.C. for the plaintiffs, moved for a rule calling upon the defendants to show cause why there should not be a new trial upon the grounds, first of misdirection, secondly that the verdict was against evidence, thirdly surprise. The misdirection alleged was that Lush, J. had too much restricted the definition of the

v. *The Universal Marine Insurance Company*, is in conflict with these propositions. It was suggested that the learned judge had directed the jury that, even though the ship were seaworthy at the in-

perils insured against, and that he had wrongly confined the time of the attaching of the warranty of seaworthiness to the departure of the vessel from Cardiff Docks, whereas the warranty would have been satisfied if she was seaworthy when in the Mersey, and he ought to have told the jury so. Cur. adv. vult.

Nov. 25, 1870.—The judgment of the Court (Bovill, C. J., Byles, J., and Brett, J.) was delivered by Bovill, C.J.—

In the case of the Merchants' Trading Company against the Universal Marine Insurance Company. The action was made in this case by Mr. Milward for a new trial on three grounds, first misdirection, secondly verdict against evidence, and thirdly on the ground of surprise. The last ground was disposed of in the course of the argument. On the second ground it did not appear to me there was any sufficient reason for disturbing the verdict, but before finally refusing the rule on that ground we were desirous of consulting Mr. Justice Lush. We have done so, and find that he is not dissatisfied with the verdict, and as our opinion entirely concurs with his there will be no rule on the second ground. The first ground remains to be considered, namely the alleged misdirection of my brother Lush, which was stated to be that he had too much restricted the definition of the perils against which the policy insured, and that he had confined the time of the attaching of the warranty of seaworthiness to the departure of the vessel from the Cardiff Docks. Upon these questions it is material to look at the facts, and the points that were raised at the trial. By the policy the vessel was insured on a voyage from the Mersey to Cardiff, whilst there, and thence to Alexandria, whilst there, and then home to a port, &c. As to the actual voyage the vessel having according to her charter, taken on board a full hundred tons of coal at Liverpool, proceeded to Cardiff, where she shipped a cargo of over 2000 tons of coal for Alexandria. She left the Cardiff Docks on the morning of the 10th Sept. 1869 with this full cargo on board, and on the night of the same day whilst riding at her anchor in Cardiff Roads foundered, and went to the bottom; there was no stress of weather or heavy sea, there were no rocks, and nothing to account for her going down; very strong, and indeed it was contended by the plaintiffs' counsel at the trial) conclusive evidence was given that her coal ports (which at one time it was suggested had been left open) were closed, and remained closed, and there was nothing it was argued by the plaintiffs' counsel to explain the cause of her loss. The account given by those on board was that the water came in rapidly in one place and in considerable quantities; that there was a noise as of the crashing or rending of iron at or near the place, and that the vessel quickly filled up with water and sank. The substantial defence set up by the underwriters, was that the vessel was not seaworthy, and that the loss was occasioned by the inherent weakness of the vessel caused by an originally weakly construction, or by the deterioration the result of neglect, and her consequent inability to carry the full cargo with which she was finally laden, and that she broke up from that cause alone, and not from any extraordinary or unusual peril. The question was discussed at the trial and endeavoured to be solved by evidence given on both sides as to the cause of this sudden rupture of the vessel in Cardiff Roads. It was contended for the plaintiffs that the vessel was proved to have been thoroughly repaired, and to have been seaworthy on leaving Birkenhead, and that the foundering or sinking of the vessel at Cardiff, could therefore only have resulted from some inexplicable and extraordinary accident which must therefore be the cause of the foundering which was a peril insured against. It was contended for the defendants that no extraordinary perils were proved, and that the fact of this vessel having sunk without any apparent or adequate cause almost immediately after her full cargo was on board, was the strongest evidence of her not having been fit to encounter the ordinary perils of the voyage; that under the circumstances which were proved nothing whatever having been shown to account for the vessel sinking whilst riding at anchor in smooth water, and so soon after she left Cardiff,

C. P.]

ANDERSON v. MORICE.

[C. P.]

ception of the risk, yet she might have foundered through wear and tear caused by no extraordinary action of the sea, and if so, it was not a loss by a peril insured against. It is true that a foundering

the natural presumption would arise that the vessel was not seaworthy, and that the loss had arisen from that cause. The warranty or condition of seaworthiness was explained by the learned judge to the jury as follows, namely "that the assured undertakes in a voyage policy that the vessel shall start upon the voyage in all respects fit to encounter the ordinary perils incident to such a voyage," and he told them that if the vessel did not start upon the voyage in that condition, then the policy did not attach at all, and the underwriters were free from responsibility, and that on the other hand if the ship was seaworthy, then the only question was whether the loss happened in consequence of the perils insured against. He further explained to the jury that the terms "perils of the sea" denoted all marine casualties resulting from the violent action of the elements of the wind and waves, lightning, tempest, stranding, striking on a rock, and so on—all such description as distinguished from the silent natural gradual action of the elements upon the vessel itself, though the latter properly belonged to wear and tear, and that what the underwriters insured were casualties that might to the happen, not consequences which must happen, casualties which might occur and were incident to navigation arising from the violent action of the elements upon the ship. The learned judge proceeded to say "that in the peculiar circumstances of this case the voyage having scarcely commenced, the vessel being in still water at the time when the casualty happened, this case was distinguishable from the class of cases in its circumstances, and those two questions apparently different in form appeared to him to become merged in the one practical question which was this, Was the leak, the extraordinary leak which occurred while the vessel was lying at anchor attributable to injury and violence from without or weakness within?" The learned judge further told the jury that the evidence about them up to that alternative one, or the other, and that if they found it could not be attributed to perils of the sea, that is the violent action of the elements from without, or any other casualty involved in perils of the sea, then that he did not see but that it was for the jury to judge what other conclusion they could come to than that it must be due to an inherent infirmity in the ship itself. After calling the attention of the jury to the details of the evidence, the learned judge proceeded to address the jury as follows "That is the whole account of what happened. Do you see in that any evidence at all of what I have described to you as perils of the sea, any violent action of the elements in stranding, collision, or anything of that kind, which would account for the vessel going down. If you do, then the loss is not by the perils of the sea; if there was no peril as I have said the silent natural action of the water on a floating body is not a peril of the sea, but it is wear and tear. According to the description given here the ship was unable to maintain herself afloat in still water lying quietly at anchor. If so there is an end of the case. It was no peril of the sea at all as I have said. That being so, and there being nothing at all to account for that mystery, what is the conclusion? That she must have been in such a condition when she left the dock as she could not encounter the ordinary perils of the voyage, she could not stand in still water at anchor." After some further observations the learned judge concluded as follows: "As I have said the two questions are so mixed up together that if it was not a peril of the sea there is an end of it in that way. If not, this concurring so soon after she left the dock the inference seems irresistible that she must have been in a very infirm state, although not known to the parties when she left the dock, to have been the subject of such a catastrophe within twelve hours after she sailed." As to the first alleged misdirection the question at the trial was whether the vessel sank through unseaworthiness or from some extraordinary and unaccountable accident, and the learned judge conspicuously expressed this contention in the question which he left to the jury of whether the leak was attributable to injury and violence from without or to weakness within. It is quite true that the perils mentioned by the learned judge do not include all the risks and perils covered by

from such wear and tear would not be a loss by a peril insured against, but it seems equally true that if a ship cannot pass through an insured voyage without foundering from the effects of wear and tear occurring without extraordinary action of sea or wind, such ship was unseaworthy at the inception of the risk; she was then incapable of sustaining the ordinary casualties of an ordinary voyage. We do not understand that either the learned judge or the court in banc treated the question of wear and tear as different from or independent of the question of whether the ship was seaworthy or not, but that the judge was reiterating in another form the alternative question which he had before stated was presented in that case, namely, whether the ship foundered by reason of unseaworthiness or of a peril of the sea. The statement of the proposition as to loss from wear and tear, or by reason of a peril insured against, contained in *Thompson v. Hopper* (6 E. & B. 172; 1 E. B. & E. 1038), is in our view entirely consistent with what we have enunciated; and the proposition is not inconsistent with the proposition quoted in argument from *Pascua v. Sarsfield* (6 E. & B. 192). It becomes necessary, therefore, to consider what was the evidence in the present case.

It is truly stated on behalf of the defendants that the greater part of it on both sides consisted of opinions founded on conjectured facts. And in our judgment some of those alleged facts could not have existed, and of others there was no such evidence as would entitle a jury to find a verdict on their

the policy, but from the nature of the question that was raised in this case which was as to the question of the sudden rushing of the water into the vessel whether it was the inherent weakness of the vessel in consequence of original defects and construction, or neglected rust, or some unaccountable accident resulting in foundering, and with reference to the evidence the attention of the jury was in our opinion properly called to such of the perils as were material to the point raised for their consideration. As to the second alleged misdirection. In some parts of the summing up the learned judge no doubt referred to the condition of the vessel when she left the Cardiff Docks, but at the commencement, when he was stating the proposition of law, he told the jury that the undertaking of the assured was that the vessel should start on her voyage in all respects fit to encounter the ordinary perils incident to the voyage went to the whole voyage, and further no point or distinction had been made, nor any evidence given to show that if she was seaworthy on leaving the Mersey, she could have become otherwise so far as her structure was concerned between the time of her leaving the Mersey, and her starting from Cardiff, or conversely if she was unseaworthy when she left Cardiff, that she was not equally unseaworthy when she left Birkenhead. It seems to have been considered at the trial that so far as her structure was concerned there was no material difference in her state at Cardiff, from what it had been at Birkenhead. In this case the fact of her sinking in smooth water and calm weather so immediately after leaving Cardiff Docks was properly treated as strong evidence of inability to carry her full cargo from Cardiff, which was evidence of unseaworthiness at Cardiff, and under the circumstances and according to the sole discussion raised on both sides of the trial it was equally strong evidence of unseaworthiness at Birkenhead. It therefore appears to us that the real and substantial questions raised between the parties were left, and properly left, to the jury, and that the direction of the learned judge having regard to those questions was correct, and we think there are no sufficient reasons for granting a new trial on either of the grounds suggested on the motion for the rule, and therefore no rule will be granted. I should mention that my brother Hylton did not hear the whole of the argument, but as far as he heard it he concurs in the conclusion at which we have arrived. Rule refused.—[Ed.]

C. P.]

ANDERSON v. MORICE.

[C. P.]

supposed existence in fact. From the position of the anchors, the depth of water, the nature of the river's bottom, and the draught of the ship, we are strongly of opinion that the ship could not have passed over either of her anchors, and, therefore, could not either have sat upon her anchor or pricked herself with her anchor. Neither do we think it possible that the ship could have twisted her anchor chains so as to bring her anchors together, or have lain fixed across a strong tide, so as to have strained herself as suggested, without her position in either respect being remarked by any officer or man on board. We think that such suggestions were unworthy of the name of evidence. We do not think that the existence of ballast heaps could be properly relied on by the jury, if it were necessary in order to support their verdict to rely upon the existence of such heaps being affirmatively proved. If there were no other evidence in the case but the opinions and conjectures of the skilled or experienced witnesses, and the fact of the sinking of the ship at anchor in smooth water so soon after the inception of the risk, we should be of opinion that the jury were bound to find that the ship was unseaworthy. But there was in this case evidence of large repairs done to the ship at no distant period from the loss, there was strong evidence of good behaviour of the ship on voyages immediately preceding the insured voyage, and indeed on the one of which the insured voyage might be said to be a continuance, there was evidence of inspection by the captain of the caulking of the ship whilst at Rangoon, and there was evidence as to the suddenness and localisation of a leak.

We are of opinion that such evidence brought the case within the rule before enunciated, and which obliged the judge who tried the cause to leave the questions as to seaworthiness and loss by a peril insured against to the jury. If the judge who tried the cause had had to find the verdict, and had been at liberty to conjecture, it is right to say that he would have acted upon the theory, as the most probable, of the seams of the top sides having been generally opened on the voyage from Point de Galle, and would have found that the ship was unseaworthy at the inception of the risk, but he is of opinion, and in that we agree with him, that there was evidence which made it not unreasonable in the jury to find for the plaintiff, and that he is, therefore, not authorised to act upon his own opinion as against their finding, and that we should not be justified in deciding that the verdict should be set aside as being against the weight of evidence. We are all of opinion that the verdict of the jury upon those issues must stand.

As to the question of insurable interest, it is this: whether, under the circumstances, the plaintiff at the time of the loss of the ship had a sufficient interest, including a sufficient risk of loss, in the rice which was on board the *Susbeam*, to enable him to recover for the loss of it under an insurance of it as rice. The question is obviously confined to the rice which was on board the ship, that being the only rice which was lost or damaged.

Now, we agree that the granting of the bill of lading had no effect in passing the property, because it was granted after the loss of the ship and cargo. We agree that the acceptance and payment of the drafts for the price were of no effect to pass the property for the same reason, because done and made after the loss of the cargo. We agree that

there was no binding appropriation to the contract of the rice on board the barge, because we think that any barge load might at any time before it was delivered into the control of the ship, have been withdrawn and replaced. It seems to us that the purchaser would not have been bound to accept the rice which was on board if the ship had arrived at her proposed destination with only so much of a full cargo as was on board, because we agree with the view of the defendants' counsel, that by the terms of the contract of purchase and sale, the plaintiff purchased, and therefore undertook to accept, "the cargo per *Susbeam*," and was entitled to reject a part cargo if offered to him. We think that, inasmuch as the plaintiff would not, if the ship had sailed and arrived with what was on board of her when she sank, have been obliged to accept what was on board, the plaintiff was not bound to pay for the rice which was on board and lost when the ship sank. But from the fact of the ship being designated in the contract, and thereby agreed by both buyer and seller to be the recipient of the rice to be appropriated to the contract, we are of opinion that there was such an appropriation of the rice on board to the contract as to prevent the seller from withdrawing the rice without the consent of the buyer. We think that the excoyutory contract as to any rice had become, as to the rice which was on board, a contract attaching to that specific rice. We agree that that does not determine the question whether the property in that rice had passed to the purchaser. Although the plaintiff could not have been forced, if the ship had sailed and arrived with only so much of a full cargo on board as was shipped and lost, to have accepted so much as was on board, yet we are of opinion that he would have had the legal option of requiring actual delivery of it. The sellers could not have withdrawn what was on board without breaking their contract with the plaintiff. They could not, if the ship had arrived, have defended an action for non-delivery on demand, by saying that they were not bound to deliver what had arrived on board the *Susbeam*, because their agents had not shipped, or had been prevented from shipping, an entirely full cargo. The purchasers might have elected to treat what was on board as a cargo, and have insisted upon its actual delivery.

It seems to us, therefore, that the final question is, whether upon such a state of facts, rights, and liabilities, the defendants (the underwriters) can allege, by way of defence, that the plaintiff (the assured) had not, after the loss, the same option as he had before it; and whether that was not the option of saying that the delivery on board the designated and agreed ship was a delivery to him; that he elected to treat the quantity on board as a cargo; that consequently he elected to say that the cargo was at his risk; and that the property in it had passed to him directly it was on board. The solution of this question seems to us to depend upon a careful consideration of what it was which gave the option of rejection to the plaintiff. Was there anything to give him such an option, other than the fact of the cargo not being a full cargo? In other words, if there had been a full cargo on board would there have been any such option? We think not. By the contract the cargo purchased by the plaintiff was to be shipped by the vendors on board a particular designated ship. It is true that the ship was to

C. P.]

ANDERSON v. MORICE.

[C. P.]

be taken up, and the freight in the first place paid, by the vendors. But the freight was specifically included in the price to be paid by the purchaser. He was, in the end, to pay the estimated cost of the hire of the ship. He agreed that the cargo should be shipped on board that particular ship, and the payment, so far as an acceptance is payment, was to be made, perhaps, before the arrival of the ship at its destination. At all events the time of such payment was independent of the time of the arrival of the ship and the delivery of the cargo. Although the price to be paid for the cargo specifically includes the freight, it does not include the insurance. The safer proposition, under such circumstances, is to say that the question as to which of the two parties was to insure, depends upon the question of construction, whether the contract in its other stipulations discloses an intention that the cargo should, on the voyage be the cargo of or at the risk of the vendor or the purchaser. It may, however, not be wrong to observe that the plaintiff, the purchaser, before any dispute as to the interpretation of the contract arose, insured the rice per *Sunbeam* on the day after the making of the contract of purchase and sale, and that the seller never insured it. Considering that the cargo was to be put on board a ship so designated by the purchaser in the contract, that the cargo could not, in accordance with the contract, be put on board any other ship, and that the conditional payment by acceptance was to be made independently of the time of the ship's arrival, although the ultimate price was to be ascertained by weighing the cargo, we are of opinion that, in the case of a full cargo having been shipped, the property in such cargo would, by the manifest intention of the parties, have at once, upon the loading, passed to the purchaser, subject to the vendor's right to stop in transitu in case of the purchaser's insolvency, and to his right to resume dominion in case of non-acceptance of the draft on presentation, or to his right to withhold actual delivery of the cargo until such acceptance.

The stipulations of the contract which enabled the vendors to take the bill of lading in their own name, and send it forward with the draft, and the fact that the price was to be finally determined by ascertaining the weight of the cargo, are *prima facie* evidence of an interest remaining in them, but they are not conclusive (*Scragrave v. The Union Marine Insurance Company*, L. Rep. 1 C. P. 305, at p. 319), and the other stipulations to which we have referred seem to us to show that the property in the cargo was, nevertheless, intended to pass on the loading of it on board the designated ship, and that the stipulations as to time and mode of payment were only for the purpose of measuring the price, and securing its payment: (see per Cockburn, C.J., in *Castle v. Playford*, in error, L. Rep. 7 Ex. 99.) The option, therefore, which the plaintiff would have had of rejecting, if it had arrived, the present cargo, arose solely from the shipment not being a full cargo. He might, on that ground, have treated himself as not bound by the contract to accept or pay for the rice which was on board; but if he did not exercise such option, then all the terms of the contract were as applicable to the lesser as they could have been to the greater cargo; then the property in the lesser cargo would have passed to him from the loading, as much as would have the property

in the larger cargo. This view may be thus tested. Suppose a lesser cargo shipped and despatched, and drafts representing it sent forward with notice that the cargo was not a full cargo, and suppose that, thereupon, the plaintiff had accepted the drafts, or otherwise notified his intention to consider the contract binding on the lesser cargo, and that after such notification the ship had been lost, is it not clear that the effect of the contract would have been the same as if a full cargo had been shipped and sent forward, and that if a full cargo would have been at the plaintiff's risk on the voyage, the lesser cargo at the time of the suggested loss would have equally been at his risk? Unless, therefore, the plaintiff chose to disclaim the contract on the ground of there being a short shipment, the contract would have had the same application to a short as to a complete shipment, or, in other words, the property and risk in the short shipment would have passed to the plaintiff in just the same manner and to the same extent as in a full shipment.

The question, then, is whether the existence of such an option as we hold the plaintiff to have had, and of such only, prevents the plaintiff, if he declines after the loss to exercise the option, from insisting successfully as against the defendants, his insurers, that he had an insurable interest in the rice to its full value. We are of opinion that it does not.

In *Sparkes v. Marshall* (2 Bing. N. C. 761), the plaintiff, the assured, had agreed to purchase oats to be shipped for Portsmouth. Oats were shipped for Southampton by the seller, and offered to the plaintiff. He might have refused, that is to say, he had the option of refusing the oats so shipped and so offered; but the vendor could not, it was held, after having appropriated the oats shipped for Portsmouth to the plaintiff's contract, withdraw such appropriation without the plaintiff's consent, on the ground that the oats were shipped for Southampton. The plaintiff insisted, until after the loss of the ship was ascertained, and as it would seem had in fact occurred, on his right to a delivery at Southampton, but eventually waived that objection, and insisted as against the defendants, his underwriters, that the property in the cargo shipped for Portsmouth, and appropriated to him by the vendors, was at his option in him. This contention was held to be a valid one: "It was held," says Phillips, "that the underwriters could not object his want of interest because the oats had not been shipped to the place designated, for he had a right to accept them, and waive any objection on that account:" (Phillips on Insurance, vol. 1, § 180.)

We, therefore, hold that the plaintiff had, in the present case, an insurable interest, to its full value, in the rice on board the *Sunbeam* when such rice had vested in him before the loss. We think that the plaintiff had an option, which existed at the time of the loss, of rejecting the rice, on the ground that a full cargo had not been shipped; but we are of opinion that the plaintiff was entitled, as against the defendants, to decline to exercise that option, and to insist that the contract of purchase and sale was fulfilled by the loading, on behalf of the vendors, on board the *Sunbeam*, of the rice which was on board when the ship foundered, and that, consequently, the property in such rice was in him, the plaintiff, at the

EX. CH.]

JACKSON v. THE UNION MARINE INSURANCE COMPANY (LIMITED).

[EX. CH.]

time of the loss. We are further of opinion that, even if the property in the rice did not legally pass to the plaintiff, yet he had an insurable interest in it, because he had an existing contract with regard to it from the time of its being loaded on board, by virtue of which he had an expectancy of benefit and advantage arising out of or depending on the safe arrival of the rice.

As to the suggested reduction of damage, we are of opinion that the policy was a valued policy, the valuation being the amount of the proper invoice, according to the contract between the plaintiff and his vendors. That amount, according to the course of dealing between the plaintiff and his vendors, included the disputed 15 per cent.

On the whole, therefore, we are of opinion that the plaintiff was entitled to succeed, that the verdict was rightly entered, and that the rule should be discharged.

Rule discharged.

Attorneys for the plaintiff, *Parker, Watney, and Co.*; for the defendants, *Hollins, Son and Oswald.*

EXCHEQUER CHAMBER.

ERROR FROM THE COURT OF COMMON PLEAS.

Reported by EYREINGTON SMITH, Esq., Barrister-at-Law.

JUNE 18 and 19, and NOV. 30, 1874.

JACKSON v. THE UNION MARINE INSURANCE COMPANY (LIMITED).

Shipping — Marine insurance — Insurance on chartered freight — Right of charterer to abandon charter where vessel delayed on voyage to port of loading — Total loss of freight by perils insured against.

An insurance was effected on 9th Dec. 1871, by the plaintiff "on chartered freight at and from Liverpool to Newport in tow, while there and thence to San Francisco." He had previously on 22nd Nov. 1871, entered into a charter-party by which the ship was to proceed with all convenient speed from Liverpool to Newport and there load a cargo of iron rails for San Francisco, the usual perils excepted. The ship left Liverpool on 2nd Jan. but got on the rocks before reaching Newport. She was not got off till 12th April, when she was taken back to Liverpool and sold. On 15th Feb. the charterers threw up the charter and hired another ship to carry the rails, and notice of abandonment of the policy was duly given to the defendants. The plaintiff sued for the total loss of the chartered freight. The jury found that the delay in getting the ship off and in repairing her was necessarily so great as to make it unreasonable for the charterers to supply the agreed cargo at the end of that time, and was so great as to put an end, in a commercial sense, to the commercial speculation entered upon by the shipowner and the charterers.

Held by Bramwell, B., Blackburn, Mellor, and Lush, J.J., and Amplett, B. J., dissenting, B., (affirming the majority of the Court of Common Pleas), that there was an implied condition precedent in the charter-party that the vessel should arrive at the port of loading within a reasonable time, and that on failure of this the contract was at an end, and the charterers were discharged.

Held, further, that the adventure having been frustrated by the perils of the sea, there was a

total loss of chartered freight within the meaning of the policy, for which the plaintiff was entitled to recover.

In this case there were originally two actions upon two policies of insurance, one on the ship *Spirit of the Dawn*, the other on chartered freight, valued at 2900*l.*, to be earned by that vessel on a voyage from Newport to San Francisco. Both actions were tried together before Brett, J., at the Liverpool Summer Assizes 1872, when it appeared from the evidence that the plaintiff had, on 9th Dec. 1871, effected an insurance "on chartered freight valued at 2900*l.*, at and from Liverpool to Newport in tow, whilst there and thence to San Francisco," and by the charter-party it was stated that the ship shall with all convenient speed proceed direct to Newport, and there load a cargo of iron rails for San Francisco, "all and every the dangers and accidents of the seas excepted." On the 2nd Jan. 1872, the ship left Liverpool, but before reaching Newport got upon the rocks in Carnarvon Bay, and was so much damaged that the charterers on 15th Feb. gave notice of abandonment of the charter, and hired another ship in which to forward their goods. The *Spirit of the Dawn* was with difficulty got back to Liverpool on the 12th April, when, upon survey, the cost of necessary repairs was estimated at 3560*l.*

Notice of abandonment was duly given under both policies but not accepted.

The questions left to the jury were first, whether there was a constructive total loss of the ship; secondly, whether the time necessary for getting the ship off and repairing her so as to be a cargo-carrying ship was so long as to make it unreasonable for the charterers to supply the agreed cargo at the end of such time; thirdly, whether such time was so long as to put an end in a commercial sense to the speculation entered upon by the shipowners and the charterers. The jury answered all these questions in the affirmative, and the learned judge directed a verdict to be entered for the defendants, reserving leave to the plaintiff to move to enter the verdict for him on either or both of the policies. Upon the argument of the rule which was accordingly obtained, an agreement was come to in respect of the policy on the ship, but with regard to the policy on the chartered freight the court below was divided, Keating and Brett, J.J., holding that the charterers were absolved from loading the vessel, and that the shipowner therefore might recover for the loss of freight, Bovill, C.J., holding on the other hand, that the charterers were not entitled to throw up the charter, and that consequently the plaintiff could not recover against the underwriters.^(a)

(a) The judgments of Brett, J. (in which Keating, J., concurred), and of Bovill, C.J., were as follows:

Brett, J. — Two actions were brought on two policies of insurance effected by the plaintiff with Messrs. Bathbone and Co., by which the ship *Spirit of the Dawn*, of which the plaintiff was owner, and the second on chartered freight to be earned by the same ship.

At the trial before me at the summer assizes held at Liverpool in 1872, on which occasion both actions were tried together, it was proved that the plaintiff, on the 22nd Nov. 1871, entered into a charter-party with Messrs. Bathbone and Co., by which the ship *Spirit of the Dawn* was to proceed with all convenient speed from Liverpool to Newport, and there ship a cargo of iron rails (railways iron) for San Francisco, ordinary perils excepted, and the freight payable on right delivery of the cargo, &c.

On the 9th Dec. 1871, the plaintiff, through his agents, effected with the defendants the freight policy sued on,

EX. CH.]

JACKSON V. THE UNION MARINE INSURANCE COMPANY (LIMITED).

[EX. CH.]

Upon the judgment of the majority of the court below the defendants brought error, which was now argued before Bramwell, B., Blackburn, Mellor, and Lush, J.J., Cleasby and Amphlett, BB.

being "on chartered freight valued at £2500, at and from Liverpool to Newport in tow, while there, and thence to San Francisco, &c." On the 12th Dec. 1871, the policy on ship was effected for the same voyage on thirty-four 64ths of ship, valued at £2500. After some complaints from the charterers as to delay, the ship sailed in tow from Liverpool on the 2nd Jan. 1872. On the 4th Jan. 1872, the ship, which was an iron ship, before arriving at Newport took the rocks in Carnarvon Bay. By authority of the plaintiff and the defendants, Captain Chisholm, of the Salvage Association, proceeded to endeavor to extricate and save the ship. She got into a place of comparative safety on the rocks on the 18th Feb. 1872, and was got off the rocks and into Holyhead between the 21st and 24th March, and was by consent of the plaintiff and defendants taken back to Liverpool, still in charge of the Salvage Association, on the 12th April 1872. The salvage charges for rearing the ship and bringing her to Liverpool were £4208. Upon survey, the estimated cost of repairs was £2450. Immediate notice of abandonment was given on both policies, but not accepted. The ship was thereupon sold to a Mr. Wilson, who proceeded to repair her. The ship was still under repair at the time of the trial, which was on the 16th Aug. 1872.

On the 16th Feb. 1872, Messrs. Rathbone and Co., chartered, without the consent of the plaintiff, another ship, by which they forwarded the rails to San Francisco. The rails were wanted there for the construction of a railway.

Upon this evidence, and some other as to the value of the ship when repaired, I left it to the jury to say—first, whether there was a constructive total loss of the ship; secondly, whether the time necessary for getting the ship off and repairing her so as to be a cargo-carrying ship was so long as to make it unreasonable for the charterers to supply the agreed cargo at the end of such time; thirdly, whether such time was so long as to put an end, in a commercial sense, to the commercial speculation entered upon by the shipowner and the charterers. The jury answered all these questions in the affirmative. I, upon the view that there was no evidence, according to the figures, of a constructive total loss of ship, and no evidence of a loss of freight by the perils insured against, because the shipowner had a right to repair his ship, however long it might take, and insist after its repair on the delivery of the agreed imperishable cargo so as to enable him to earn the chartered freight, directed the verdict to be entered for the defendants, reserving leave for the plaintiff to move to enter a verdict on either or both of the policies.

Mr. Butt moved accordingly, and obtained a rule nisi in Michaelmas Term 1872; it being agreed that, upon showing cause against such rule, the defendants should be at liberty to argue, as against the application to enter the verdict for the plaintiff, that the findings of the jury on all or any of the questions left to them were against the weight of evidence. This rule was argued before me in Hilary Term of the present year.

It was determined in the course of the argument that the verdict as to the total loss of the ship was unsatisfactory; and, by the agreement of the counsel, that part of the case is to be referred as an average loss.

In the action on the policy on freight, it was argued for the defendants that, unless there was a total loss of ship, either actual or constructive, there could be no loss of freight by perils of the sea; that the plaintiff, the shipowner, in the case of damage to the ship, however great, where such damage was not caused by any default of his own, had a legal right under such a charter-party as the present, to repair his ship with reasonable diligence, and to tender her when repaired, however long a period of time such repairs might take, to the charterer, and to insist on the loading of the agreed cargo, if the cargo was of such a nature as to be able to be carried at the end of such period of the agreed voyage so as to earn freight. If the shipowner, it was argued, in such circumstances prevented from earning freight by the refusal of the charterer to supply cargo, his loss must be recovered by action against the charterer; it is a loss

Benjamin, Q.C., C. Russell, Q.C., and Appling for the defendants below.—Can there be a total loss when both cargo and ship remain in specie, and the perils of the sea only interpose so as to cause

ceased by the illegal refusal of the charterer to supply cargo, and met by perils insured against. It was further argued that some of the findings of the jury displaced this position, and that the findings of the jury were against the weight of the evidence.

For the plaintiff it was urged that the findings of the jury were justifiable, and that on either or both of them the shipowner ceased to have the power to enforce his rights under the charter-party to earn freight; that, assuming either or both of the findings to be true, although the ship was not a total loss, the charterer, who had not as yet received any benefit from the charter-party, could not be obliged to supply any cargo; that the power of earning the chartered freight, which was the freight insured, was consequently lost to the plaintiff immediately on the happening of the damage to the ship, such damage being to the extent found by the jury; that such damage was caused by, and therefore the loss was the immediate result of, a peril insured against.

The first point raised by these arguments is, whether the findings are so far against the weight of the evidence as to call upon the Court to set them aside. If it had been within my province I would at the trial have given answers to both questions different from the answers returned by the jury. But the amount of freight on which shipowners will undertake charters depends very much upon the time at which such charters are negotiated and at the time these calculated for their fulfilment. Freight rises and falls according to the variations of the freight market; and so, on the other hand, the expediency or otherwise of the export of iron or iron rails depends upon the iron market and its fluctuations at different times. Taking these views into consideration, and paying considerable deference to the finding of a mercantile special jury with regard to them, I am not prepared to say that the findings are wrong. They must therefore be treated as correct and binding.

The question, then, is whether, assuming the findings to be correct, there was a loss of freight by perils of the sea. That question divides itself into two—first, did the injury to the ship, caused, as it undoubtedly was, by sea peril, make it impossible for the shipowner to earn the chartered freight? Secondly, if it did, did such impossibility, so caused, amount to a loss by perils of the sea within the meaning of a freight policy on chartered freight? The first question depends upon what were the rights, under the circumstances, of the plaintiff and the charterers under the charter-party, the second upon the rights of the plaintiffs and the defendants under the policy.

As to the first, the question is whether, upon an injury happening to a chartered ship in the voyage preliminary to that on which the chartered freight is to be earned, happening before the charterer has received any advantage from the contract, where an injury is caused by a peril excepted in the charter-party, where it is caused without default of the shipowner, where he has not been wanting in due diligence to arrive at the appointed place of loading, but where the injury is so great as to prevent the arrival of the ship or of her presentment to the charterer in a state fit to carry cargo within a reasonable time, having regard to the business of the charterer, or within any time which could have been at the time of making the contract in the contemplation of either the charterer or shipowner as a time in any way applicable to the commercial speculation of either of them—the question is, whether the contract is not at end, in the sense that neither party to it can enforce any obligation under it against the other. In other terms they may be stated to be, whether in such a contract there is not an implied stipulation that the shipowner cannot, upon the happening of such extensive injury to the ship, though without default of his, compel the charterer to supply at so remote a date, a cargo, and that the charterer, conversely, cannot compel the shipowner at so remote a date to tender his ship—the reason being that the contract is not applicable, and could not in the mind of either party have been considered as applicable, at the time of making it, to the earning of profit either by the ship-

[Ex. Ch.]

JACKSON v. THE UNION MARINE INSURANCE COMPANY (LIMITED).

[Ex. Ch.]

delay in carrying out the contract? The freight was not lost here, because the plaintiff might have enforced the earning of it. It is admitted that there was no condition precedent in this charter-

owner or the charterer by reason of the transport of goods at so remote a period under mercantile contingencies and on mercantile considerations which must be absolutely different from and unconnected with any consideration then between them. There being no stipulation that the ship should be at Newport at any fixed date, the stipulation being only that she should proceed there with all convenient speed, there is no condition precedent that she should be there at any given time: (*Hodley v. Clarke*, 8 T. R. 239.) The cases of *Clipham v. Verius* (5 Q. B. 265), *Hurst v. Osborne* (18 C. B. 144), and *Jones v. Holme* (L. Rep. 2 Ex. 335), seem to me authorities for saying that there is no condition precedent, though there is a contract that the ship shall arrive or be fit to be tendered within a reasonable time in regard to the charterer's business. If the finding of the jury, therefore, on the second question proposed to them, is immaterial, the question itself was immaterial. Even a delay caused by the default of the shipowner will not of itself release the charterer from his obligation to provide a cargo: (*Hovlock v. Geddes*, 10 East, 555; *Clipham v. Verius*, sup.)

But in *Hovlock v. Geddes* (sup.), Lord Ellenborough deals with the rights of the parties where the ship is so unfit as to take from the charterer all the advantages he can be supposed to have originally contemplated from the contract, and where he has in fact had no advantage whatever from it. Had the plaintiff's neglect," he says, "here precluded the defendants from making any use of the vessel, it would have gone to the whole consideration, and might have been insisted upon as an entire bar. In *Freeman v. Taylor* (8 Bing. 124), Tindal, C.J., directed the jury, in an action for not loading, "that the freight could not, for an ordinary deviation, put an end to the contract; but if the deviation was so long and unreasonable that in the ordinary course of mercantile concerns it might be said to have put an end to the whole object the freighter had in view in chartering the ship, in that case the contract might be considered as an end." He left it to the jury to decide. The jury found for the defendant, the freighter; and the court held that there was no misdirection. In *Tzavackis v. Hickie* (1 H. & N. 183; 5 W. R., C. L. Dig. 233), *Cresswell, J.*, in an action against the freighter for not loading, asked the jury whether the vessel sailed and proceeded to Cardiff with convenient speed, or in a reasonable time; and if not, whether the object of the voyage was thereby frustrated. The jury found that the vessel did not with all convenient speed, or in a reasonable time, sail and proceed to Cardiff, but that the object of the voyage was not thereby frustrated. A verdict was entered for the defendant, leave being reserved to the plaintiff to move to enter a verdict for him. The rule was refused. That case is a direct authority against the second question and answer in this case, but it seems to assume the propriety and materiality of the third question and answer.

In *Moscow v. Fletcher* (14 C. B., N.S., 147; 1 Mar. Law Cas. O.S. 380), it was elaborately argued that the shipowner, in case of damage to the ship by an excepted peril in the charter-party, is entitled to any period of time, however long, to repair his ship, and is entitled to insist on carrying the agreed cargo and on earning freight at the end of such time. The decision is put on other grounds, but it is evident that the court did not accept the validity of the argument urged on behalf of the shipowner. In *McAndrew v. Chappell* (L. Rep. 1 C. P. 648; 2 Mar. Law Cas. O.S. 329), *Wilkes, J.*, states the present position of the law to be thus: "It seems to me now settled that delay by deviation is the same as a delay in starting; and it is also settled, at any rate in this court, that a delay or deviation which, as has been said, goes to the whole root of the matter, and deprives the charterer of the whole benefit of the contract, or entirely frustrates the object of the charterer in chartering the ship, is an answer to an action for not loading a cargo; but that loss, delay, or deviation short of that gives an action for damages, but does not defeat the charter." In *Gripet v. Smith* (L. Rep. 7 Q. B. 404; ante, Vol. I, p. 268), *Blackburn, J.*, speaking of the contract of charter-party, and of the parties to it, says: "The object of each of them was the

party, for no time was specified within which the ship was to arrive. (*Blackburn, J.*)—Is it your proposition that so long as the delay is caused by the excepted peril the charterer must keep his goods,

carrying out of a commercial speculation within a reasonable time; and if restraint of prizes intervened and lasted so long as to make this impossible, each had a right to say 'our contract cannot be carried out,' and therefore the shipowner had a right to sail away, and the charterer to sell his cargo, or refrain from procuring one, and treat the contract as at an end."

In the opinions given by the judges in the House of Lords in *Rankin v. Potter* (L. Rep. 6 H. of L. 83 ante, vol. II., p. 65), *Blackburn, J.*, says: "I should have added a further term, that the repairs could be done so promptly that she might arrive at Calcutta within a reasonable time as between the shipowner and De Mattos, were it not for the case of *Hurst v. Osborne* (sup.), which seems to me an authority against this position. And, though I do not hesitate to advise your Lordships to re-consider that case, if necessary, I think it is not necessary to do so in the present case." And *Brameswell, B.*, says: "I may observe in passing that I could not, acting as a jurymen, find as a fact that they could have repaired the ship in time for it to be ready for the adventure for which De Mattos agreed to find the cargo; and indeed, as the case stands, I should think he might have refused, on the ground that the ship was a year overdue." And again, "No doubt, had the owner repaired the ship, the loss of freight would not have been total, supposing the repairs in time for the voyage for which De Mattos undertook to find a cargo; which, if it were in controversy, I could not find in the plaintiff's favour." And *Brett, J.*, says: "Without, therefore, relying upon the other impediment and prevention obviously in the way of the plaintiff's earning the charter-party freight, viz., the certainty from the extent of damage that the ship could not be repaired so as to be seaworthy within any time during which the charterer would be bound to wait, it seems to me that the other facts which I have mentioned show conclusively that there was a loss of freight by reason of damage to the ship caused by a peril happening during the voyage insured."

These authorities seem to support the proposition, which appears on principle to be very reasonable, that, where a contract is made with reference to certain anticipated circumstances, and where, without any default of either party, it becomes wholly inapplicable or impossible of application to any such circumstances, it ceases to have any application; it cannot be applied to other circumstances which could not have been in the contemplation of the parties when the contract was made. Such a state of things arises where the third question left to the jury in this case can be properly answered, as the jury have answered it in this case.

In such a state of things arising under a charter-party, such as the charter-party under discussion, where no benefit of any kind has occurred to the charterer, the shipowner has lost his power of earning any part of the chartered freight. The immediate cause of such a loss is the extent of injury caused to the ship by the peril insured against under the policy during the voyage thereby insured. Such a loss is, therefore, a loss caused by a peril insured against, within the policy on freight.

For these reasons, I think that, in the action on the policy on freight, the rule must be made absolute to enter the verdict for the plaintiff for a total loss. *Boville, C.J.*—The first question in these cases was, whether there was a total loss of the ship within the meaning of the policy. The jury found that there was such a constructive total loss; but my brother Brett was dissatisfied with the verdict upon that point, and during the argument it was agreed that the court should dispose of it, and that, if in our opinion the total loss could not be maintained, the amount of the average loss upon the ship should be referred to an average assessor.

The evidence upon this point was, no doubt, contradictory; but it strongly preponderated in favour of the defendants (quite independently of any liability of the freight to contribute to the expenses of salvage); and, although the ship was upon the rocks, yet, from her position there, and the probability of her being got off, and looking to the evidence of the damage which she

EX. CH.]

JACKSON v. THE UNION MARINE INSURANCE COMPANY (LIMITED).

[EX. CH.]

and be ready to load when the ship shall arrive, even if it be twenty years.] The cases in reference to the frustration of the object of the voyage seem to bear out that proposition, beginning with

had sustained, and of the probable expense of repairing her, I am of opinion that the circumstances were not sufficient to establish a total loss of the ship, or to justify her abandonment.

An intimation to this effect was given by the court in the course of the argument; and I concur with my learned brothers in their judgment that the plaintiff cannot maintain his claim for a total loss of the ship. The amount of the partial loss will be ascertained by an average stater as arranged.

With respect to the insurance on the freight, I have the misfortune to differ from my learned brothers, and think that the plaintiff is not entitled to recover. As there was no total loss, either actual or constructive, of the ship, the only loss of freight was that which arose from the refusal of the charterers to load the vessel, and from the plaintiff not having insisted upon their performance of the contract. The plaintiff contends that, under the circumstances, and by reason of the perils incurred against, the charterers were absolved from their engagement to load the vessel, and that he was therefore justified in adopting the charterers' refusal to load, and may maintain this action for a loss of the freight against the underwriters on freight.

The question then is, whether the charterers were justified in throwing up the charter. By the charter-party the vessel was to proceed with all convenient speed (dangers and accidents of navigation excepted) from Liverpool to Newport, and there load a cargo of iron rails for San Francisco. On the 2nd Jan. 1872, the vessel having been properly equipped, proceeded on her voyage from Liverpool to Newport, and on the following day took the rocks in Carnarvon Bay. Whilst she remained there—viz., on the 15th Feb., the charterers threw up the charter, and the next day hired another ship, by which they forwarded the iron to San Francisco. The plaintiff on the same 15th Feb. gave notice of abandonment of ship and freight to the underwriters, which was not accepted. If there had been a total loss of the ship, both the charterers and the plaintiff would have been justified in the course which they took, and the underwriters would have been responsible for the loss of the freight; but, upon the facts as they appeared at the trial, we have already decided that there was no such total loss of the ship.

It was probably a very convenient course, as well for the charterers as for the shipowner, in the then position of the vessel, and looking to the delay which would necessarily be occasioned by repairing her, to abandon the charter; and the plaintiff may have been more willing to acquiesce in its abandonment, from the hope of being able to claim the freight from the underwriters; but if the charterers were not entitled to abandon their contract, the plaintiff clearly cannot recover for a loss of freight against the underwriters.

In considering whether the charterers were absolved from their contract, the position of the shipowner must also be borne in mind. When the accident occurred, we must assume that in the ordinary course of business the shipowner would have incurred expense in equipping his vessel and providing her with some portion at least of her stores and supplies, and had made engagements with the crew, and for having his vessel towed to Newport, as well as other engagements for the voyage; he would also in the ordinary course have probably insured her; and the voyage had actually been commenced. A shipowner also constantly makes engagements for the further employment of his vessel, dependent upon the completion of a previous voyage. It is important to all parties to know what their rights and obligations are with reference to the prosecution of the voyage on the one hand, and the loading of the vessel on the other, and it would, as it seems to me, lead to the greatest inconvenience to shipowners with reference to the engagements connected with their vessels if, under such circumstances, after they had incurred expense and partially performed their part of the contract, and made no default, a charterer was at liberty to throw up the contract.

The vessel having met with misfortune in the course of

Havelock v. Geddes (10 East, 555) *Freeman v. Taylor* (8 Bingh. 124), *Clipham v. Virtue* (5 Q. B. 265) and later *Tarrabochia v. Hickie* (1 H. & N. 183) *Behn v. Burness* (1 Mar. Law Cas.

navigation, and being upon the rocks, it was the duty of the plaintiff, both as regards the charterers and the underwriters, to use all reasonable and practicable means to get her off and repair her within a reasonable time, and then to prosecute the voyage and fulfil her engagements without any unreasonable delay. The reasonable time, however, would be that which was required for the purpose of putting the vessel in a fit state to continue her voyage; and if the shipowner had made default in that duty, his rights and liabilities might be very different from those which arise where there is no default on his part.

There was no engagement in this charter-party that the vessel should arrive at Newport by any particular day, or within any specified time; and, if it was of importance to the charterers that the ship should be there to receive the rails by any particular time, they might have introduced a stipulation into the charter to that effect. As they did not do so, the risk and consequences of any justifiable delay must, I think, rest with and fall upon them. If a charter-party were altogether silent as to the time of proceeding to the port of loading, the law would imply that it was to be done within a reasonable time; but in this case, as in most charter-parties, the obligation of the shipowner was not left to be implied, but was made the subject of express stipulation; and all that the shipowner agreed to do was to proceed to Newport with all convenient speed, with an express stipulation, in the usual form, whereby the dangers and accidents of the seas were excepted. This stipulation would, in my opinion, equally apply to any implied engagement to proceed within a reasonable time, and to the express agreement to proceed with all convenient speed, and must govern the rights of both parties. Where such an exception is contained in a charter-party, it seems to me that, upon a misfortune occurring to a vessel, not amounting to an actual or constructive total loss, and for which neither party is responsible, it is not competent either for the charterer or the shipowner, of his own will, and without the concurrence of the other party, to put an end to the contract, and on this simple ground, that by the terms of the contract the parties have expressly agreed that such an occurrence shall not affect its continuance. If this were not so, whenever a vessel was stranded or got upon rocks, or even when she met with serious damage requiring heavy repairs and a long time to complete them, it would be in the power of a charterer who found the delay inconvenient or injurious, and likely to frustrate his object in making the charter, to abandon the charter-party, which would be contrary to every principle of law as applicable to contracts generally, or to charter-parties which contain the usual exceptions of the dangers and accidents of navigation.

In cases where the delay, inconvenience, or expense of repairing the vessel would materially affect and be injurious to both parties, they would generally agree to cancel the contract. But, where it is the interest of one party only to put an end to it, he must make out his right to do so before he can be justified in refusing to perform it. In order to excuse himself he must bring the case within some exception to the contract, or there must be a breach by the other party of some condition or warranty, or of some stipulation in it which goes to defeat the whole consideration; otherwise, and however great the inconvenience may be to both or either of the parties from some unforeseen occurrence which is not provided for, the engagements of the contract must still be performed.

Upon a charter-party where the charterer does not stipulate for the arrival of the vessel by any particular day, the risk of her non-arrival, by reason of the weather and the accidents of navigation, always rests with the charterer; and, where the stipulation is simply that the ship will proceed to the loading port with all convenient speed, the dangers of the sea are excepted, the shipowner performs his part of the contract, and there is no breach of it by him, if, without his default, the arrival of the vessel is delayed only by the accidents and dangers of the sea, even although that delay may prevent the loading of the vessel at the usual time, or so as to be profitable to the charterer.

EX. CH.] JACKSON v. THE UNION MARINE INSURANCE COMPANY (LIMITED).

[EX. CH.]

O. S. 178, 329; 3 B. & S. 751), *McAndrew v. Chapple* (2 Mar. Law Cas. O. S. 339; 8 L. T. Rep. N. S. 207; L. Rep. 1 C. P. 643), *Stanton v. Richardson* (ante vol. 1, p. 449; ante p. 288;

The law has no power to make a contract different from that which a person has entered into; and where a shipowner does not agree that his vessel shall arrive at the loading port by any particular day, but only that she shall proceed there with all convenient speed, or, what the law would imply, that she shall proceed and arrive within a reasonable time, and expressly stipulates that this shall be subject to the dangers and accidents of the seas and navigation; I do not see how that exception is to be got rid of, or how a contract with such an exception can properly be construed as, or converted into, an absolute engagement on his part that his vessel shall proceed or arrive within a reasonable time, as if there were no exception. If the contract could be so treated, it must be equally open to the shipowner to put an end to it, which in some cases might be productive of the greatest inconvenience to the charterer.

I quite admit the great inconvenience and possible loss to both shipowner and charterer when any serious delay is caused by the necessity for heavy repairs arising from sea perils; but the answer to such an argument, as it seems to me, is, that if either party desires to protect himself from such risk or inconvenience, he should introduce stipulations into the contract with that object; and, if instead of doing so, both parties agree that the vessel is to proceed and load subject to the accidents of navigation, which they expressly except, I think it is not competent for either of them afterwards to claim to be absolved from his contract by reason of an accident of navigation which he has expressly agreed shall be excepted.

If a man chooses to enter into a contract to do a particular act, he is bound to answer for it, although the performance of the act may be prevented by the occurrence of unforeseen circumstances which it was beyond his power to control, and which have arisen from no act or default of his own, because he might and ought to have provided for the contingency by his contract. (See *Paradise v. Jane*, Ayles 26.)

Where such a contingency is provided for, effect must be given to such provision as affecting the rights and obligations of both parties; and there is no principle of law that I am aware of which would excuse either party from performance of a contract, because such performance would be highly inconvenient or injurious to himself, or lead to extraordinary expense. Where a lessee had engaged to pay a proportion of the value of coal to be raised, unless prevented by unavoidable accident from working the pit, and the pit became flooded with water from an unavoidable accident, which prevented the coal being raised except at a cost exceeding its value when raised, it was held that as the colliery was liable to such accidents, and inasmuch as the water might have been removed, though at a ruinous cost, and after some months' interruption of the working, the lessee was not excused from working the pit or paying the stipulated proportion of the coal which could have been so raised: (*Morris v. Smith*, 3 Dong. 279.) In all maritime contracts, the performance of them must necessarily be affected by the winds and waves, and also by the regulations of foreign ports, which may be wholly or partially inaccessibly in consequence of sanitary or police regulations or restrictions in time of war, and they must equally be dependent in some parts of the world upon frost and ice and all the accidents of the weather, as well as upon fire, and all contingencies which are considered as the act of God; but, in the absence of express stipulation, the risks arising from such causes would not generally excuse the performance of the engagements of the contract on either side: (See, generally, *Barter v. Bedford*, 3 M. & S. 279; *Kron v. Pearson*, 5 H. & N. 26; 10 W. R. 12; and *Jones v. Heime*, L. Rep. 2 Ex. 385; 2 Mar. Law Cas. O. S. 551.) It is on this account that, in charter-parties, bills of lading, and other contracts of a similar description, the dangers of the seas and many other contingencies are usually provided against and excepted; and, in such cases, unless some precise time be stipulated for the arrival of a vessel, I apprehend there is no engagement by a shipowner that the ship shall arrive within a reasonable time, but only that she shall arrive within a reasonable

27 L. T. Rep. N. S. 513; L. Rep. 7 C. P. 421). In every one of these cases one party had been guilty of a breach of contract, and the question was always asked at Nisi Prius whether the breach

time unless prevented by the excepted perils. Where such matters have not been provided for by the contract, they have constantly led to the greatest possible inconvenience and serious loss to one or both of the parties, and the occurrence of them has practically frustrated the purposes and objects of one or other, and sometimes of both the contracting parties; and yet it has, I believe, always been held that their occurrence, unless provided for, will not absolve either party, whilst, if they are provided for and excepted in the contract, the engagements of the parties must be construed accordingly, and the obligations of each party will be qualified by the exception.

(The learned judge then reviewed the cases of *Hedley v. Clarke*, 3 L. T. Rep. 239; *Toutin v. Hubbard*, 3 B. & P. 294; *Bligh v. Pope*, 5 B. & P. 295 N.; *Hurst v. Ulsoner*, 18 C. B. 144; *Allen v. The Mercantile Marine Insurance Company*, 44 New York Reps. 427; *Blasco v. Fletcher* (ubi sup.), and *Geipel v. Smith* (ubi sup.), and then continued.)

There are, no doubt, cases where delay which frustrated the object of a contract has been held to absolve a party from the further performance of it; but that is only where there has been some default or breach of contract by the other party as to a stipulation which was not in the nature of a condition precedent, and would not, but for such frustration of the adventure, have gone to the whole consideration or have afforded an excuse in law for the breach of contract complained of. The cases of *Havelock v. Geddes* (sup.), *Freeman v. Taylor* (sup.), *Torrabachia v. Hickie* (sup.) were all cases where there had been a breach or default by one of the parties; and the question arose as to the effect of such breach if it frustrated the whole object of the contract; but I am not aware of any case in which the mere frustration of the voyage by an unforeseen circumstance, where there had been no breach or default, has been held to absolve either party from his engagement.

The observations of several of the learned judges in *Rant v. Potter* (sup.), in the House of Lords, are certainly deserving of great consideration with reference to the obligation of a charterer to load a cargo where, upon a ship becoming disabled, the necessary repairs are likely to cause considerable delay and inconvenience to him. But, on the other hand, the consequences to the shipowner, if a charterer were at liberty to throw up the contract under such circumstances might, and in many instances would, be very serious with reference not only to the engagements into which the shipowner had entered with the crew, and other persons connected with the voyage, but also with reference to further charters and engagements of the vessel which might be dependent on the first charter.

It seems to me also impossible to determine the rights or obligations of the parties upon any principle or doctrine of convenience, which must vary in almost every case, and might affect the respective parties to the contract so very differently; and the only safe rule, as it seems to me, is to abide by the general principles of law and the cases that have been decided. These decisions have, as far as I know, been uniform—thus a charterer is not discharged from the delay arising from an accepted cause, and where there had been no breach of contract or default by the shipowner. I am not aware of any decision to the contrary, although expressions may be found in some of the cases to that effect, nor have I been able to discover any authority for saying that a shipowner who makes a contract to proceed with convenient speed (sea perils excepted) comes under any obligation that his ship shall arrive within a reasonable time with reference to the business of the charterer; and I cannot find any clear ground of mutual convenience in such cases which would induce the courts to lay down such a rule. It also appears to me that, if any such doctrine were allowed to prevail, it would give rise to great confusion, and no one would know, when once a ship was disabled, what the effect would be on her engagements, or what course ought to be taken either by the owner or the charterer. Where parties desire to protect themselves against contingencies, they can always do so by

[EX. CH.]

JACKSON v. THE UNION MARINE INSURANCE COMPANY (LIMITED).

[EX. CH.]

went to the root of the whole contract, or whether it would merely give a ground for a cross action for damages. So here the question is, is the breach so grave as to entitle the charterer to sue the shipowners? But there is also a series of cases which show that where there is no default, then no delay justifies the abandonment of the adventure. These are *Hadley v. Clarke* (8 T. R. 259), *Bligh v. Page* (3 B. & P. 235), *Touteng v. Hubbard* (3 B. & P. 291), *Barker v. Hodgson* (3 M. & S.

express provisions; and if they omit to adopt this precaution, and especially when such contingencies are provided for by being excepted from the contract, they have no good ground for complaint if they suffer inconvenience or loss by being held to the terms of their contract.

Where, from the nature of the contract, circumstances occur which make its provisions altogether inapplicable, it may be admitted that the contract has no longer any effect; but that doctrine, as it seems to me, does not apply to a case like the present, where the vessel might and ought to have been repaired, and where the cargo of iron could have been loaded and carried to its destination, and where the contract might thus have been fully performed on both sides, and where the contingency which has occurred, of damage to the vessel by the sea perils was specially contemplated and provided for in the contract itself.

In answer to questions put by the learned judge, the jury found that the time necessary for getting the ship off and repairing her was so long as to make it unreasonable for the charterers to supply the agreed cargo at the end of such time, and so long as to put an end, in a commercial sense, to the commercial speculation entered upon by the shipowner and the charterers.

If the general views which I have stated with respect to the law applicable to this case be correct, then I apprehend these findings by the jury are wholly immaterial, and that the defendants, notwithstanding what the jury have so found, would be entitled to our judgment; but, as such findings of the jury seem to have proceeded mainly upon the intention and object of the charterers in agreeing to load the vessel, it appears to me that they cannot, consistently with the view of the law which I have ventured to express, be supported in point of fact.

The underwriters do not insure against mere delay or its consequences, nor against wrongful breaches of contract, or the voluntary surrender of a charter-party; and, assuming that the charterers were not justified in their refusal to load the vessel under the charter-party, then it is clear there is no loss of freight by any of the perils insured against. The vessel was not wholly lost but might and ought to have been repaired; and she would then have been capable of completing the voyage and earning the freight.

The probable delay in this case was provided for and excepted by the express terms of the charter-party; and there was consequently no breach of any condition or warranty—no default or breach of the charter-party by the plaintiff; and not even a breach of any stipulation in the contract for which an action for damages could have been maintained against him; and, therefore, in my opinion, nothing to justify the charterers on that ground, or under the provisions of the charter in refusing to carry it out.

If the charterers were not entitled—as I think they were not—to throw up the charter, then the remedy of the plaintiff for the freight is against them (unless he has precluded himself from that remedy by assenting to the abandonment of the charter), and not against the underwriters; and I think under the circumstances, that upon this point the view, which my brother Brett originally took at the trial, was correct, and that our judgment ought to be for the defendants.

My two learned brothers being of a different opinion, the judgment of the court will be entered for the plaintiff.

The rule will, therefore, be absolute to enter the verdict for the plaintiff in the first action for a partial loss on the ship, the amount of such loss is to be ascertained by an average stater, as arranged between the parties, and then to enter the verdict in the second action for the plaintiff as for a total loss of the freight.

287), *Hurst v. Ushorne* (18 C. B. 144), *Barker v. M'Andrew* (2 Mar. Law Cas. O.S. 205; 12 L. T. Rep. N.S. 459; 18 C. B. N. S. 759), *Blasco v. Fletcher* (1 Mar. Law Cas. O. S. 380; 9 L. T. Rep. N. S. 169; 14 C. B. N. S. 147). The reason why in no case does the common object appear to have been frustrated, is that under such circumstances no dispute arises. The opinion of Lord Alvanley (in *Touteng v. Hubbard, ubi sup.*), though it must be admitted not to be the *ratio decidendi* of the judgment, is strongly in favour of the defendants' contention; and in all the cases cited the courts held that the excuse must have been anticipated in the contract, and is not to be implied. A condition is not to be imported into the contract, for the court will not put that in which the parties themselves have not inserted. So *Hurst v. Ushorne (ubi sup.)* is directly in point. [BLACKBURN, J.—Yes, we cannot affirm this judgment without overruling that case and Lord Alvanley's dictum.] Then *Barker v. M'Andrew (ubi sup.)* shows that the exception of perils of the sea applies to a preliminary voyage. But where there is no breach, no default that is, by the party asking that the contract should be carried out, there is no case to be found in which the other party may say it does not emit his convenience. In *Gripel v. Smith (ante, vol. 1, p. 208; 26 L. T. Rep. N. S. 361; L. Rep. 7 Q. B. 404)*, which was decided on demurrer, the reference in the judgments to reasonable time will be seen to have been made in consequence of the allegations in the pleas to that effect. In *Potter v. Rankin (ante, p. 65; 29 L. T. Rep. N.S. 142; L. Rep. 6 H. L. 85)* there had been a default by the shipowner, and it is on that ground clearly distinguishable from this case.

Then, secondly, I say that this was a contract which could have been carried out if it suited the charterer's purpose, and the underwriters do not insure against the purposes of the charterer. The proximate cause of the loss was the refusal of the charterer to wait; and therefore the underwriters are not liable as for a loss of freight by the perils insured against—see *Manley v. Jones* (4 B. & C. 394), *Anderson v. Wallis* (2 M. & S. 240), *Everth v. Smith* (2 M. & S. 278), *McCarthy v. Abel* (5 East, 388), *The Scottish Marine Insurance Co. v. Turner* (1 Macq. H. L. 325). The loss here was not by perils of the sea, because, notwithstanding them, the ship could have earned the freight, but the perils of the sea influenced the charterer's judgment as to the success of his speculation. *Taylor v. Dunbar* (L. Rep. 4 C. P. 206) shows that delay is an unknown cause of loss in insurance law.

Bull, Q.C. and Gully for the plaintiff.—The contention on the part of the plaintiff is that you must imply a term of some sort which you do not find ordinarily expressed in a charter-party. Here no day is named for the arrival of the ship at Newport, so a time must be implied, and that is a reasonable time. Assuming that to be an implied condition, then comes the question, did she arrive within a reasonable time? But it was decided by *Potter v. Rankin (ubi sup.)* that in the case of a constructive total loss, there is a loss of the freight, and so a further term comes to be implied in the charter-party, viz., that it shall be carried out unless it becomes unreasonable. It was argued on the other side that there must have been a default, and also a frustration of the voyage, but we say

EX. CH.]

JACKSON v. THE UNION MARINE INSURANCE COMPANY (LIMITED).

[EX. CH.]

that if by no fault of anyone the vessel cannot arrive at the port of loading within a reasonable time, both parties are absolved, and reasonable time is such time as that beyond it the object of the voyage would be frustrated. That this is a necessary implication appears from a consideration of the principle involved. Suppose the cargo to be ice which melts, oranges which rot, then the charterer is not obliged to wait, and his excuse can only be because the law implies a reasonable time, though none is specified in the charter-party. Such indeed is the general rule of law where no time is specified in a contract, and there is nothing here to take this contract out of the ordinary rule. Personal contracts are analogous, because their performance depends on the existence of the person, and that of this on the existence of the thing. See *Caldwell v. Taylor* (3 B. & S. 826) cited and followed in *Appleby v. Myers* (16 L. T. Rep. N.S. 609; L. Rep. 2 C.P. 651), *Boat v. Firth* (16 L. T. Rep. N.S. 609; L. Rep. 4 C.P. 1), *Hawell v. Coupland* (30 L. T. Rep. N.S. 677; L. Rep. 9 Q.B. 462). Then if *Geipel v. Smith* (*ubi. sup.*) be rightly decided, the plaintiff's contention here is supported, because the only difference was that there the contract was wholly executory, and here the ship had gone part of the way on her voyage. Another class of cases where the charterer has been held absolved because there had been a frustration of the object of the voyage, shows that the principle is according to our contention, though it is true that in all there was a default made. Of the three authorities most pressed against us we say that first in *Hadley v. Clarke* (*ubi. sup.*), a substantial part of the contract had been performed, there was no exception as to restraint of princes, and there was no finding that the object of the adventure was frustrated.

Secondly, as to *Touleng v. Hubbard* (*ubi. sup.*), Lord Alvanley's remark was merely *obiter dictum*; and thirdly, in *Hurst v. Osborne* (*ubi. sup.*) there was no finding of the frustration of the adventure, and as the charter-party said "grain or other lawful merchandise," it would be impossible to have admitted evidence as to the season being past. Cresswell, J. says: "No time is expressed, but the reasonable time which the law implies," and the judgment of Willes, J., in *McAndrew v. Chapple* (*ubi. sup.*) is contrary to the interpretation sought to be put on his words by the other side in the case now being cited. [They were stopped in support of the second contention, that if the charterer had a right to throw up the charter, it was a total loss of freight.]

Appland in reply.—The only ground given for the assumption that a reasonable time is implied, is that in very extreme cases it would work hardship if it be not. But that argument is as valid the other way. Then the express stipulation in this charter-party as to proceeding with all possible dispatch, excludes any other stipulation on the same subject, viz., of time, being implied. The report of Cresswell, J.'s judgment in *Hurst v. Osborne* (in 25 L. J. 211, C.P.), is strongly in our favour upon the point. *Blanco v. Fletcher* (*ubi. sup.*) where a question of reasonableness was left to the jury was a case where there had been an authority to the shipowner to do the best for all parties. Again, it is admitted that there is no authority for implying the particular stipulation here required, unless *Geipel v. Smith* (*ubi. sup.*) be one; but there there was an express condition which actually happened.

Surely as this must have occurred repeatedly, the fact of there being no authority shows that the law has been accepted as in accordance with the cases in our favour which are direct. A decision for the plaintiff merely on the suggestion of extreme cases of hardship, may equally well produce as great hardships the other way, and such a decision would throw all contracts into confusion by importing an element of uncertainty into them by the addition of some term which the parties themselves have not expressed.

Cur. adv. vult.

Nov. 30.—The court having differed in opinion, the following judgments were delivered. The judgment of Bramwell, B., Blackburn, Mellor, and Lush, JJ., and Amphlett, B., was delivered by

BRAMWELL, B.—The first question in this case is whether the plaintiffs could have maintained an action against the charterers for not loading, for if they could there certainly has not been a loss of the chartered freight by any of the perils insured against.

In considering this question the finding of the jury, that "the time necessary to get the ship off and repairing her so as to be a cargo-carrying ship was so long as to put an end in a commercial sense to the commercial speculation entered into by the shipowner and charterers" is all important. I do not think the question could have been left in better terms, but it may be paraphrased or amplified. I understand that the jury have found that the voyage the parties had contemplated had become impossible, that a voyage undertaken after the ship was sufficiently repaired, would have been a different voyage; not indeed different as to the ports of loading and discharge, but different as a different adventure; a voyage for which at the time of the charter the plaintiff had not in intention engaged the ship, nor the charterer the cargo; a voyage as different as though it had been described as intended to be a spring voyage, while the one after the repair would be an autumn voyage. It is manifest that if a definite voyage had been contracted for, and become impossible by perils of the seas, that that voyage would have been prevented, and the freight to be carried thereby would have been lost by the perils of the seas. The power which undoubtedly would exist to perform, say an autumn voyage in lieu of a spring voyage, if both parties were willing, would be a power to enter into a new agreement, and would no more prevent the loss of the spring voyage and its freight, than would the power (which would exist if both parties were willing) to perform a voyage between different ports with a different cargo.

But the defendants say here the contract was not to perform a definite voyage, but was at some and any future time, however distant, provided it was by no default in the shipowners, and only postponed by perils of the seas, to carry a cargo of rails from Newport to San Francisco. That no matter at what distance of time, at what loss to the shipowner, whatever might be the ship's engagements, however freight might have risen or seamen's wages, though the voyage at the time when the ship was ready might be twice as dangerous, and possibly twice as long, from fog, ice, and other perils, though war might have broken out meanwhile between the country to whose port she was to sail and some other, still she was bound to take and had the right to de-

C. P.]

JACKSON v. THE UNION MARINE INSURANCE COMPANY (LIMITED).

[EX. CH.]

mand the cargo of the shipper, who in like way had a right to have carried and was bound to find the agreed cargo, or if that had been sent on already, a cargo of the same description no matter at what loss and however useless the transport of the goods might be to him. This is so inconvenient, that though fully impressed with the considerations so forcibly put by Mr. Aspland, and retaining the opinion I expressed in *Tarrabochia v. Hickie*, I think that unless the rules of law prohibit it we ought to hold the contrary.

The question turns on the construction and effect of the charter. By it the vessel is to sail to Newport with all possible dispatch, perils of the seas excepted. It is said this constitutes the only agreement as to time, and provided all possible dispatch is used, it matters not when she arrives at Newport. I am of a different opinion. If this charter-party be read as a charter for a definite voyage or adventure, then it follows that there is necessarily an implied condition the ship shall arrive at Newport in time for it. Thus if a ship was chartered to go from Newport to St. Michaels in terms in time for the fruit season, and take coals out and bring fruit home, notwithstanding the opinion expressed in *Touteng v. Hubbard*, on which I will remark afterwards, it would follow that if she did not get to Newport in time to get to St. Michaels for the fruit season, the charterer would not be bound to load at Newport, though she had used all possible dispatch to get there, and though there was an exception of perils of the seas. The two stipulations to use all possible dispatch and arrive in time for the voyage are not repugnant, nor is either superfluous or useless. The shipowner in the case put expressly agrees to use all possible dispatch; that is not a condition precedent; the sole remedy for and right consequent on the breach of it is an action. He also impliedly agrees that the ship shall arrive in time for the voyage; that is a condition precedent as well as an agreement, and its non-performance not only gives the charterer a cause of action, but also releases him. Of course, if these stipulations owing to excepted perils are not performed, there is no cause of action, but there is the same release of the charterer. The same reasoning would apply if the terms were to "use all possible dispatch, and further and as a condition precedent to be ready at the port of loading on June 1st." That reasoning also applies to the present case. If the charterer be ready as for a voyage or adventure not precisely defined by time or otherwise, but still for a particular voyage, arrival at Newport in time for it is necessarily a condition precedent. It seems to me it must be so read, I should say reason and good sense require it. The difficulty is supposed to be that there is some rule of law to the contrary. This I cannot see, and it seems to me that in this case the shipowner undertook to use all possible dispatch to arrive at the port of loading, and also agreed that the ship should arrive "there at such a time that in a commercial sense the commercial speculation entered into by the shipowner and charterer should not be at an end but in existence." That latter agreement is also a condition precedent. Not arriving at such a time puts an end to the contract; though, as it arises from an excepted peril, it gives no cause of action. And

the same result is arrived at by what is the same argument differently put. Where no time is named for the doing of anything, the law attaches a reasonable time.

Now let us suppose this charter-party had said nothing about arriving with all possible dispatch. In that case, had the ship not arrived at Newport in a reasonable time, owing to the default of the shipowner, the charterer would have had a right of action against the owner, and would have had a right to withdraw from the contract. It is impossible to hold that in that case the owner would have a right to say, I came a year after the time I might have come, because meanwhile I have been profitably employing my ship, you must load me, and bring your action for damages. The charterer would be discharged, because the implied condition to arrive in a reasonable time was not performed. Now let us suppose the charter contains as here, that the ship shall arrive with all possible dispatch; I ask again is that so inconsistent with or repugnant to a further condition that at all events she shall arrive within a reasonable time, or is that so needless a condition, that it is not to be implied? I say certainly not; I must repeat the foregoing reasoning. Let us suppose them both expressed, and it will be seen they are not inconsistent nor needless. Thus, I will use all possible dispatch to get the ship to Newport, but at all events she shall arrive in a reasonable time for the adventure contemplated. I hold, therefore, that the implied condition of a reasonable time exists in this charter.

Now what is the effect of the exception of perils of the seas, and of delay being caused thereby? Suppose it was not there, and not implied; the shipowner would be subject to an action for not arriving in a reasonable time, and the charter would be discharged. Mr. Benjamin says the exception would be implied. How that is it is not necessary to discuss, as the words are there; but if it is so, it is remarkable as showing what may be implied from the necessity of the case. The words are there, what is their effect? I think this, they excuse the shipowner, but give him no right. The charterer has no cause of action, but is released from the charter. When I say he is, I think that both are. The condition precedent has not been performed, but by default of neither. It is as though the charter were conditional on peace being made between countries A. and B., and it was not; or as though the charter agreed to load a cargo of coals, strike of pitmen excepted. If a strike of probably long duration began, he would be excused from putting the coals on board, and would have no right to call on the shipowner to wait till the strike was over. The shipowner would be excused from keeping his ship waiting, and have no right to call on the charterer to load at a future time. This seems in accordance with general principles. The exception is an excuse for him who is to do the act; and operates to save him from an action, and make his non-performance not a breach of contract; he does not operate to take away the right the other party would have had, if the non-performance had been a breach of contract, to retire from the engagement; and if one party may, so may the other. Thus A. enters the service of B. and is ill, and cannot perform his work; no action will lie against him, but B. may hire a fresh servant, and not wait his recovery if his illness would put an end, in a

EX. CH.]

JACKSON v. THE UNION MARINE INSURANCE COMPANY (LIMITED).

[EX. CH.]

business sense, to their business engagement, and would frustrate the object of that engagement. A short illness would not suffice, if consistent with the object they had in view. So if A. engages B. to make a drawing, say of some present event for an illustrated paper, and B. is attacked with blindness which will disable him for six months, it can't be doubted that though A. could maintain no action against B., he might procure some one else to make the drawing. So of an engagement to write a book, and insanity of the intended author. So of the case I have put of an exception of a strike of pitmen.

There is then a condition precedent that the vessel shall arrive in a reasonable time. On failure of this, the contract was at an end, and the charterer discharged, though he has no cause of action as the failure arose from an excepted peril. The same result follows then, whether the implied condition is treated as one that the vessel shall arrive in time for that adventure, or one that it shall arrive in reasonable time, that time being in time for the adventure contemplated; and in either case, as in the express cases supposed, and in the analogous cases put, non-arrival and incapacity by that time ends the contract; the principle being that though non-performance of a condition may be excused, it does not take away the right to rescind from him for whose benefit the condition was introduced. On these grounds I think that in reason, in principle, and for the convenience of both parties, it ought to be held in this case that the charterers were on the finding of the jury discharged.

It remains to examine the authorities. The first in date relied on by the defendants is *Hadley v. Clarke* (8 T. R. 259). Now it may safely be said that there the question was wholly different from the present. There was no question in that case as to the performance of a condition precedent to be ready at a certain or within a reasonable time, or such a time that the voyage in question, the adventure, should be accomplished and not frustrated. That condition had been performed; the ship had loaded and sailed in due time—the plaintiff had had a part of the benefit intended—the defendant had in justice earned part of his freight. Had the plaintiff demanded his goods at Falmouth, he ought to have paid something for their carriage there. He could not, therefore, very well have said that he would not go on with the adventure, but undo it. But, if I am right, unless both could, neither could. Further, in that case there was no finding, or anything equivalent to a finding, that the objects of the parties were frustrated. This case is therefore in every way distinguishable.

Then there is the case of *Touleng v. Hubbard* (*ubi sup.*). The opinion there expressed was obiter; of weight, no doubt, but not of the same weight it would have been had it been the *ratio decidendi*. I cannot think that it would have been so held, had it been necessary to act on it. To hold that a charterer is bound to furnish a cargo of fruit at a time of year when there is no fruit, at a time of year different to what he and the shipowner must have contemplated, the change to that time being no fault of his, but the misfortune at best of the shipowner, is so extravagant when the consequences become apparent that it could not be. Suppose a charter to fetch a cargo of ice from Norway,

entered into at such a time that the vessel would reach its destination with reasonable dispatch in February, when there was ice, and bring it back in June when ice was wanted, and by perils of the seas it could not get to Norway till the ice was melted, nor return till after ice was of no value. Can it be that the charterer would be bound to load, that he had agreed in those events to do so?

Another case is *Hurst v. Ulborne*. That is a case of which, if I know no more than I learn from the books, I should say it did not decide the question we have before us. It is true that the report in the Law Journal, as Mr. Aspland pointed out, says that Mr. Justice Crosswell said he knew of no time the shipowner was bound to, except to use reasonable dispatch. Still, I cannot see from the reports, that the point now before us was presented to the judges in that case. My brother Blackburn, who was counsel in the cause, says it was intended to raise this point by the evidence that was rejected at Nisi Prius. No doubt, therefore, that was so, but I cannot think it was so understood by the court; I see no adjudication on it. Mr. Butt pointed out that the charter was for barley or other lawful merchandise; even if for barley only, it does not appear that barley might not have been stored at Limerick, nor that barley from Limerick arriving in England at the time it would, had the defendant loaded, would not have been as valuable as arriving earlier. I cannot but think it was a hasty decision; a rule was refused, and certainly one would think, after the argument we have heard, that the matter was worth discussing; at the same time its tendency is favourable to the defendants. I think it unsatisfactory, and, if a decision on the question now before us, wrong. Mr. Justice Willes did not seem to be of opinion that the law was as he is supposed to have laid it down in that case; see his judgment in *McAndrew v. Chapple* (*ubi sup.*), where indeed there had been a breach of his contract by the shipowner, but the observations are general. I may also properly refer to the opinions, if not of myself, of my brothers Blackburn and Brett in *Potter v. Rankin* (*ubi sup.*). They undoubtedly assumed the law to be as the plaintiffs contend.

There is also *Guipel v. Smith* (*ubi sup.*), nearly, if not quite, in point. The shipowner there was excused, not merely for refusing to take a cargo to a port which became blockaded after the charter, but also in effect for refusing to do so after the blockade was removed. Restraint of princes not only excused, but discharged him. The same, no doubt, would have been held as to the charterers.

Then there are the cases which hold that where the shipowner has not merely broken his contract, but so broken it that the condition precedent is not performed, the charterer is discharged: (see *Freeman v. Taylor*, 8 Bing. 124.) Why? not merely because the contract was broken. If it is not a condition precedent, what matters it whether it is unperformed with or without excuse? Not arriving with due diligence or at a day named is subject to a cross action only—but not arriving in time for the voyage contemplated, but at such a time that it is frustrated, is not only a breach of contract but discharges the charterer; and so it should though he has such an excuse that no action lies.

EX. CH.]

JACKSON v. THE UNION MARINE INSURANCE COMPANY (LIMITED).

[EX. CH.]

Taylor v. Caldwell (ubi sup.), is a strong authority in the same direction, I cannot but think then that the weight of authority, as might be expected, is on the side of reason and convenience. On the other question, viz., whether though the charterer by perils insured against had a right to refuse to load the cargo, there had been a loss of freight by perils of the seas, I am of opinion that there has been. It was argued that the doctrine of *causa proxima spectetur non remota*, applied: That the proximate cause of the loss of freight here was the refusal of the charterer to load. But if I am right the voyage, the adventure, was frustrated by the perils of the seas, both parties were discharged, and a loading of cargo in August would have been a new adventure, a new agreement; but even if not the maxim does not apply. The perils of the seas do not cause something which causes something else. The freight is lost unless the charterer chooses to go on. He does not. In the case of goods carried part of the voyage and the ship lost, but goods saved, the shipowner may carry them on if he chooses, but is not bound.

Suppose he does not, his freight is lost, so if he does not choose to repair a vessel which remains in specie, but is a constructive total loss. For these reasons I think the judgment should be affirmed. My brothers Blackburn, Mellor, and Amphlett, agree in this judgment as does my brother Lush, who however only heard part of the arguments.

CLEASBY, B.—The question in this case was whether there was a total loss by perils of the sea of the freight to be earned under a charter-party. By the charter-party the vessel, *Spirit of the Dawn*, was to proceed from Liverpool to Newport, and there take on board and carry to San Francisco a cargo of iron rails. The vessel sailed from Liverpool on the 2nd Jan. 1872, got aground on the 3rd upon the rocks in Carnarvon Bay, was got off and taken to a place of safety on the 18th Feb., then taken to Holyhead, and afterwards to Liverpool, where she was sold by auction on the 13th June for 5300*l*. The purchasers repaired her, and it was proved that on the 15th Aug. it would take about a fortnight more to complete the repairs. But in the meantime, after the vessel got on the rocks, and as soon as it was plain some time would be required for her repairs, attempts had been made by the charterers to come to some arrangements with the plaintiffs for taking up another ship to forward the rails which were wanted for the construction of a railway. The plaintiffs refused so to release the charterers from their contract, and on the 16th Feb. the charterers chartered another ship by which they forwarded the rails. Under the circumstances the plaintiffs who had effected an insurance for 1500*l*. on chartered freight valued at 2900*l*. upon the voyage from Liverpool to Newport, and thence to San Francisco, claimed for a total loss, on the ground that they were prevented by the perils from carrying the freight.

The case was tried at Liverpool before Brett, J., and he may be considered for the purpose of the present case to have left two questions to the jury, viz., first, whether the time necessary for getting the ship off and repairing her was so long as to make it unreasonable for the charterers to supply the agreed cargo at the end of the time; and, secondly, whether such time was so long as to put an end, in a commercial

sense, to the commercial speculation entered upon by the shipowner and the charterers. The jury found both questions in the affirmative, and the learned judge being of opinion, notwithstanding the finding of the jury, that there was no evidence of a loss of freight by the perils insured against, directed a verdict for the defendants, reserving leave to move to enter a verdict for the plaintiffs. A motion was made, and afterwards a rule made absolute to enter a verdict for the plaintiffs as for total loss of freight. The question upon the case on appeal is stated to be whether the plaintiffs are entitled to have the verdict entered for them, and if the court is of opinion that they are so entitled, the judgment is to be entered for 1500*l*. or such sum as the court or an average adjuster appointed by them shall direct.

The principal question argued before us was whether the necessary delay caused by the getting the vessel off the rocks and repairing her, and which had the effect found by the jury, disentitled the plaintiffs to insist upon the performance of the charter-party, by reasons of its being an implied term and condition of the charter-party that the vessel should arrive at Newport within a reasonable time.

Another question was also raised by the learned counsel for the defendants, viz., that supposing there was such an implied term, and the plaintiffs were disabled by the delay from insisting upon the performance of the charter-party, still the loss of freight was not the immediate consequence of the sea damage, but of the right exercised by the charterer of throwing up the charter-party, which he might or might not have done, and in doing which he was influenced by the exigency of the particular case, and the necessity of getting the rails to San Francisco as soon as possible. And it was forcibly argued that if this necessity had not existed, and freights had risen, the charterers would have claimed the performance of the charter, and that the underwriters were only responsible for the necessary consequence of sea damage, and not for the manner in which any option or right is exercised. This view was rejected by the court upon the argument, and as I thought upon the ground, that at the time of the alleged loss the plaintiff's interest was the right, under the charter-party, to have the rails loaded, and so to earn the freight, and that as soon as that right was destroyed by sea damage, there was a total loss of his interest by the perils insured against. If the question had been a new one, I should have thought it followed, from the interest lost being the right under the charter-party to have the executory contract of the freighters performed, that the total loss could be measured by the value of that right, and that the proper course would not be to enter the verdict for 1500*l*. but to resort to the second alternative above referred to, and have the verdict entered for such sum as an average-stater shall direct. But the authorities are decisive that where there is a charter-party under which the shipowner will be entitled to certain freight so soon as the voyage under the charter-party has commenced, the right to the whole freight attaches, and as I cannot presume to overrule these authorities, so far as the question now under consideration is concerned, the verdict is properly entered.

But this was not the principal question raised in the case argued before us. The principal ques-

[EX. CH.]

JACKSON v. THE UNION MARINE INSURANCE COMPANY (LIMITED).

[EX. CH.]

tion was one of great interest, because the decision upon it not only decides the case before us, but regulates the conduct of all who enter into charter-parties—a very numerous class of persons of many nations, and who ought to have some known rule to act upon. The question is, whether, under the circumstances of the present case, the plaintiffs were entitled to repair the vessel (using all proper dispatch in doing so), and to call upon the charterers to fulfil their charter.

I agree with the opinion expressed by my brother Brett at the trial, and adopted by Bovill, C. J., in the court below, that the findings of the jury are immaterial, and that upon such facts as the present, which are free from questions, it was not for the jury to put a construction upon those facts, but for the law to determine the rights of the parties upon them.

Indeed I think the law has already done so by settled principles and decided cases. The settled principle is that when in an agreement a provision is made applicable to a particular subject, that provision forms the agreement on that subject. The rule is *expressum facit cessare tacitum*. There is no further qualification or limitation to be implied. This is essential to all, certainly in the obligations which persons place themselves under; or the agreement would be the uncertain conclusion of a particular jury, as to what was reasonable or convenient.

In such a case as that under consideration, the charter relates to a voyage necessarily exposed to disasters causing delay, and the whole enterprise is made subject to the consequences of these disasters; the voyage from Liverpool to Newport, and from Newport to San Francisco, equally so. It must not be read as an agreement the object of which is proceeding from Liverpool to Newport, the object of the agreement is carrying a cargo of rails from Newport to San Francisco. There is no limit to the time occupied in doing so unless it be caused by some breach of duty. If the rails had been taken on board at Newport, and the vessel had got upon a rock the day after leaving Newport, no matter how great the delay the shipowner would have been entitled to repair to earn the freight under the charter by completing the voyage. No one disputes this, and the same thing may happen over and over again in several parts of so long a voyage as from Newport to San Francisco, which in the result may not be completed within a year or even possibly two years. Still the charter would continue in force. If the goods were intended for a particular market or a particular purpose, it would not be a question whether an unreasonable time had been occupied, or whether the commercial speculation of the charter-party was at an end; so far as the charterer was concerned, his commercial speculation must have been ruined by the delay, and so far as the shipowner was concerned, also (except so far as he was indemnified by insurances or possibly by means of valued policies was making a profit of each disaster), but still the agreement would continue because nothing had happened except what was provided for. The agreement for conveying the rails from Newport to San Francisco is as much acted upon by setting sail from Liverpool with the ship equipped for the voyage, and prepared for the cargo of rails, as if the rails had been taken on board, and the same rule of course ought to apply.

It cannot properly depend upon the part of the voyage in which the damage is sustained. The preliminary voyage might be a long one to the other extremity of the globe, and the disaster happen towards the end of it, the rule must be the same whether it be to Newport to carry out rails, or to the Chinças to bring home guano.

The principal argument addressed to us was that convenience was so much in favour of the charter-party not continuing in force after a delay of unusual and unreasonable length in proceeding to the port of lading, that a term or condition ought to be implied making the charter no longer obligatory upon the freighter after such delay. I have already pointed out that it is one voyage under the charter-party, and the inconvenience of detention would apply to all parts. It would be extremely inconvenient that the rails which were wanted at San Francisco should be loaded and detained at Monto Video, or Valparaiso, for four or five months, when they might be forwarded at once at an easy freight to San Francisco, and yet this would not affect the charter-party.

But independent of this, it appears to me that when the matter is properly considered the argument of convenience is entirely against the implication contended for. The rule to be laid down not only settles the rights of parties to such an agreement, but regulates their conduct in a very important matter. The question is what are the masters of vessels under charter to do when they have sustained damages? They are in a position of trust and great responsibility, belonging to all nations, and ought to have a clear and definite rule of conduct to go by. The rule of conduct, which the law has hitherto prescribed is, repair your vessel and proceed with your charter. But the rule now laid down would place shipowners and freighters in a position of the greatest uncertainty and difficulty. Instead of having a clear course to pursue without delay and independent of collateral considerations, such as I have mentioned, the master of a damaged vessel is to form a conclusion upon a doubtful matter, viz. the time to be consumed in repairs, and then either by himself or with the assistance of others to get at the effect of this, and thus satisfy himself whether the delay is likely to make it unreasonable for the charterers to wait, or in the words of the case whether the delay would put an end in a commercial sense to the commercial speculation entered into between him and the charterer. It would be a puzzling question for him to answer if he understood it. The answer would depend upon a variety of circumstances. The captain might say, "The commercial speculation which I entered into was and continues an excellent one. I had a charter for San Francisco at a high freight, and have from my connections a good expectation of finding a return cargo at San Francisco, and freights have here now fallen." The charterer, if freights had fallen, would say: "This has been a bad commercial speculation for me, and the best thing I can do would be to get out of it," and hire a vessel at once at a lower rate of freight. If on the other hand freights had risen the captain would wish to get out of the charter and procure a high freight, and the freighter contrariwise.

Thus, while by upholding the charter in its terms you give a rule of conduct which is certain, clear, and not influenced by unfair collateral considerations of interest, by introducing

EX. CH.]

JACKSON v. THE UNION MARINE INSURANCE COMPANY (LIMITED).

[EX. CH.]

the suggested implication, you make the course of conduct different, dependent upon doubtful intervals of time, and results which cannot be ascertained, and expose it to the influences which I have suggested. In short, one rule makes it the duty of both parties under all circumstances to uphold the charter; the other in every case of considerable damage and necessary delay in repairing, gives each party the chance of getting out of the charter according as it is his interest to do so.

As is usual in all arguments founded upon consequences, we were pressed by extreme cases, and it was asked how long a man was to keep a cargo, perhaps a perishable one. Was he to keep it for months, a year? The answer is, that if the cargo is of such a nature, or an early shipment of vital importance, the charterer should have a special clause in the contract; but if he does not, still the contract is not one upon which there can be a claim for a specific performance. As soon as it is plain that the delay will be really serious as regards the condition of the intended cargo or the purpose to which it was destined, the charterer should forward the cargo by another vessel, giving notice at the earliest period to the shipowner of his intention. He will be liable in damages no doubt, but not to the freight, and the amount will depend upon the state of freights. If freights had risen the shipowners would sustain but little damage and the charterer would himself be a loser by forwarding his cargo at a higher rate. If freights had fallen there might be a considerable liability, but the charterer would share the advantage by having his goods forwarded at an easier rate. In the present case, the damages would probably not be heavy, for all the loss of delay and detention would not be the fault of the charterer, but caused by perils for which he was not responsible, and the shipowner would be in the same state as he was before he started. The charter-party might perhaps be framed, so as to make the charterer liable for a specified amount of stipulated damages for a particular default. If this were so it would be his fault for entering into such a stipulation, when the delay by sea perils would be so serious. In the present case, as is usual, the penalty for non-performance would not make the liability greater than the damages sustained.

It appears to me, therefore, that too much stress was laid during the argument upon the apparent injustice which would be done in a particular case of extreme delay if the charter was upheld, and not sufficient regard had to the general inconvenience which would arise if the charter were defeated in such cases. So far as the argument from convenience is concerned, it preponderates in favour of a construction which gives a certain clear and honest rule of conduct to act by in all cases, upholding a contract over one which introduced uncertainty and difficulty as to conduct, and admitting of reasons for defeating a contract which are to be derived from considerations of interest at the time. Independent therefore of authority, I should think the general rule should prevail, of construing the contract as to all matters within its provisions, and not introducing an additional implied term.

I have more fully considered the case upon principle, because although the authorities appear to me to preponderate, and indeed, but for some

very recent dicta and decisions, to be conclusive in favour of this view, I do not propose to refer to them in detail, as that has been done by the late Lord Chief Justice Bovill in his judgment in the court below, with which I entirely agree.

The authorities apply to two distinct conditions of things, viz., one where delay has been caused by a breach of some stipulation by the shipowner, and the other where there has been no such breach.

In the former case, except in a few cases where the stipulation is held to be a condition precedent (*Gladstone v. Hayes*, 5 M. & G. 257; *Olive v. Becker*, 1 Ex. 416), the breach is held to give a claim for damages only, and not to defeat the charter-party—such stipulations, for instance, as to sail with the first fair wind, or by a particular day. In such a contract as a charter-party, where so many circumstances may arise at the port of departure to prevent an exact compliance, and which may still not be excused, it would be most unreasonable to enable the freighter, because the bargain turned out an unprofitable one, to throw up the charter for such a default. Accordingly, if the freighter relies upon the breach of some obligation of the shipowner as an answer to an action for not providing a cargo, he must allege that he has lost all benefits of the voyage by the plaintiff's delay. He may fairly say, you have broken the contract, and I have lost all the intended benefit by your breach, and I am thus discharged: (see *Freeman v. Taylor*, 8 Bing. 124; *Clapham v. Verne*, 5 Q. B. 265; *Tarrabochia v. Hickie*, 1 H. & N. 183; *Wheeler v. Bewidge*, 9 Ex. 608.) It should be observed that this loss of benefit to the charterer is a totally different thing from what is set up in the present case, viz., that the delay was unreasonable, and the commercial speculation of the charter-party itself at an end. If there had been any breach by the plaintiffs in not setting sail and proceeding with convenient speed from Liverpool, the charterer might have said his object was defeated, and he was discharged; not because the delay was of itself an answer to the charterer, but because the breach was made an answer by the delay.

In the present case, the second condition exists, and there is no breach of the terms of the charter-party; but the delay itself is made an answer, and the authorities are, I have said, against it. I will only refer to three in particular, but the language of the judges in them is so clear, and to the point, that I cannot help referring to it.

Hadley v. Clarke (*ubi sup.*) was the case of a charter-party, perils of the sea being the only exception. The vessel was detained on the voyage from Liverpool to Leghorn by an embargo laid at an intermediate port, to which the vessel was driven, for the period of two years. It was contended that the shipowner was excused by this delay, not caused by his default, and no one can doubt, I should think, that the commercial speculation entered into by the shipowner and charterer, so far as I understand the meaning of these terms, had long been defeated by such a misadventure. But the language of Laurence, J., has been always referred to as the authority on the subject: "The counsel for the defendants were driven to the necessity of introducing into the contract other terms than those which it contained. They contended that the defendants were only bound to

[Ex. Ch.]

JACKSON v. THE UNION MARINE INSURANCE COMPANY (LIMITED).

[Ex. Ch.]

fulfil their engagement within a reasonable time, and then argued that, as the embargo prevented the completion of the contract within a reasonable time, the defendants were absolved from the engagement altogether. It was incumbent on the defendants, when they entered into this contract, to specify the terms and conditions on which they would engage to carry the plaintiff's goods to Leghorn. They accordingly did express the terms, and absolutely engaged to carry the goods, the dangers of the seas only excepted. That, therefore is the only excuse which they can make for not performing the contract. If they had intended that they should be excused from any other cause they should have introduced such an exception into their contract." There is no doubt a distinction of fact between that case and the present one, viz., that in that case the cargo remained on board during the whole period of detention, and was, as it were, during all that time detained, subject to the charter-party; but this does not appear to make any difference in the principle, since the contract had been acted on in the present case, and the vessel had been prepared and had on board all the necessary equipments, and had set sail for the voyage.

In the case of *Touteng v. Hubbard* (ubi sup.) the cargo had not been taken on board, and the action was for not providing a cargo at the port of loading—St. Michaels. The charter had the exception of restraint of princes, and had proceeded on the voyage from London, but was detained at Ramsgate, by an embargo, for six months, and the charterer refused to load a cargo on the ground that the season for shipping fruit had long passed, and the voyage would be useless and nugatory, which may be construed as having the same meaning as that the commercial speculation was at an end. The case was ultimately decided upon a question of nationality. The judgment of Lord Alvanley is referred to at some length in the judgment of Lord Chief Justice Bovill in the court below. I refer to the following passage, because it bears also upon the authority of *Hadley v. Clarke*: "If, then, this had not been the case of a Swedish ship, hired by an English merchant, the merchant would have been under the necessity of furnishing the ship with a cargo if she had arrived at St. Michaels as soon as she conveniently might after the embargo was taken off, although, by arriving after the fruit season was over, the object of the voyage might be defeated. Such is the doctrine in *Hadley v. Clarke*, and *Bligh v. Pope*. I have no difficulty in subscribing to the doctrine laid down in *Hadley v. Clarke*, that a common embargo does not put an end to any contract between the parties, but is to be considered as a temporary suspension of the contract only, and that the parties must submit to whatever inconvenience may arise therefrom, unless they have provided against it by the terms of their contract. The object of the voyage might equally have been defeated by the act of God as by the act of the State, as, if the ship had been weather bound until the fruit season was over; and yet in that case the merchant would have been bound to fulfil his contract. The principle of *Hadley v. Clarke* is, that an embargo is a circumstance which it is equally competent to the parties to provide against as against the dangers of the seas, and, therefore, if they do not provide against it they must abide by the consequences of their contract."

I shall only refer to one other case for the purpose of quoting the opinion of the late Mr. Justice Willes upon the question raised in the present case; *Hurst v. Uaborne* (ubi sup.). In that case there had been a detention for 152 days, being perils of the seas, and the charterers refused to load, partly on the ground that the vessel had arrived after the time when the export trade usually took place from the port of loading. The following is the judgment of Willes, J.: "As to the other question, whether the construction of the charter-party can be affected by the fact that the particular description of cargo could only be supplied at a certain season of the year, the answer to that I apprehend is, that the charter-party was probably entered into in the hope that the vessel would arrive at Limerick at that time of the year. But the question is, who takes the risk whether she will or not? Why the person who is to ship the goods takes the risk, unless he stipulates that the other party shall take it. Here it is not stipulated that the vessel shall arrive at Limerick by any particular day, but only that she shall proceed there with all convenient speed. The owner has performed his contract to proceed with all convenient speed when he has done all he could, but has been prevented by danger of the seas."

The case of *Hadley v. Clarke* was decided in the year 1799, and it and the cases following upon it have been regarded as authorities ever since, and quoted in all the text books. They are referred to as authorities by the American, as well as English writers. Lord Tentorden, in his work on Shipping, the first edition of which was published in 1802, devotes a paragraph to it, as giving the law on the subject (p. 429, 5th edit.). And for the American text books, see *Parsons on Shipping*, vol. 1, pp. 318, 330. In the latter passage the learned writer insists upon the authority of *Hadley v. Clarke*, and referring to it and other cases in conformity with it in the American courts he says: "It is very clear that an embargo, though of an indefinite duration, may suspend the performance of the contract." Kent also refers to *Hadley v. Clarke* as an authority not questioned: (vol. 3, pp. 312, 346, 10th edit.) In the latter reference, after referring to matters which put an end to the contract by breaking up the voyage, he adds: "But a temporary impediment of the voyage does not work a dissolution of the charter-party, and an embargo has been held to be such a temporary restraint, even though it be indefinite as to time. (He here refers to *Hadley v. Clarke*, and the American cases.) The same construction is given to the legal operation of a hostile blockade or investment of the port of departure, upon the contract. It merely suspends the performance of it, and the voyage must be broken up, or the completion of it become unlawful, before the contract will be dissolved. If the cargo be not of a perishable nature, and can endure the delay, the general principle applies, that nothing but occurrences which prevent absolutely the performance of the contract will dissolve it. The parties must wait until those which merely retard its execution are removed." But such occurrences would cause unreasonable delay, and destroy the commercial speculation of the contract; still it would subsist.

Against this weight of authority there are, no doubt, authorities entitled to great consideration. In the case of *Bankin v. Potter* (ubi sup.), in which the judgment really was that a constructive total loss

EX. CH.]

JACKSON v. THE UNION MARINE INSURANCE COMPANY (LIMITED).

[EX. CH.]

of the ship was of itself a loss of chartered freight, without notice of abandonment, there are dicta of several of the judges, in their opinions delivered to the House of Lords, to the effect that where a vessel under charter was delayed for an unreasonable time, the charterer was not bound to provide a cargo. Venturing, as I do, to differ from the judgment of the court below, I must, of course, venture to differ from those dicta. And it may properly be noticed that those dicta are upon a matter which did not necessarily arise upon the question on which the case was decided, and that they did not in the slightest degree enter into any of the judgments of any of the noble lords who decided the case, and were not noticed by them. Indeed, the judgments given exclude delay from sea damages, as an answer to the obligation of the charterer to load a cargo. The following are the words of Lord Chelmsford in relation to the right of the shipowner under the charter, where there has been damage requiring repair: "If the sea damage which the ship sustained in New Zealand was such as to reduce her to a state which rendered her utterly incapable of performing the voyage to England without an expense which no prudent uninsured owner would incur, then the freight was totally lost from that moment, and how the owners chose to deal with the disabled ship afterwards was wholly immaterial. If the damage to the ship had been such that it might have been repaired at a reasonable expense and put into a condition to earn the freight, and the shipowners had declined to take this course, they would have lost the freight, not by the perils of the sea, but by their election." The rule given is a simple one: repair the damage, if it can be done at a reasonable expense, and tender your vessel to the charterer. Not a word about the time which it may require. The same remark applies to the judgment of Lord Colonsay and Lord Hetherley. It may also be noticed with reference to the dicta of the learned judges, that those dicta had reference in the particular case, not to the necessary delay during the time required for the repair of damage, but to the unusual and unnecessary delay arising from the shipowner, instead of repairing the vessel, making use of it and letting it out for months as a store depot for coals, in consequence of the want of funds.

Much reliance was placed in the argument upon the case of *Geipel v. Smith* (ubi sup.), and if that case could be regarded as overruling the authorities referred to, I should have to consider whether I thought myself bound by the earlier authorities or the last one. But that is not the case at all. Not a word is said in that case about overruling any previous authority; on the contrary, my brother Blackburn says that very different considerations arose in *Hadley v. Clarke*. And this was undoubtedly so, for *Geipel v. Smith* was not a case of detention by embargo or delay from necessary repairs, but of the performance of the charter becoming impossible, that is, impossible without liability of forfeiture of ship and cargo by reason of a duly notified and effective blockade at port of delivery. It had been held in the case of *Medeiros v. Mill* (8 Bing. 231), that when after the known existence of a blockade a charter-party was made to convey a cargo to the blockaded port (the case being clear from the difficulty which might arise if the object was to run the blockaded port), the existence of the blockade

was no answer to the engagement to proceed on the voyage. The object of the merchant in making such a charter was, as stated by the judgment, to be in readiness to enter the port so soon as the blockade was taken off, and so get the advantage of a good market. But in *Geipel v. Smith*, the blockade, after the making of the charter, interposed the impossibility of completing it. The charter contained the exception of restraints of princes.

Now, according to the law of England, if a person engages absolutely to do something, the fact of its becoming impossible, or attended with penalties, is in general no answer: (*Paradine v. Jane*, so often referred to, and many subsequent cases.) But it would, perhaps, be sufficient to say that such a rule could not apply to a contract between the shipowner and the charterer, when the consequence of carrying the contract into effect would be to expose the cargo as well as the ship to seizure and forfeiture. I take it the shipowner not only is not bound to run the risk of seizure by attempting to enter the blockaded port, but would not be justified in doing so without the consent of the charterer; I mean as between them. But, independent of that consideration, the rule is founded upon the presumption, that where the engagement is absolute, the party takes upon himself the risk of being able to perform the contract. But that presumption is gone when by the contract itself it appears that the party contracting does not take upon himself that risk, and the exception of the restraint of princes in the charter-party negatives the shipowner having taken upon himself the risk of blockade. That being so, it would indeed have been most unreasonable to hold that the shipowner was bound by such a charter-party after the impossibility of completing the contract arose, to load the cargo and carry it to a distant port, and there wait, perhaps, until it was necessary to return home for stores and provisions, more especially under the particular circumstances appearing in the pleadings in that case. The cases upon the effect of blockade upon a contract of charter-party, are few in our courts; but the question has arisen in America, and the decision there has been, that the effect of a blockade of the port of delivery after the contract, is to justify the shipowner in throwing up the charter. Kent, vol. 3, p. 346, 10th edit., is very clear in the distinction that while embargo at the port of loading is only a temporary impediment, and leaves the contract continuing, a blockade of the port of delivery makes the performance of the contract impossible, and justifies the parties in throwing it up. And he refers to two cases, *The Titela* (6 C. Rob. 181), and *Scott v. Libby* (2 Johnson's cases in the Supreme Court of New York, p. 336). In the first case, Sir W. Scott seems to think it clear that a blockade of the port of discharge puts an end to a charter previously made, and in the American case the judgment begins thus, p. 338: "It appears to be conceded by the counsel on both sides, that by the blockade of the port of discharge the charter-party was dissolved, and all right to freight under it gone." The great loss and inconvenience of equipping and starting upon an enterprise which is at the time impossible, seems a sufficient reason for the distinction. But without saying that our courts would at present go that length, I think I may say that the case of *Geipel v. Smith* is no authority

[ADM.]

H.M.S. BELLEPHON.

[ADM.]

that detention for necessary reparation justifies the throwing up the charter, or leaves it in force, according as a jury find, that the time taken was reasonable or the reverse.

Other cases were referred to in which implied terms had been introduced in express contracts, but I do not think that they throw any light upon the particular question before us. Indeed it would be impossible to examine all the imperfect analogies which may be put forward. Such, for example, as the implied condition that a person who has contracted to do some piece of work which no one else can do, such, for instance, as painting a picture, shall live long enough to be able to paint it; and other similar instances. No doubt when the existence of a particular person or thing, or state of things, can be regarded as the very foundation of a particular transaction, it may be implied that if the foundation fails, the transaction which is founded upon it ceases to be effectual. But upon this subject I would beg to refer to the clear and comprehensive judgment of my brother Blackburn in *Taylor v. Caldwell* (3 B. & S. 826).

For the reasons which I have now given, it appears to me that the charter-party in the present case continued hindering upon the charterers, that consequently there was no loss of freight by the perils, and therefore the defendants are entitled to judgment, which would be a reversal of the judgment already given.

Judgment affirmed.

Attorneys for the plaintiff, Norris, Allens, and Carter.

Attorneys for the defendants, Field, Roscoe, and Co., for Bateson and Co., Liverpool.

COURT OF ADMIRALTY

Reported by J. P. ASHALL, Esq., Barrister-at-Law.

Tuesday, Nov. 3, 1874.

H. M. S. BELLEPHON.

Inspection of documents—Collision—Report by captain of H. M. Ship to Admiralty—Privilege—Public policy.

Where a collision occurs between one of H. M. ships and a ship belonging to a private owner, and the captain of H. M. ship makes (in accordance with the usual practice) a report to the Lords of the Admiralty, the High Court of Admiralty will not, in a cause against the captain of H. M. ship, in which an appearance has been entered by the Queen's Proctor by order of the Lords of the Admiralty, order it to be produced for inspection by the opposite parties if the Secretary to the Lords of the Admiralty makes an affidavit to the effect that such production would be prejudicial to the public service.

This was a cause of damage instituted on behalf of the Liverpool, Brazil, and River Plate Steam Navigation Company, the owners of the steamship *Flamsted*, against the Hon. George G. Wellesley, C.B., Vice-Admiral in Her Majesty's Navy, commanding the fleet on the North American Station, and Richard Wells, Esq., captain of H. M. S. *Bellephon*, to recover damages for the loss of the *Flamsted*, which occurred in consequence of a collision with the *Bellephon*. An appearance was entered on behalf of the defendants by the Admiralty Proctor, by the directions of the Lords Commissioners of the Admiralty.

VOL. II., N. 8.

The case first came before the court on 8th July 1874, when a motion was made on behalf of the plaintiffs "for liberty to inspect and take copies of and extracts from the entries in the log books of H. M. S. *Bellephon* relating to the collision, and of all reports made to the Admiralty prior to the institution of the cause by the defendants or either of them relating to the collision." The plaintiffs filed an affidavit by one of the managers of the plaintiff company in support of their motion, and it was there stated that it was believed that the plaintiffs would obtain material evidence in support of their case from an inspection of the log books of H. M. S. *Bellephon*, and also from an inspection of certain despatches or reports, which had been received by the Admiralty from the defendants, one or both of them in consequence of or relating to the collision. The application was not opposed on behalf of the defendants so far as it related to the log books, but in so far as it related to the reports or despatches it was objected by counsel for the defendants that the production of such reports might be prejudicial to the public service, and that they were in consequence privileged. The court, however, intimated that the mere statement of objection by counsel was not enough, but that if the defendants could show upon affidavits their grounds for objecting to produce the reports they would entertain the objection; the court accordingly made an order that the plaintiffs or their proctors be at liberty to inspect and take copies of or extracts from the log books of H. M. S. *Bellephon*, relating to the collision in question in this cause, but made no order for the present upon the remainder of the plaintiffs' motion, but directed the defendants to file an affidavit as to their reasons for objecting to the inspection of any reports relating to the said collision made by them or either of them prior to the institution of the cause.

In obedience to this order the Admiralty Proctor filed an affidavit in which Mr. Vernon Lushington, the permanent secretary to the Lords Commissioners of the Admiralty, stated as follows:

I, Vernon Lushington, of the Admiralty, Whitehall, in the county of Middlesex, one of Her Majesty's counsel, make oath and say as follows:

1. I am secretary to the Lords Commissioners of the Admiralty of England.

2. When any collision of importance occurs between one of Her Majesty's ships and any other ship or vessel, it is the duty of the officer in command of Her Majesty's ship forthwith to report such collision to his senior officer or commander-in-chief, and of such senior officer or commander-in-chief to forward the same, with or without remarks, as he may think fit, to the Lords Commissioners of the Admiralty.

3. Such reports are designed solely for the information of the reporting officers, naval superiors, and the Lords Commissioners of the Admiralty, and are in the nature of confidential communications. It will be prejudicial to the public service to allow such reports to become liable to inspection by litigants in any proceedings at law touching the matters therein reported.

4. On the above ground, I object on behalf of the Lords Commissioners to the reports of the Honourable Geo. G. Wellesley, C.B., and Richard Wells, Esq., touching the collision in question in this cause being inspected by, or copies thereof furnished to the plaintiffs in this cause, or any one on their behalf.

A renewed notice of motion having been filed and served for the present date, the motion again came on upon the question of the obligation to produce the reports.

2 G

ADM.]

H.M.S. BELLEROPHON.

[ADM.]

Bull, Q.C., Cohen, Q.C. (Clarkson with them), for the plaintiffs, in support of the motion.—This action is nominally against the officers commanding H. M. ship, but in reality it is against the Admiralty, who have directed their proctor to enter an appearance; the Crown is consequently a party to this cause, and this application is to compel the production of documents relating to the question at issue which are in the possession of one of the parties. If this suit were against a private owner, reports by his master would not be privileged. Can it be said that they are privileged simply because they are made to the Crown? The allegation in the affidavit of the Secretary to the Admiralty is that the production of documents of this nature would be prejudicial to the public service. That we submit is not enough to exempt them from the ordinary rule; there ought at least to be an allegation that the production of these particular reports would be prejudicial, even if the Crown as parties to the suit are in a position to object at all. The Crown could have discovery against the plaintiff. Can it be right that the Crown should have discovery and not give it? The question whether the production of a class of documents is prejudicial is clearly not for the head of a Government department, but for the judge to decide. The head of a department may decide if a particular document ought to be produced, but here that is carefully avoided. If there is any part of this document which ought not to be made public let it be sealed up, and let the plaintiff have inspection of the rest. The true way in which the character of the document should be ascertained is by laying it before the court, which should decide on seeing it whether it ought or ought not to be produced.

R. E. Webster, as amicus curiæ.—In the case of *Dixon v. The Small Arms Company*, which was before the Court of Queen's Bench last term, the action was brought to recover royalties from the defendants in respect of certain rifles which they had manufactured for the Government, of a pattern which had been patented by the plaintiff. The defendants defended on the ground that, as they were acting for the Government, they were not bound to pay royalties. The plaintiff applied for inspection of the contract between themselves and the Government, which was in the possession of the War Office. The Attorney-General appeared in court and objected to produce the document on the ground that its production might be prejudicial to the public service. The Court of Queen's Bench said that this was a mode of taking the objection that was wholly without precedent, and that they could not allow the objection in that form, but that if the Attorney-General would bring in an affidavit by the proper officer, stating that the production of the particular document would be actually prejudicial that would be the proper course, and the case was adjourned to give the Attorney-General time to consider the course he would pursue. Subsequently, however, the Government produced the document without further action being taken.

The Admiralty Advocate (Dr. Denne, Q.C.) and H. G. Stokes for the defendants.—In *Beaton v. Skene* (2: L. J. 430, Ex.), an action was brought by the plaintiff, an officer in the English forces during the Turkish war against the defendant, his commanding officer, for libel. The libel was alleged to have been contained in a report sent by

the defendant to the War Office, and at the trial the Secretary for War was called upon to produce the report, but declined, upon the ground that the production would be prejudicial to the public service, and Bramwell, B., who tried the case, declined to order its production. This ruling was upheld by the Court of Exchequer, and it was there laid down that the person who is to judge whether a document is to be produced or not is the official who has charge of it, and not the judge who tries the case. It is contended that if the production of part is objectionable and the rest not, the document ought to be produced, subject to the sealing up of the former part, but this is not in accordance with the decisions. The document can only be treated as a whole, and if its official character is established, the person in whose custody it is may object to produce it.

Wade v. The East India Company, 8 De G. M. & G. 152;

Smith v. The East India Company, 1 Phillips 50.

In the latter case Lord Lyndhurst says, "Now it is quite obvious that public policy requires, and looking at the Act of Parliament, it is quite clear that the legislature intended that the most unreserved communication should take place between the East India Company and the Board of Control, and that it should be subject to no restraints or limitation; but it is also quite obvious, that if at the suit of a particular individual, those communications should be subject to be produced in a court of justice, the effect would be to restrain the freedom of the communications, and to render them more cautious, guarded, and reserved." Taylor on Evidence, paragraph 806, after speaking of the privileges of witnesses, says, "Upon similar grounds, the official transactions between the heads of departments of Government, and their subordinate officers are, in general, treated as secrets of State. . . . The President of the United States, the Governors of the several States, are not bound in America to produce papers or disclose information communicated to them, when, in their own judgment, the disclosure would, on public considerations, be inexpedient. And the same doctrine it would seem, prevails in England, whenever Ministers of State are called as witnesses for the purpose of producing public documents." The proceedings in this court differ entirely from petition of right, as they are not against the Crown, and even in a petition of right it is only by special Act of Parliament that the Crown is placed in anything like the same position as a private individual as to evidence, &c.

Bull, Q.C. in reply.—In *Beaton v. Skene* (ubi sup.) there was an express statement that the production of the particular document sought would be prejudicial, and that is not stated here. Moreover, in that case the Crown was not a party, and the Secretary of War was not a sailor, and was not deciding in a matter in which he might be prejudiced. If this objection is allowed the Secretary of the Lords of the Admiralty will be setting himself up as a judge in his own case. In Taylor on Evidence, paragraph 368, it is further said that, "If, however, the Minister, instead of attending personally at the trial, should send the required papers by the hands of a subordinate officer, the judge would probably examine them himself, and would compel their production, unless he were satisfied that they ought on public grounds to be withheld." It is nowhere held that the affidavit of the secre-

ADM.]

H.M.S. BELLEPHON.

[ADM.]

tary of a Minister is enough to excuse production. The court ought to see the document itself.

Sir ROBERT PHILLIMORE.—This is a cause of damage which is instituted on behalf of the Liverpool, Brazil, and River Plate Steam Navigation Company, the owners of the steamship *Flamsted*, against the Vice-Admiral George G. Welleley, C.B., commanding the fleet on the North American Station, and Richard Wells, captain of H. M. S. *Bellerophon*. The action is entered in the sum of 40,000*l*.

The cause has not yet been tried upon the merits, but an application has been made to the court to order "that the plaintiffs may be at liberty to inspect and take copies of and extracts from entries in the log book of H. M. S. *Bellerophon* relating to the collision in question in this cause;" and, according to the best of my recollection, that part of the motion has already been granted. But the application goes on further, and prays "for liberty to inspect all reports made to the Admiralty, prior to the institution of the cause, by the Hon. Geo. G. Welleley, C.B., and Richard Wells, or either of them, in consequence of and relating to the said collision."

It occurred to me when this matter was brought before me on a former occasion, that the second part of the application ought to stand over in order that the Lords of the Admiralty might take such course with respect to it, as they should be advised was proper; and I have before me now the affidavit of Mr. Vernon Lushington, the secretary to the Lords Commissioners of the Admiralty, in which he states as follows: "When any collision of importance occurs between one of Her Majesty's ships and any other ship or vessel, it is the duty of the officer in command of Her Majesty's ship forthwith to report such collision to his senior officer or commander-in-chief, and of such senior officer or commander-in-chief to forward the same, with or without remarks as he may think fit, to the Lords Commissioners of the Admiralty. Such reports are designed solely for the information of the reporting officer's naval superior and the said Lords Commissioners of the Admiralty, and are in the nature of confidential communications. It will be prejudicial to the public service to allow such reports to become liable to inspection by litigants in any proceedings at law touching the matters therein reported."

It is obvious that if communications contained in reports of the nature mentioned in this affidavit should be held liable to inspection there would be great danger of producing a result which—to use the words of Lord Lyndhurst in *Smith v. The East India Company* (1 Phillips, 50)—would be "to restrain the freedom of the communications, and to render them more cautious, guarded, and reserved" than they otherwise would be between the officers of Her Majesty, and thereby do "injury to the public interest."

It is contended by the plaintiffs that the affidavit is faulty in various respects, the principal objection taken by them being that it is not for the Secretary of the Admiralty to judge whether the inspection would or would not be prejudicial to the public service, but that it is a matter upon which the court is to form and express its own opinion. And it is also contended that if it would be prejudicial to the public service to allow inspection of any particular por-

tion of the document, that part of it ought to be sealed up, and the other part left open for inspection. It has moreover been argued that the affidavit is also deficient in this respect, that it does not state that in this particular case the production of these reports would be prejudicial to the public service, but places the present case in a category of cases, of which it may be predicated that in such cases the production of such reports would be prejudicial to the public service.

Now, it appears to me that the principle upon which this case ought to be decided has been laid down in the case of *Beaton v. Skene* (5 H. & N. 838; 29 L. J. 430, Ex.), which was referred to by the learned advocate for the Admiralty. That was a case in which a single judge, Baron Bramwell, had held at Nisi Prius, that a communication in answer to the Secretary of War was a privileged communication, and could not be produced in evidence without the consent of the Government. Upon motion for a new trial the matter came before the full court, and the opinion of Baron Bramwell was sustained by the Court of Exchequer. During the course of the judgment I find the following passage:—"We are of opinion that if the production of a State paper would be injurious to the public service, the general public interest must be considered paramount to the individual interests of a suitor in a court of justice." Then follow these important words:—"And the question then arises, how is this to be determined? It is manifest it must be determined, either by the presiding judge or by the responsible servant of the Crown, in whose custody the paper is. The judge would be unable to determine it without ascertaining what the document was, and why the publication of it would be injurious to the public service, an inquiry which cannot take place in private, and which, taking place in public, may do all the mischief which it is proposed to guard against. It appears to us, therefore, that the question, whether the production of the document would be injurious to the public service, must be determined, not by the judge, but by the head of the department having the custody of the paper, and if he is in attendance, and states that, in his opinion, the production of that document would be injurious to the public service, we think the judge ought not to compel production of it."

It appears to me that nothing has been urged before me which is sufficient to take the present case out of the operation of the principle here laid down. It is true that in this case Mr. Vernon Lushington has made a statement in an affidavit instead of orally. I cannot see that that makes any difference as to the principle to be applied to the case; and in this case the heads of the department—for so I read the affidavit of Mr. Lushington—that is to say, the Lords of the Admiralty have distinctly stated that it will be prejudicial to the public service to allow such reports to become liable to inspection by litigants in any proceedings at law touching the matters therein reported.

I do not see on what evidence the court acted in the case referred to of *Beaton v. Skene*, when it came to the conclusion that the head of the department objected to produce the document asked for. It is not one therefore, which, on the question of what evidence will justify me in refusing to order the production of the document

ADM.]

THE DANNEBROG.

[ADM.]

forms a precedent for the case now before me; but agreeing as I do with the principles laid down in that case, and feeling it to be my duty to follow the opinion of the Court of Exchequer on such a question as the admissibility of evidence; upon these grounds I must reject the application now made to me—that is, that part which relates to the inspection of the reports made by the defendants or either of them, to the Lords Commissioners of the Admiralty.

I have already granted the application as far as the inspection of the log is concerned, and, therefore, there is no necessity for repeating anything upon that point.

Solicitors for the plaintiffs, *Pritchard and Sons*.
Proctor for the defendant, *The Admiralty Proctor*.

Saturday, Nov. 21, 1874.

THE DANNEBROG.

Admiralty Court Act 1861, sect. 6—Jurisdiction—Breach of contract before goods loaded.

The High Court of Admiralty has no jurisdiction to entertain a suit for breach of contract under the Admiralty Court Act 1861 (24 Vict. c. 10), sect. 6, where the breach occurs before the goods are laden on board the vessel which under the contract afterwards carries the goods into a port in England or Wales.

THIS was cause of damage to cargo arising out of breach of contract or duty instituted under the 6th section of the Admiralty Court Act 1861, on behalf of Messrs. John S. De Wolf and Co., of London, merchants, against the foreign ship *Dannebrog*, and it now came before the court upon motion on behalf of the defendants "to reject the 2nd and 3rd, and to direct the amendment of the 6th and 9th articles of the petition, on the ground that the court has no jurisdiction to try the claim made by the said 2nd and 3rd articles." The petition was, so far as is material, as follows:

1. By charter-party, dated the 29th May 1874, between H. Jorgensen, the master of the above named foreign vessel *Dannebrog* and the plaintiffs (charterers); it was mutually agreed that the said vessel being light, staunch and strong, and every way fitted for the voyage, should with all convenient dispatch proceed to Moose River, county of Halifax, Nova Scotia, or so near thereto as she might safely get, and there load always afloat from the charterers' agents a full and complete cargo of birch timber, deals, boards, ^{and} other woods, goods, ^{and} lawful merchandise, deal ends, lath-wood palls, ^{and} laths for broken stowage, which the charterers bound themselves to ship, not exceeding what she could reasonably stow or carry over and above her tackle, apparel, provisions and furniture, and being so loaded should thereafter proceed to Liverpool, Clyde, or Bristol Channel, a direct port, orders on signing bills of lading and discharge at a dock as ordered on arrival by charterers' agent, or so near thereto as she might safely get, and deliver the same on being paid freight as therein mentioned; and by indorsement on the said charter-party, dated the 27th June 1874, it was mutually agreed between the said master and the plaintiffs that the *Dannebrog* should if required call at Fenchurch Roads for orders, and also give option of discharging at Gloucester; and that should vessel require to lighten part cargo to enable her to go up to Gloucester, the charterers should pay the expenses of said lightering and other expenses as therein mentioned.

2. In accordance with the said charter-party the plaintiffs provided a full and complete cargo of birch timber, and other wood goods ready to be shipped on

board the *Dannebrog* at the usual loading place in Moose River; and it became and was the duty of the master of the *Dannebrog* to proceed with the said vessel to Moose River and to the usual loading place there, and to load the said cargo; but although all conditions were fulfilled, and all times elapsed necessary to entitle the plaintiffs to have the said charter-party performed and to have the said vessel proceed to Moose River and to the usual loading place there, and to load the said cargo and although she could have safely proceeded to Moose River, and to the said usual loading place, and could have there loaded the said cargo always afloat, the said master proceeded with the said vessel to Nium Tanok Bay, which is a place not in but short of Moose River, and there anchored the said vessel, and neglected and refused to proceed with the said vessel to Moose River and to the said usual loading place.

3. The agents of the plaintiffs thereupon, under protest, loaded the said vessel in Nium Tanok Bay, with a full and complete cargo of birch timber and other wood goods, as specified in the said charter-party; but by reason of the said refusal the plaintiffs were put to expenses in lightering the said cargo and other expenses which they would not have incurred if the said vessel had proceeded to Moose River and there loaded her cargo; and by reason of such refusal and of the said vessel having been driven ashore owing to Nium Tanok Bay being an exposed anchorage, a much longer time was consumed in loading the said cargo than would have been consumed in loading the same had the said vessel proceeded to Moose River and there loaded her said cargo in accordance with the said charter-party; and the said vessel did not sail on and complete her voyage and deliver cargo as soon as she would have done had she proceeded to Moose River.

4. When the said cargo had been so loaded, as aforesaid, on board the *Dannebrog*, her said master signed and delivered to the plaintiffs four bills of lading of the same tenour and date which were and are in the words and figures following, that is to say:

"Shipped in good order and condition by J. and E. de Wolf and Co., Halifax, in and upon the good ship or vessel called the barque *Dannebrog*, whereof Jorgensen is master for this present voyage, or whoever else may go as master in the said ship, and now lying in the port of Moose River, N. S., and bound for Penarth for orders to discharge in port in the Bristol Channel, including Gloucester, 444 pieces of birch timber 227½ tons, 2900 palls, 613 deal ends, 216 boards, 5435 pieces of deals being marked and numbered as per margin, and are to be delivered in the like good order and condition at the aforesaid port in Bristol Channel (all and every the dangers and accidents of the seas and navigation of whatsoever nature or kind excepted) unto Messrs. John S. de Wolf and Co., or to their assigns, freight for the said goods to be paid at freight paid all other terms as per charter party with average accustomed. In witness whereof the master or agent of the said ship or vessel hath affirmed to four bills of lading all of this tenour and date, one of which bills being accomplished, the rest to stand void. Dated in Moose River, N. S., 23rd July, 1874.

"Signed under protest,

"Measure and quality unknown.

H. JORGENSEN."

5. The said vessel subsequently sailed with the said cargo to and in pursuance of orders which were duly given by or on behalf of the plaintiff, arrived with the said cargo at Gloucester, but although one of the said bills of lading was duly presented to the said master, and delivery of the said cargo was demanded on behalf of the plaintiffs and the freight for the carriage of the said cargo was duly paid to the said master, and all conditions were fulfilled, and all times elapsed and all things happened necessary to entitle the plaintiffs, and although the plaintiffs became entitled to have all the said cargo delivered in accordance with the terms of the said bill of lading, the master of the said ship refused and neglected

ADM.]

THE DANNEBERG.

[ADM.]

to deliver a large portion of the said cargo in accordance with the said bills of lading.

6. The plaintiffs were at the time of the said refusal of the said master to go to Moses River, and thenceforth down to and at the time when they became entitled as aforesaid to have the said cargo delivered at Gloucester, the owners thereof within the meaning of sect. 6 of the Admiralty Court Act, 1861.

7. By reason of the several breaches of duty and breaches of contract hereinbefore stated, the plaintiffs have sustained damage by loss of market for their said cargo, have lost the said portion of cargo, and have otherwise incurred great losses and expenses.

Cohen, Q. C. and W. G. F. Phillimore for the defendants in objection to the petition.—The court has no jurisdiction over a claim of this nature. The breach of contract complained of is a breach of charter-party in not proceeding to the agreed place of loading before the goods were put on board, and before the bills of lading were signed. The bill of lading being a contract to perform something after the goods are put on board can have and has no reference to the terms of the charter-party relating to acts to be done before the loading, and consequently this breach cannot in any way be said to be a breach of the contract contained in the bill of lading. The jurisdiction is wholly conferred by the Admiralty Court Act 1861 (24 Vict. c. 10), sect. 6, and the question is whether the breach comes within that section which enacts that this court "shall have jurisdiction over any claim by the owner or consignee or assignee of any bill of lading of any goods carried into any port in England or Wales in any ship for damage done to the goods or any part thereof by the negligence or misconduct of or for any breach of duty or breach of contract on the part of the owner, master, or crew of the ship." The claim made by the second and third acts of the petition is not for "damage done to the goods," but is for "breach of contract on the part of the owner, master, or crew." These words are wide, but they must have some limit. It has been said that the court has no jurisdiction over a claim brought exclusively on charter-parties, although it has jurisdiction over actions upon bills of lading and for breaches of duty on the part of the shipowner in relation to the goods carried by him in England or Wales. In *The Kasan* (Br. & Lush. 1) the contract was by one charter-party to carry an outward cargo, deliver it abroad, and carry back to this country a homeward cargo; the outward cargo was not delivered according to contract; the homeward cargo was carried into an English port, but it was held that there was no jurisdiction over the breach of contract as to the outward cargo, as the breach to give jurisdiction must relate to the goods carried into the English port. In *The St. Cloud* (Bro. & Lush. 4, 14; 8 L. T. Rep. N. S. 54; 1 Mar. Law Cas. O. S. 309) Dr. Lushington says, "The statute is remedial. The short delivery of goods brought to this country in foreign ships or their delivery in a damaged state, was frequently a grievous injury for which there was no practical remedy; for the owners of such vessels being resident abroad, no action could be successfully brought against them in a British tribunal." This shows the object of the statute, and that it refers entirely to the goods brought into this country, and to the contract under which they are brought; and the jurisdiction must be taken to be limited by the subject-matter in relation to which the statute was intended to supply a remedy (*Simpson v. Blues*, ante vol. 1, p. 326; L. Rep. 7 C. P. 290,

294; 26 L. T. Rep. N. S. 697. In *The Pieve Superiore* (ante p. 319; 30 L. T. Rep. N. S. 97), the Privy Council say, "The Legislature has used the words 'carried into any port in England or Wales,' and may have done so designly to meet cases of the kind to which reference has just been made (refusal to carry on). It has said nothing of delivery, nor of the purpose for which the goods may be carried into port. The general words of the clause 'any claim for any breach of contract on the part of the owner &c., of the ship' must undoubtedly be construed to have relation to the contract in the bill of lading." The statute refers only to the bill of lading, and not in any way to the charter party; the charterer therefore, as charterer, can have no *locus standi* in this court. The word "contract" does not include every contract, but only such as is in the bill of lading, and therefore one which is entered into after the goods are put on board. In no case can there be a claim under a charter-party unless the charterer is also holder of the bill of lading. [Sir R. PHILLIMORE.—In the cases arising out of the German War the claims were nearly all made by the consignees or assignees of the bills of lading, and arose under charter-parties: See *The Heinrich*, ante vol. 1, p. 79; L. Rep. 3 Adm. & Ecc. 424; 24 L. T. Rep. N. S. 915; *The Wilhelm Schmidt*, ante vol. 1, p. 82; 25 L. T. Rep. N. S. 34; *The Express*, ante vol. 1, p. 355; L. Rep. 3 Adm. & Ecc. 597; 26 L. T. Rep. N. S. 956.] In those cases the damage arose after the goods were shipped, not before, as in this case. Moreover, the suits were really brought in these cases on the bills of lading, because the terms of the charter-parties which had been broken were by reference incorporated in the bills of lading; here no such incorporation could take place, as the bills of lading did not exist when the breach occurred. The breach of contract complained of does not relate to goods carried into England or Wales, but to a breach of an agreement by which the shipowner was to proceed to Moses River before the goods were put on board. If the vessel had not only broken her charter-party by not going to Moses River at all but had loaded no cargo, this court would have had no jurisdiction. It cannot be contended that because events have happened after the breach complained of, which give the court jurisdiction over other breaches, it can take jurisdiction over the earlier event. *Simpson v. Blues* (ubi sup.) and *Cargo Ex Argo* (ante vol. 1, p. 579; L. Rep. 5 P. C. 148; 28 L. T. Rep. N. S. 745), although conflicting decisions as to the jurisdiction of the County Courts, agree as to the fact that the Admiralty Court has no jurisdiction over clauses arising out of charter-parties only. It is clear that the construction of the words "breach of contract" in the 6th section of the Admiralty Court Act 1861, must be limited; and we submit that the true construction is that the contracts over which this court has jurisdiction are such as are contained in bills of lading, or such as might be contained in a bill of lading. In so far as a charter-party contains stipulations to be performed prior to the loading of cargo, it is not cognisable here; but those terms of a charter-party or bill of lading, under which goods, after they have been loaded, are to be carried into an English port, may be enforced in this court.

C. Russell, Q.C. and E. C. Clarkson for the plaintiffs in support of the petition.—The cases

cised are not in point, and the question must be decided upon the construction of the statute itself. If the plaintiffs can bring the case within the words of the Act he is entitled to his remedy at the hands of the court. The defendants undertook by their charter-party to load the cargo at a specified place, he does not load it at that place but at another place, and so breaks his contract; this contract so broken was a contract relating to goods which have been carried into a port in England or Wales. [Sir R. PHILLIMORE.—If the breach had occurred, and the contract had not been carried out further, should I have had jurisdiction?] We must admit that you would not.

[Sir R. PHILLIMORE.—Then this is in reality a claim in relation to the carriage of goods which at the time the claim arose had never been carried.] Such a claim is within the words of the statute. It may well be that the jurisdiction conferred by the statute is to be taken with certain limitations; but the conditions required by statute clearly express that the question for the court to consider is not the time when they were complied with, but whether they have in fact been complied with. At the time of the breach the court would have no jurisdiction, it is true, and could have acquired no jurisdiction if the goods had not been carried into a port in England or Wales; but they have been so carried, and hence within the express words of the statute there is jurisdiction. [Sir R. PHILLIMORE.—Only three persons can claim under this section, the owners, the consignees, or the assignees of the bill of lading. The claim of the two latter can only arise under a bill of lading, as nobody becomes either consignee or assignee until the bill of lading is signed.] The plaintiff claims as owner of the goods, and his contract is contained in the charter-party. [Sir R. PHILLIMORE.—All reference to the charter-party is omitted in the section. Does not this appear to be intentional?] In *The Dauphin* (Bro. & Lush, 102), Dr. Lushington said, "I think the intent of the statute is to give a remedy to the owner or consignee whenever the ship arrives in a British port, and the cargo is unduly delivered in consequence of a breach of contract or duty on the part of the owner, master or crew of the ship. The intention is sufficiently expressed; the term 'carried' means 'carried or to be carried.'" A charter-party is just as much a contract to carry goods as a bill of lading, and if a charterer were to put his own goods on board, the bill of lading would be nothing more than a receipt for the goods; in point of fact, there need be no bill of lading at all; still, in such a case, this court would have jurisdiction if the goods were damaged. Any contract relating to the carriage of goods must necessarily relate to the loading of the goods. A charter-party may contain stipulations as to ventilation, &c., and these are never contained in a bill of lading, and yet the owner of the goods could recover for damage done by breach of these stipulations in this court, and he must sue under the charter-party. In contemplation of law, the contract to carry is complete when the charter-party is entered into; and any breach of that contract, resulting in damage to the goods or loss in respect thereof, may be proceeded for in this court, provided that conditions of the statute are complied with.

Cohen, Q.C. in reply.

Sir R. PHILLIMORE.—This is a question relating

to pleading, but it raises a very difficult point in the construction of a statute, which the court, if it had the option, would be unwilling to decide.

The second and third articles of the petition state in substance a breach of contract, upon the ground that the cargo was not put on board at a place called Moses River, where it was contracted to be put on board, and it is said that under the Admiralty Court Act 1861 I have authority to entertain the claim. The words of sect. 6 of the statute are "by the negligence or misconduct of, or from any breach of duty or breach of contract on the part of the owner, master, or crew of the ship."

It is not denied that those words, "breach of contract," must be construed with some reasonable limitation. It cannot be a breach of "any contract." The question the court has to decide is whether these words will include a case in which the breach of contract took place before the goods were put on board. I do not deny that there is great difficulty in arriving at any satisfactory conclusion upon the construction of this statute, but I do not think that in the sense in which the statute ought to be interpreted for the purposes of this case, there is here a breach of contract arising out of the carriage of goods, but rather a breach arising out of an obligation to be performed before the goods were shipped; and my opinion is that the breach of such an obligation is not the breach of contract the statute refers to.

I must therefore order the petition to be performed by striking out the second and third articles.

Solicitors for the defendants, *Ingladeu, Ince, and Greening.*

Solicitors for the plaintiffs, *Gregory, Rowcliffe, and Co.*

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Reported by JAMES P. ARTHUR, Esq. Barrister-at-Law.

Dec. 4 and 5, 1874.

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

(Present: The Right Hons. Sir JAMES W. COLVILLE, Sir BAENES PEACOCK, Sir MONTAUX SMITH, and Sir ROBERT P. COLLIER.)

THE HIBERNIA.

Collision—Lights—Regulations for preventing collision—Effect of infringement of—Merchant Shipping Act 1873 (36 & 37 Vict. c. 85), s. 17.

Where a collision occurs at night, and the lights of one of the ships are not burning at the time when the vessels come in sight, and the court is not satisfied that the want of those lights is occasioned by circumstances over which the crew of the ship had no control, she must, even if the want of the lights did not contribute to the collision, be held to blame under the Merchant Shipping Act 1873, sect. 17, which provides that "If in any case of collision it is proved to the court before which the case is tried that any of the Regulations for Preventing Collisions, contained in and made under the Merchant Shipping Acts 1854 to 1873, have been infringed, the ship by which such regulation shall be infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the court that the circumstances of the case made a departure from the regulations necessary."

[Priv. Co.]

THE HIBERNIA.

[Priv. Co.]

The Merchant Shipping Act 1873, s. 17, renders it necessary for the court, in every cause of collision, to inquire whether there has been an infringement of a regulation, and, if so, whether the circumstances rendered a departure from the regulations necessary.

Although a ship must be deemed in fault for an infringement of the regulations proceeding but not occasioning the collision under The Merchant Shipping Act 1873, s. 17, she is not necessarily wholly in fault; but if the other ship has been guilty of negligence, or a breach of the regulations, the latter will also be held to blame, and the damages divided between them.

THIS was an appeal from a decree of the High Court of Admiralty of England, in a cause of damage promoted by the owners of the cargo lately laden on board the *British Banner*, the respondents, against the steamship *Hibernia* and her owners, the appellants, in respect of the loss of the cargo belonging to the respondents by reason of a collision between the two vessels.

The case of the respondents, as set out in their petition, filed in the High Court of Admiralty was substantially as follows:

The barque *British Banner* left the Commercial Docks, in the Port of London, on the 22nd Oct. 1873, with a crew of ten hands and laden with a cargo of iron, bound for Newcastle-on-Tyne.

About 8 p.m. of the next day, the 23rd, she, in the course of her voyage, was in about midchannel between the Ship Wash Light and Orfordness. The wind was about west. The weather was very fine and clear, the tide was flood, of the force of between two and three knots an hour. Two *British Banner* was under two topmasts, foresail, mainsail, and mizen, and foretopmast staysails, sailing about on a beam reach by north, making about seven knots an hour, with a good look-out. The respondents then proceeded to plead in these words:

3. The regulation lights of the *British Banner* had been duly exhibited on board her between 3 and 6 p.m. of the same day, and burnt brightly then and thenceforth until within a few minutes from the time of the collision hereinafter stated, and the plaintiffs believe and aver that they continued in their places burning brightly from the time when they were first exhibited as aforesaid till the time of the said collision. The plaintiffs further say that, even if they did not continue so burning, the weather was such that the *British Banner* could be clearly seen for a distance of upwards of a mile.

The case of the respondents was further that, in the circumstances above stated, those on board the *British Banner* observed a white and a green light (the lights of the *Hibernia*) about a mile off, and about two points on the starboard bow. That the *British Banner* kept her course, while the *Hibernia* came on, continuing to exhibit her green light for some time, and then suddenly showed her red light, and, though loudly hailed by those on board the *British Banner*, almost directly after came at a great rate of speed into and very violently struck her with the stem, near her starboard cathead, doing her such damage that she sank at once, and her master and five others of her crew were drowned.

The respondents charged the *Hibernia* with not keeping a good look-out, with improperly porting, and with not complying with the 16th article of the Regulations for Preventing Collisions at Sea.

The case of the appellants, the owners of the *Hibernia*, as set forth in their answer, was that the

Hibernia, a screw steamship of about 512 tons register, with her master and a crew of twenty-nine hands, a general cargo, and nineteen passengers, left Dundee on the 22nd Oct., bound for London.

Their answer then alleged as follows:

About 7.30 p.m. of the 23rd Oct. the said steamship was nearly abreast of the Ship Wash Light Ship. The wind was about north-west, blowing a fresh breeze, the night was dark but clear, and the tide was about one hour flood and of the force of from two to three knots an hour. The *Hibernia* was steaming about south-west, and making about eleven and a half knots an hour, and carried her proper regulation side and masthead lights, which were properly placed and fitted and burning brightly, and a good lookout was kept on board her. About this time the look-out forward reported a vessel ahead with no light. The chief officer, who was on the bridge at the time, saw the vessel so reported right ahead, but without any light visible on board of her. The said vessel afterwards proved to be the barque *British Banner*, the cargo of which the plaintiffs allege themselves to be the owners of. In consequence of the darkness, and the absence of any light on board of the said barque, those on board the *Hibernia* supposed that the barque was going in the same direction as the *Hibernia*, and the chief officer of the *Hibernia* had the steamer's helm put to port in order to pass clear of the barque. It was not known that the *British Banner* was approaching the steamer until the vessels were very near together, when the steamer's helm was put hard to port, and, seeing that there was then danger of collision, her engines were stopped. The *British Banner* starboarded her helm and the two vessels came into collision, the stem and port bow of the steamer striking the starboard bow of the *British Banner*.

The appellants charged the *British Banner* with not having proper regulation lights duly exhibited, with not keeping a proper look-out, and with starboarding, and further with being "in fault within the meaning of the 17th clause of 36 & 37 Vict. c. 85, for infringing the Regulations for Preventing Collisions at Sea by neglecting to carry proper side lights."

On the 20th April 1874 the cause came on for hearing upon oral evidence before the learned judge of the Court of Admiralty, assisted by Trinity Masters. The evidence and facts proved are sufficiently shown in the judgment of the High Court and of the Judicial Committee.

The learned judge, with the concurrence of his nautical assessors, found the *Hibernia* alone to blame for the collision.

The judgment of the learned judge was as follows:

Sir R. PHILLIMORE: In this case the collision happened about eight o'clock on the evening of the 23rd Oct. 1873, and somewhere about midway between the Ship Wash Lightship and Orfordness. The vessels that came into collision were the barque the *British Banner*, with a crew of ten hands, laden with a cargo of iron, and bound for Newcastle-upon-Tyne, and she was a very small vessel, 465 tons—the tonnage is not pleaded, but that is the evidence—and the *Hibernia*, a screw steamship of 512 tons register. The case of the *British Banner* is, that the weather was fine and clear, the tide flood, of the force of between two and three knots, and she was under two topmasts, foresail, mainsail, and mizen, and foretopmast staysail, sailing about N.E. by N., making about seven knots an hour. The third article pleads, in rather a remarkable manner, the facts as to her regulation lights. It pleads as follows: (The learned judge then set out the third article of the respondents' petition, as given above.) They therefore take up

these two positions: first, that their lights were certainly burning within a very short time of the collision, and the presumption must be that they were burning at the time of the collision; and, secondly, that if they were not so burning, still that the barque was visible at the distance of upwards of a mile. The defence is, that the *Hibernia* screw steamship was steaming about S.W., and going, according to the evidence, at not less than fifteen knots over the ground; that the look-out reported a vessel ahead with no light. The chief officer saw the vessel without any light visible; that in consequence of the darkness and absence of any light the *Hibernia* supposed that the barque was going in the same direction as herself, and it was not known she was approaching the steamer till the vessels were very close together, when the *Hibernia's* helm was put hard a port and the engines stopped; and she ascribes the collision to two causes, viz., that the *British Banner* had not her regulation lights duly exhibited, and she improperly starboarded her helm, and that under the 17th section of the 36 & 37 Vict. c. 85—the statute passed last year—she was in fault for neglecting to carry her proper side lights. Now upon this question as to whether the *British Banner* had not her side lights burning at the time of collision, the evidence is certainly to a great extent embarrassing and doubtful. These facts, indeed, are proved, that the *British Banner* had proper lights, properly placed, and certified by the Board of Trade. It is proved, too, that it was her habit to carry these lights, for she had put them out the night before the collision happened; it is proved that they were put up that very night, and were burning within ten minutes of the collision. The evidence mainly relied upon on behalf of the defendants is by one of the crew of the *British Banner*, stating that just before the collision he ascertained that the port and starboard lights had both simultaneously gone out, from what cause is not known; and it is further urged in support of this position that a vessel called the *Thames* was in the vicinity of this collision, so that, though the master and the second mate both say that they saw the barque a mile off quite distinctly upon the water, and a mile and a half through their glasses, yet they do not say anything with respect to her carrying lights, which is true. As I have already said, the evidence upon this point is embarrassing and conflicting; but I am of opinion that, assuming that these lights had become accidentally extinguished just before the collision, being of a proper character, and properly burning, and properly put up that night, the 17th section of the 36 & 37 Vict. would not apply, which enacts that, "If, in case of any collision, it is proved to the court before which the case is tried that any of the regulations for preventing collision contained in or made under the Merchant Shipping Acts 1854 to 1873, has been infringed, the ship by which such regulation has been infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the court that the circumstances of the case made departure from the regulation necessary." I am not disposed at present to hold that this clause of the statute would apply to a case where the lights had been properly put up, were of a proper character, and were properly burning, and accidentally extinguished. But I do not think it necessary, after a conference with the Elder Brethren, to come to any decided con-

clusion as to which side the court ought to believe with respect to the fact of these lights being burning and extinguished at the time of collision; and for this reason, the steamer in her case states the wind to have been N.W., and all her witnesses agree that the barque was seen right ahead, upon which the steamer alleges she immediately ported and hard-a-port, and it must have been done, according to her own showing, at the least of from a quarter to half a mile off, and at a speed of fifteen knots, which she was going at that time. The Elder Brethren are of opinion that, upon this statement, it is physically impossible the collision could have taken place as here described, viz., by the stem of the steamer striking the *British Banner* upon her starboard cathead. Now if the wind was, as the *Hibernia* states it to have been, N.W., and the barque's course was N.E. by N., she had the wind only one point free, and, therefore, it was impossible she could have starboarded to the extent to have brought about the collision; and I must add to this, that I am satisfied by the evidence that the barque did not starboard at all; but taking the case as the steamer puts it, and, under the advice of the Elder Brethren, I find it impossible the collision could have taken place in the way she describes. In our judgment the *British Banner*, even if she had not lights, was seen at a sufficient distance, and in circumstances which ought to have led the *Hibernia* to execute the proper manœuvre for getting out of her way, instead of which she ported her helm, and brought about the collision. I therefore, find, upon the steamer's own showing, that her story is not to be maintained, and I am of opinion that she alone is to blame for this collision.

From this decree the owners of the *Hibernia* appealed, for the following amongst other reasons:

1. Because the judgment is contrary to the facts proved, and ought to be reversed, and is wrong in law.
2. Because it is clearly established by the evidence that the *British Banner* had not her regulation lights duly exhibited at the time of the collision, and because the absence of such lights contributed to and caused the collision.
3. Because the *British Banner* was in fault within the meaning of the 17th section of the 36 & 37 Vict. c. 85.
4. Because the fair inference to be drawn from the whole of the evidence is, that the *Hibernia* was navigated with all due care and skill, and that there was no neglect or default on the part of those in charge of her.
5. Because the *British Banner* had no proper look-out and improperly starboarded her helm.

Day, Q.C. and Gainsford Bruce, for the appellants.—The court below has omitted to find whether the *British Banner* had or had not her regulation lights burning at the time of the collision, and has said that the *Hibernia* could have avoided the collision even if the *British Banner* had no lights. We submit that the court was bound to find, as a question of fact, whether the *British Banner* had lights or not. The Merchant Shipping Act 1873 (35 & 36 Vict. c. 55), s. 17, renders a ship absolutely to blame for a collision if proof is given of a neglect of the Regulations for Preventing Collisions, even if that neglect does not contribute to the collision, unless the circumstances of the case warrant a departure from the rule infringed. Consequently, the court

[PRIV. CO.]

THE HIBERNIA.

[PRIV. CO.]

below was bound to consider whether the regulations had been complied with by the barque, and, if not, whether there was any valid excuse. If the barque did not carry lights when she ought to have done so, she must be held to blame. [Sir M. SMITH.—To give effect to that section, ought there not to be an inquiry in every case of collision as to whether the regulations have been complied with? otherwise the section would be inoperative.] As we submit, the section was intended as an additional mode of enforcing the regulations, and to decide that a ship can escape condemnation in damages because, although she breaks the regulations, her infringement of them did not contribute to the collision, would destroy the effect of the Act. The Merchant Shipping Act Amendment Act 1862 (25 & 26 Vict. c. 63), sect. 29 is sufficient to meet the case where the infringement of the regulations complained of occasions or contributes to the collision; such a case is there expressly provided for. But this Act was not found sufficiently stringent, and the Legislature, to enforce the observance, has made vessels responsible for infringement of the rules independently of these infringements having occasioned the damage. [Sir M. SMITH.—If a vessel for some time before she came into collision were in such a position that she could show, and did show nothing but her red light, and it should turn out that during that time her starboard light was not burning, would she be liable to condemnation, even if her starboard light (if lighted) could not have been seen, and therefore could not have affected the collision in any way?] Such, we submit, is the true construction of the statute. On the facts it is distinctly shown that the barque's lights were not burning for some time before the collision; nor is the *Hibernia* in any way to blame.

Butt, Q.C., and W. G. F. Phillimore (Stokes, with them), for the respondents.—If the statute is construed literally and strictly, as contended for by the appellants, it will work enormous hardship. Suppose a case where a vessel has her lights washed out in very bad weather; has she infringed the regulations, or is she within the last words of sect. 17 of the last Act, that is to say, "the circumstances of the case make a departure from the rule necessary." [Sir R. P. COLLIER.—It would rather be that the rules, in such a case, had never been infringed. The last words of that section must be taken to apply to the meeting and sailing rules, and not to lights. It can never be "necessary" to depart from the regulations as to carrying lights.] In another view, a ship ought in such a case to be exempt from the obligation; the mere absence of a light cannot be said to be necessarily an infringement of the regulations within the meaning of the statute, and if it is an infringement an excuse may be shown. [Sir BARNES PEACOCK.—The statute throws the onus of showing that excuse upon the person not complying with the regulations.] That we must admit. Then, assuming that, if the lights of the barque had ceased to burn through no fault of the respondents shortly before the collision, they would not be to blame, can we show sufficient excuse for their not being alight? [Sir R. P. COLLIER.—That is a question of fact. Before going to that, I should like to know what your contention is on the construction of the statute, supposing it is found that the lights were extinguished through your neglect.] We must admit that the Legislature has enacted

that we must be held to blame for an infringement of the regulations, although not causing the collision. Then, can we show good cause? [Sir M. SMITH.—*Prima facie*, the fact of your light being out is evidence of negligence. There is no evidence in this case that there was any accidental cause which would have put the lights out.] It is shown that they were properly trimmed and lighted, and were looked to shortly before the collision. There is a presumption that they were proper lights, and would burn the usual time. No negligence has been shown, and it ought to be presumed that they went out by accident, unless shown otherwise. [Sir BARNES PEACOCK.—What are the circumstances shown to the satisfaction of the court which made a departure from the rule necessary?] The fact of their going out through no explainable cause is a circumstance showing that the not having them burning at the time of collision was an accident.

We submit, however, that in fact the lights were burning at the time of collision. The judgment of the court below must be taken to mean that the judge, without deciding the question whether the lights were or were not burning at the time of collision, assumes that they were not burning, and finds that if they were not they had gone out through some cause which was not an infringement of the statute. [Sir BARNES PEACOCK.—The learned judge expressly declines to find whether they were burning or not.] His judgment would seem to be that he considers it unnecessary to determine whether the lights were burning or not, because he says that if they were out at the time of collision, they went out accidentally. [Sir BARNES PEACOCK.—Then you say that his finding is, that there was no infringement. Sir R. P. COLLIER.—Is not the finding, that because the lights had been properly trimmed and lighted in the first instance, they must have gone out by accident; and is not the true inference that, because they went out, they were not properly trimmed?] The finding in substance is, there was no negligence, and consequently no infringement of the regulations, and that is what the statute really refers to; the statute is intended to meet cases of negligence, not accident.

The *Hibernia* is to blame upon the facts, for not keeping a good look-out, and for not slackening speed in proper time.

Day, Q.C., in reply.

Cur. ad. vult.

Dec. 5, 1874.—The judgment of the court was delivered by

Sir BARNES PEACOCK.—This was a suit instituted in the High Court of Admiralty on behalf of the owners of certain cargo which had been shipped on board a barque called the *British Banner*, and which cargo was lost, together with the vessel, in consequence of a collision which took place on the 23rd Oct. 1873, between the barque and a steam vessel called the *Hibernia*.

It appears that the collision took place about eight o'clock in the evening. The *British Banner* states that her course was N.E. by N. The course of the steamer was S.W.; so that the vessels were in fact going in opposite directions. The allegation in the petition on the part of the plaintiff was: "The regulation lights of the *British Banner* had been duly exhibited on board her between 5 and 6 p.m. of the same day, and burnt brightly then and thenceforth until within a few minutes from

PRIV. CO.]

THE HIBERNIA.

[PRIV. CO.]

the time of the collision hereinafter stated. And the plaintiffs believe and aver that they continued in their places burning brightly, from the time when they were first exhibited as aforesaid, till the time of the said collision." Then there follows a very remarkable statement: "The plaintiffs further say, that even if they did not continue so burning, the weather was such that the *British Banner* could be clearly seen for a distance of upwards of a mile." They do not state that if the lights did not continue burning, the cause of their not continuing to burn was in circumstance over which they had no control. One of the answers on behalf of the *Hibernia* was, "The *British Banner* was in fault within the meaning of the 17th clause of the 36 & 37 Vict. c. 85, for infringing the regulations for preventing collisions at sea by neglecting to carry proper side lights." There was conflicting evidence in the cause as to whether the lights were or were not burning at the time of the collision, or at the time when the vessels came within the distance of sight. The learned Judge of the Court of Admiralty who tried the case said that the evidence was embarrassing, but that he did not consider it necessary to come to any decided conclusion as to which side the court ought to believe with respect to the fact of the lights being burning and extinguished at the time of the collision. The meaning of that is, that he thought it unnecessary to decide whether the allegation of the one side who said that the lights were burning, or the allegation on the part of the other, that the lights were extinguished was true. It appears to their Lordships to be a subject of regret that the learned judge who heard the witnesses and saw their demeanour did not decide the question of fact, whether at the time of the collision, or when the vessels first came within sight, the lights were or were not burning. Their Lordships consider it very important in deciding whether the *Hibernia* was wholly in fault, and the judgment right in that respect to consider whether the lights were or were not burning at the time when the vessels came in sight.

The Merchant Shipping Act of 1862 (25 & 26 Vict. c. 63) enacted, "If in any case of collision it appears to the court before which the case is tried that such collision was occasioned by the non-observance of any regulation made by or in pursuance of this Act, the ship by which such regulation has been infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the court that the circumstances of the case made a departure from the regulation necessary." That section applies only to a case in which it appears to the court before which the case is tried that the collision was occasioned by the non-observance of any regulation. But by a subsequent statute, which was passed in the last session, to prevent the necessity of deciding upon conflicting evidence whether the collision was caused by the non-observance of the regulation, it was enacted that, "If in any case of collision it is proved to the court before which the case is tried that any of the regulations for preventing collision contained in or made under the Merchant Shipping Act have been infringed," not that the collision has been caused by the infringement, but simply if it shall appear to the court that the regulation has been infringed, "the ship by which such regulation has been infringed shall be deemed to be in fault, unless it be shown to the satisfaction of the court that the

circumstances of the case made a departure from the regulation necessary." (36 & 37 Vict. c. 85, s. 17.) If it turns out that these lights were not burning at the time when the vessels came in sight, and there was no excuse for the lights having been extinguished, it appears to their Lordships that the case falls within that section; that the regulation which enacts that the lights shall be carried was infringed, and that the barque must be deemed in fault, unless it is shown to the satisfaction of the court that the circumstances of the case made a departure from the regulation necessary. It is, therefore, necessary to inquire first, whether the regulation was infringed, and if so, whether the court is satisfied that the circumstances of the case made a departure necessary.

Now, with reference to the question as to whether the lights were burning, the evidence of the chief mate of the *British Banner* is important. At page 8, line 11, of the record, the question is put to him: "Q. Now had or had not your regulation lights been put out that evening? A. They had been put out. Q. By 'put out,' you do not mean 'blown out,' but put in their proper positions? A. Yes. Q. What time were they put out? A. A little before six. Q. Had you given instructions with regard to them? A. Yes, I superintended the lighting of them myself, and saw that they were properly trimmed. Q. Who trimmed them? A. The steward. Q. I believe the steward was drowned in the collision? A. He is drowned. Q. Did you yourself do anything to them before they were put out? A. I lighted the lamps. Q. Did you manipulate them in any way? A. I screwed them down to the proper focus. I was with them before. I was afraid to trust him, and did it myself. Q. You knew what trim they required? A. Yes. Q. What did you burn in them? A. Paraffin oil. Q. Were they old or new lights? A. New lights. Q. When you say 'new,' how long had they been in the ship? A. Six months. Q. Had they been passed by the Board of Trade Surveyor? A. In July, in the Hull Docks at Shields. Q. How long would these lights, in the ordinary course of things, burn without trimming? A. From six at night to four in the morning." So that, according to his account, without fresh trimming, the lights which were put up at six ought to have been burning till four o'clock in the morning. "Q. That is ten hours? A. Ten hours. Q. You say you saw them up a little before six; did you see them again at all before the collision? A. Between five and ten minutes before eight; I could not say exactly, but as near as possible five minutes before eight. Q. How long was that before the collision? A. About ten minutes, perhaps not so much. Q. Where did you see them from? A. I went forward to examine them. Q. How were they burning? A. Brightly. Q. I believe you did not see them again? A. I did not see them again. Q. Are you certain that ten minutes before the collision they were burning? A. Well, I am quite certain they were." Then he is asked, "Had you any other lights at all; I do not mean coloured? A. Yes, we had relieving lamps on board. Q. What were they for? A. They were for putting out if the others wanted to be taken in for trimming. Q. And were they always kept trimmed? A. Always ready. Q. Were they ready this night? A. They were ready that same night." Then at p. 11 he is cross-examined; "Q. You say the steward was the man

[Priv. Co.]

THE HIBERNIA.

[Priv. Co.]

who trimmed the lamps on this occasion? A. He trimmed them." Now it is to be remarked that this steward was a man whom he could not trust, he had stated so in the previous part of his evidence. The man whom he could not trust is stated to have trimmed them. "Q. He had charge of the lamps? A. No. Q. Who had on board the ship? A. When we were going down I had charge of them. Q. You were going up? A. We were going down the river; the steward was a stranger on board. He was a black, and I took full charge of them by the captain's order. Q. You did not trim them? A. I did not trim them, but lighted them. Q. Who would have charge of the lamps? A. I had. Q. What was the steward's name? A. Joe; I think he was an old man." It appears, then, that these lamps were lighted at six o'clock, and this witness says in his evidence he saw them not later than ten minutes before the accident happened. If they had gone out during that space of ten minutes, and before the time when the vessel came in sight of the *Hibernia*, it became necessary to consider whether they were extinguished by unavoidable circumstances, or under circumstances over which the owners of the vessel had no control. Now, the evidence of the master, the mate, the second mate, and all the evidence on the part of the *Hibernia* was that when they first saw this vessel at a distance they saw no lights, that there were no lights burning at that time. The master and mate of the *Thames* were also called as witnesses in the cause. They were independent witnesses, and they were not asked with respect to the lights as to whether they saw them or not.

John Littlefield, one of the crew of the barque, was also called as a witness, and he proved distinctly, if his evidence is to be believed, that the lights were not burning at the time when the vessels came in sight. He was asked, "Going on deck, did you observe anything yourself? A. I walked straight away forward on the starboard side, and when I got forward I heard a man, called 'Curly' by nickname, say, 'Why, this port-light's out!' When I heard him say that, as I was on the starboard side, I looked over the rail in this position, and looked aft, and I said, 'Why, the starboard light is out too!' Then I heard 'Curly' say, 'One of you take this lamp from me, and I will hand it down to you.' I said, 'I will take this here lamp down,' that was the starboard lamp. As I was going to take the starboard lamp down, I see the men who had been on the look-out from six to eight with it in his right hand. Q. By the Court, Who was that? A. The man that had been on the look-out from six to eight. Q. Took it down? A. Had it in his right hand, and his left hand hold of the banyards of the rigging—starboard rigging. From there I slewed round and went across to the forehatch, and as I was stepping off the fore-hatch I looked forward and see the steamboat's three lights." So that at that time, when he saw the steamer's lights, he has proved as a fact that the lights were not burning on board the *British Banner*. It is said that this witness is not to be believed. Their Lordships see no reason to discredit his evidence. There seems to be no reason why he should have invented this story. Then it is said that he came for the purpose of proving the case of the *Hibernia*, and that he went on to say he saw the sails of the barque flapping, which is not the case, and that he

is not to be believed. It should be remarked that the chief mate was asked whether he did not remember having a conversation with this man, John Littlefield, after he was picked up and taken on board the steamer. He was asked, "Q. Do you remember having a conversation with John Littlefield on board the steamer? A. I merely said to him, 'Say nothing here,' as they would be asking him questions, but to wait till he got to London." He said he told him this, because he was stiff when he got on board; but why his being stiff and cold should be a reason for his not answering any questions, or his being likely to answer them in the wrong way, or not according to truth, with reference to whether the lamps were lighted or not, their Lordships are unable to see. "Q. You mean when he was picked up out of the water? A. Yes. Q. That was after the collision? A. After the collision? Q. Do you remember asking John Littlefield whether he was stiff or not; whether he said anything about the lights on board the steamer? A. I said so to him because the captain of the boat asked me about them, and I thought he might say something to him, and I warned him and said, 'Be careful what you say until you get to London,' and I said no more to him." It seems certainly reasonable to suppose that he was speaking to John Littlefield, and cautioning him against giving any answer with reference to the lights, because he himself was aware that the lights were not burning at the time of the collision. He was asked, "Did he tell you that he had relieved the lookout, and unshipped the port light to have it retrimmed? to which he answered, 'That I do not know.'"

Their Lordships have come to the conclusion upon the whole of this evidence that the lights were not burning at the time when the vessel first came in sight of the *Hibernia*.

Then comes the question, what was the cause of the lights not burning? It is unnecessary for their Lordships to come to any definite conclusion as to what was the cause of their not burning, because the Act of Parliament requires it to be proved to the satisfaction of the court that the circumstances of the case made departure from the regulation necessary. The onus lies upon those who aver that the *British Banner* was not in fault, to satisfy the court that the circumstances under which the lights went out rendered a departure from the regulation necessary. No evidence upon that point was given, and, if one may conjecture upon the subject, there seems to be very little doubt but that the lights went out because there was not sufficient oil to supply them. It appears that they had been burning the night before, that they ought to have been trimmed by the steward, Joe, a black man, new on board, in whom they had no confidence. All that the mate can say as to their having sufficient oil, is from trimming them down, as he says, to the proper focus. He did not examine the reservoir of the lamps to see whether there was sufficient oil in them.

Their Lordships, on the whole of the evidence, are of opinion that the *British Banner* was not carrying her regulation lights at the time when the vessels first came in sight, and they are not satisfied that the want of those lights was occasioned by circumstances over which the crew of the *British Banner* had no control; and that it was not from an unavoidable accident. The case

[Priv. Co.]

THE AMÉRIQUE.

[Priv. Co.]

therefore falls within the statute, and their Lordships consider that they are bound to pronounce that the *British Banner* was in fault.

But the statute does not say, that under those circumstances the defaulting ship shall be considered the vessel wholly in fault, and it becomes necessary to consider whether the *Hibernia* in any way contributed to the collision. Now the learned judge, who heard the witnesses, arrived at the conclusion, with the assistance of the Elder Brethren of the Trinity House, that the *Hibernia* was wholly in fault. He says, "In our judgment the *British Banner*, even if she had not lights, was seen at a sufficient distance, and in circumstances which ought to have led the *Hibernia* to execute the proper manœuvre for getting out of her way, instead of which she ported her helm and brought about the collision." It is important, then, to consider whether the learned judge was wrong in arriving at the conclusion that the *Hibernia* was in fault. Now, so far from thinking that he was wrong, their Lordships are entirely of that opinion. According to the evidence of independent witnesses, the master and the chief mate of the *Thames*, the *Hibernia* passed them, and after they got clear from the smoke of the *Hibernia* they saw the *British Banner*, and they could make out through their glasses that she was approaching them, that she was coming in an opposite direction. Now if they, notwithstanding the darkness of the night, could see that the *British Banner* was coming in that direction, their Lordships think that if the *Hibernia*, which at that time had approached nearer to the barque, had kept a proper look-out she must have seen that the other vessel was coming in an opposite direction in sufficient time to enable them to keep out of her way. They say they had a right to assume, not seeing the vessel's lights, that she was going in the same direction as themselves, in which case they would not have seen the lights even if they had been burning. But their Lordships are of opinion that, by the use of their glasses, they might have made out in sufficient time that the vessel was an approaching vessel, and not one going in the same direction as themselves. According to their evidence, they did not discover, until the vessel came within 150 feet, that it was within 50 yards of them, whether she was an approaching vessel or not. If such were the case their Lordships are of opinion that there could not have been a proper look-out on board. The evidence of the master, James Finlay, is this: He says he took charge of the ship at the Ship Wash Light at 10 minutes to 8 o'clock. He was asked, "How long was it before the collision you went on deck?" A. About 15 seconds before the collision happened. Q. Were you about going on deck before you heard any orders given? A. I was about going on deck, I was opening my room door and I heard "port!" My house is in front of the poop, and I heard "port," and "hard a-port!" as I went forward, and the collision just happened as I went on the bridge. Q. When you opened your room door you heard "port!" A. Yes, heard "port!" when I got on the top of the poop, on the top of the ladder I heard "hard a-port!" Then he was asked "you heard 'port,' and by the time you got to the ladder, you heard hard a-port?" A. Yes. Q. You did not see anything of the barque just before the collision? A. No. Q. Who had charge of the deck? A. The chief officer. Q. Did you stop your engines? A. When

I went on the bridge, I see the vessel, and I said 'God help, that vessel sinks,' and she (meaning the *Hibernia*) was stopped." The engineer says the vessel was stopped about two seconds only before the collision took place. It appears that the blow was such that the *British Banner* was sunk almost immediately.

It appears to their Lordships, upon the whole of the evidence, that the learned judge came to a right conclusion upon the evidence, that the *Hibernia* was in fault. Their Lordships are of opinion that the want of the regulation lights on board the *British Banner* contributed to the accident, and that at all events the *British Banner* must, under the provisions of the 36 & 37 Vict. c. 85, s. 17 be deemed to be in fault.

Under these circumstances their Lordships will feel it their duty to recommend to Her Majesty that the judgment of the court below be reversed, and that it be pronounced that both vessels were in fault, and that each party do pay his own costs in the court below, and the costs of this appeal.

Appeal allowed. Judgment below reversed.

Solicitors for the appellants, Deacon, Son, and Rogers.

Solicitors for the respondents, Stokes, Saunders, and Stokes.

Dec. 9, 10, and 19, 1874.

THE AMÉRIQUE.

Salvage—Quantum of reward—How arrived at—Appeal

The Judicial Committee will not reduce an award of the High Court of Admiralty in a case of salvage, unless the amount awarded is so exorbitant, and so manifestly excessive that it would be unjust to confirm it.

The value of property saved is to some extent to be treated as an ingredient in the calculation of the quantum of salvage remuneration, but that value must not be allowed to raise the quantum to an amount altogether out of proportion to the services actually rendered.

An award of 30,000*l.* on a value of 120,000*l.* in the case of a derelict ship reduced to 18,000*l.* on the ground that the reward was out of proportion to the services rendered.

THESE were appeals from decrees of the High Court of Admiralty in two cases of salvage instituted by the respondents against the French steamship *Amérique*. The one case was a consolidated cause instituted on behalf of the owners, masters, and crews of the steamship *F. T. Barry* and the barque *Auburn*; the other, a cause instituted on behalf of the owners, master, and crew of the steamship *Spray*.

The *Amérique*, a very large iron screw steamer of 4600 tons register, employed in conveying goods and passengers between Havre and New York and back, was, when on a voyage from New York to Havre, abandoned by her master, crew, and passengers, about 4.30 p.m. of the 14th April 1874, when about seventy or eighty miles west of Ushant.

At the time the *Amérique* was abandoned she had encountered heavy weather for about two days, and through some unexplained carelessness a great deal of water had been allowed to get into her, which had risen high enough to put out the

[Priv. Co.]

THE AMERIQUE.

[Priv. Co.]

engine-room fires, and some of her pumps were choked. She was, however, perfectly sound in hull, having no leak which could be afterwards discovered in her.

About 4.30 a.m. of the 15th April the barque *Auburn*, which was the first vessel to come up with the *Amerique*, came up, and about 10.45 a.m. a boat's crew from her boarded the *Amerique*.

About 10.30 a.m. the *Spray* came up, and about 11 a.m. a boat's crew from her boarded the *Amerique*.

The *Spray* is a steamship of 393 tons net register, with engines 80 horse-power nominal, working up to 390, and having a crew of sixteen hands. She was outward bound for Gibraltar.

The mate of the *Spray* who commanded the boat's crew went all over the *Amerique*. She had then a list to port, and about a foot of water in the lower saloon, which apparently came from one of the glass side ports being out, into which the water came as the vessel rolled. He stopped this side port with bedding. He found no other damage down to the fourth deck or in the fore or main holds except two other side ports broken on the starboard side, a considerable height above water. In the stoke-hold he found six feet of water from the bottom of the ship, and the pumps choked.

Some further hands were sent from the *Spray*, and it was arranged that two of the crew of the *Auburn* should remain on board the *Amerique*, and the *Spray* began towing the *Amerique*. During the course of the towing the chain to which the hawser was attached on board the *Amerique* ran out and could not be unshackled or got rid of.

The *Spray* began to tow, and towed during the rest of that day and the night. Those on board the *Amerique*, however, in the uncertainty of the weather and their position, thought it safe to go on board the *Spray* for the night.

In the morning they returned, and began to cut the cable, which they succeeded in doing after some work. About this time the *F. T. Barry*, another steamship, came up.

The *F. T. Barry*, a steamship of 545 tons net register, with engines of 99 horse-power, working up to 400, having a crew of twenty-three hands all told, and being homeward bound, did not come up with the *Amerique* till about 6 a.m. of the 16th April. The *Amerique* was then lying with the *Spray* alongside of her, and the crew of the *Spray* were cutting with cold chisels a large chain hanging out of the hawspipe which had run out in the process of towing the *Amerique* the day before. After some conversation between the mate of the *Spray* who was in charge of the *Amerique*, in the course of which the mate of the *Spray* offered the *F. T. Barry* 1000*l.* to assist in the towage, which was refused, an arrangement was made between the two masters. After the chain had been severed both vessels began to tow the *Amerique*, and continued to tow towards Plymouth with some not unusual casualties, such as the tow ropes occasionally breaking and the towing vessels occasionally getting out of position, till the 18th April.

On one occasion the *F. T. Barry*, during the course of the towage, got in such a position that she came into collision with the *Amerique* in two places, and sustained damage.

About 2 p.m. of the 18th April the *Amerique* arrived off the Eddystone Lighthouse. About 3.30 p.m. the *Spray* let go of her. The *F. T. Barry* continued towing her, and after a short time a tug came

out and assisted. About 5 p.m. the *Amerique* was brought to a safe anchorage in Plymouth.

No further services were done by the *F. T. Barry*.

There was some difficulty in the towing on account of the great size of the *Amerique*, and she settled down in the water to some extent during the towage; but she steered very well, the weather was fine, and there was no danger of her sinking when she got into Plymouth.

A claim was preferred on behalf of the *F. T. Barry* for the damages occasioned to her by the collision with the *Amerique*, and evidence was given that it cost 600*l.* to make this damage good. A claim was also made in respect of anticipated liability to the owners of the cargo on board the *F. T. Barry* by reason of delay.

50*l.* was paid for the tug by the owners of the *Spray*. After the *Amerique* came to anchor about twenty men and some force pumps were sent on board by the agents of the *Spray* to pump her out. On the morning of the 19th it was found that there had occurred during the night some derangement of the machinery of one of the water closets, and that a good deal of water was coming into the ship thereby. Some more men and a fire-engine were sent on board her, and in the afternoon she was towed by the tug which had first taken her in tow and two Government tugs to the Cutwater, where she was given up to the collector of customs, and the services of the *Spray* ceased.

A claim was preferred on behalf of the *Spray* for 60*l.* for loss and damage to ropes and hawsers, and 130*l.* expenses or loss occasioned by her going into Plymouth, but no evidence was given that her owners had been put to expenses at all equal to this amount. A claim was further made for 37*l.* 6*s.* 10*d.* expenses incurred by the agent of the *Spray* at Plymouth. A claim in respect of loss in consequence of inability to fulfil the charter-party under which the *Spray* then was also was presented.

The value of the *Amerique* was agreed as 155,000*l.* and her cargo and freight at 35,000*l.* Charges of misconduct were made against the salvors by the appellants, who accused them of pillaging the *Amerique*.

On the 16th July 1874, the two causes came on for hearing before the learned judge assisted by Trinity Masters; and the learned judge decreed to the whole of the plaintiffs the sum of 30,000*l.* with costs, and out of this sum he awarded 15,500*l.* to the owner, master, and crew of the *Spray*, to the owner, master, and crew of the *F. T. Barry* 14,000*l.*, and to the owner, master, and crew of the *Auburn* 500*l.*

The judgment of the High Court of Admiralty after setting out the facts was as follows:

Sir R. PHILLIMORE.—And now I must deal with the charge against the salvors, which I regret was not fully withdrawn, but I think substantially, as far as the present parties before the court are concerned, it may be said to be retracted, and it was in my judgment hastily, unduly, and unjustly made. The deck of this vessel appears to have been strewed with property of all descriptions, as one might expect in a vessel of this enormous size, carrying passengers and being suddenly deserted, and some few of those articles appear to have been taken possession of—as it would seem to me—for the purpose of custody and not for the purpose of improper appropriation by those on board the

[PRIV. CO.]

THE AMÉRIQUE.

[PRIV. CO.]

Spray and those on board the *F. T. Barry*; and there was an averment, which showed an extravagant piece of recklessness in this case, that by taking possession of these articles and not immediately restoring them, the salvors were deprived of their right of salvage, which of course could not be entertained by the court. Looking to the whole of the circumstances of the case, I am satisfied that no blame attaches on this score to the salvors in this case. Well, then, this enormous vessel was saved by the exertions of these salvors. The cargo and the vessel arrived comparatively uninjured. One of the questions I have had to put to the Elder Brethren of the Trinity House is—What would have happened if the vessel had not met with the salvors at the time when she did? In their judgment she might have floated some time longer, which is, of course, an uncertain conjecture, or would probably have gone ashore or on the rocks. There is one circumstance to which Sir John Karslake (for the *Spray*) adverted most properly, namely, that nothing could be more dangerous to the general interests of navigation in this part of the world than that a vessel of 4600 tons without lights and without anything to indicate which course she was pursuing should be floating about in the water. We all know that the Peninsular and Oriental Steamers come in that track, but without alluding to their particular case, every vessel would have been subject to the possibility of very great danger if the vessel had not been taken in tow at the time when she was. I have already said that there was considerable danger to the salvors, and on consultation with the Elder Brethren they are perfectly satisfied that nothing more could have been done than was done with regard to the navigation of the *Amérique*, and that she had not strength of hands enough to reduce the water to enable the fires to be lighted, which it appeared might have been effected by a sufficient crew, but that was not done. Now, seeing that this was a French vessel, and that Brest was not very far distant from the place where the desertion took place, I was anxious to know what the French law would have awarded by way of compensation in a case of this description, not that that information could lead the court to follow precisely the French law, but that it might afford to it some guide in regard to a property of this enormous value, towards making up its mind as to what the English law ought to award, because there being no fixed sum, according to our jurisprudence, it must always remain in the breast of the court, exercising the best judgment it can, after receiving nautical advice, to fix an equitable remuneration. And I do not think it wholly irrelevant to say that the French law, as I am able to ascertain it, is to be found in the well-known work, the *Ordonnance de la Marine* of Louis XIV. Although I have no evidence as to the immediate modern practice, still I am justified in saying that the French law, as a rule, gives always one third of the property saved of a derelict to the salvors. I am to award that remuneration according to the *lex loci*, but after weighing carefully all the circumstances of the case, to the principal of which I think I have adverted—and there are others, no doubt, which if the court were to take a longer time before delivering its judgment it might advert to—I think that I shall act in accordance with the principles and the decisions of the English cases and the proper equitable and legal considerations which present themselves to the mind of the court on the facts

which are proved before it, if I award out of this 130,000*l.* saved entirely from utter destruction by the salvors, after the crew and the master had abandoned her as hopelessly lost, the sum of 30,000*l.* I shall give the *Auburn* 500*l.* I shall give the *Spray* 15,000*l.*, because she had, it appears to me, the greatest labour, and is entitled to that sum, notwithstanding she was not the first in possession; and the *F. T. Barry* 14,000*l.*, making in the whole 30,000*l.* I intend that sum to include all charges whatever—the injury done to the *F. T. Barry*, the injuries done to the hawser, and all the different items that were mentioned in the course of this inquiry. I would rather not proceed to a distribution of this, unless I am especially asked to do so. I would rather think that the owners would be of opinion that it is a case in which the men ought to be most liberally rewarded, and certainly I wish to say now that the mate of the *Spray*, who was put on board first, ought at least to receive a double portion. I direct the amount awarded to be paid by the ship and cargo in proportion to their value. The plaintiffs are, of course, entitled to their costs.

From these decrees the owners of the *Amérique* appealed upon the ground that the amount awarded was excessive.

Butt, Q.C. and W. G. Phillimore (Stables with them), for the appellants—The amount awarded in the court below is excessive. The learned judge has taken into consideration two elements which he ought not to have considered at all; first, the French law as to derelict property; secondly, the value of the property saved. Whatever the French law may be, an English tribunal ought not to consider it in awarding an amount of compensation; such amounts are clearly to be measured by the rules in force in the tribunal in which the case is tried. Moreover, there was no mention in the pleadings of French law. Then as to the value of the property. Not many years back there were no such large steamers and no vessels of such enormous value. In those days it occasionally happened that half the value of a derelict was awarded, but that practice has long been abandoned, and the amount of award depends upon the circumstances of each case. We submit that the value of the property saved ought not to be considered on assessing the reward. The true elements of salvage reward are a sum to compensate the salvors for the risk and trouble they have undergone, and a further sum to render similar salvage services on another occasion if required. In *The Syria* (2 Mar. Law. Cas. O.S. p. 387) the vessel saved was not a derelict, but the principles there laid down apply equally to the case of a derelict; it is there said: "In dealing with the present case, the court also bears in mind that there is a large amount of property saved, but for the single purpose of remembering that it is enabled out of an ample fund fitly to remunerate meritorious services well performed; and the court does not hold the large value of the property saved as a ground for attempting to extort from the owners of that property, or from the underwriters, as the case may be, more than a full recompense for such services." In that case the salvage was the more meritorious because there was salvage of life. The true interpretation of that decision is that if the court has not enough to reward salvors adequately for their services, let them have a large proportion, even up to one-half; but if the property saved

PRIV. CO.]

THE AMÉRIQUE.

[PRIV. CO.]

is so large that salvors can be adequately rewarded, reward them liberally, but without reference to the value of the property saved. The rate of salvage reward ought not to bear any proportion to the value of the property saved so long as there is enough to reward the salvors. The main considerations are the services rendered and the danger run, and the reward should bear a proportion to these and not to the value. In *The Blendenhall* (1 Dods. 414, 421), it is said, "In fixing a proportion of the value, the court is in the habit of giving a smaller proportion where the property is large and a higher proportion where the value is small; and for this obvious reason, that in property of small value, a small proportion would not hold out a sufficient encouragement; whereas in cases of considerable value, a smaller proportion would afford no inadequate compensation;" and an award was made of one-tenth of 72,000*l.* in the case of a derelict ship. Some such proportion, if the reward is so calculated, would be ample here. In the judgment of the court below it is found that the salvors did not improperly appropriate certain things on board the *Amerique*, and so, finding on what he considered was an improper charge, he has awarded a larger sum than he would otherwise have done.

Milward, Q.C. and *R. E. Webster*, for the respondents, the owners, masters, and crews of the *Auburn* and the *F. T. Barry*.—The amount awarded is not excessive, considering the danger to the salvors and the property saved and is not out of proportion to the awards shown to have been made in

Pritchard's Admiralty Digest, p. 841;

The Thetis, 8 Hagg. 14; 2 Knapp P. C. 390.

Sir *H. James* and *Pritchard* (E. C. *Clarkson* with them), for the respondents, the owners, master, and crew of the *Spray*.—Since the decision in *The Chetoh* (19 L. T. Rep. N. S. 621; L. Rep. 2 P. C. 205; 3 Mar. Law. Cas. O. S. 177) there can be no doubt that this court can reduce the amount of salvage awarded by the High Court of Admiralty, but they will not interfere with the amount awarded if, as was said in the *Carrier Dove* (2 Moore P. C. C. 243, 254), "there has been nothing, to use a familiar expression, to shock the conscience—nothing gross, nothing extravagant." If it should appear upon the face of the judgment of the court below that the ingredients going to make up the amount are improperly used, this court will no doubt remove those ingredients and reduce the amount accordingly, but not otherwise. Are there, then, any improper ingredients? The only two suggested are, first that the judge was influenced by improper charges made against the salvors; secondly, that he took into consideration the French law. As to the first, there is no trace of it in his judgment. As to the second, the judgment expressly proceeds upon the *lex fori* and not upon French law. But even if the judge did consider the French law, why should he not do so? The amount to be awarded is a matter of discretion, and in such a matter it is not improper to consider the amount that would have been awarded in the country to which the ship belongs. There can be no doubt that the rule laid down by the *Ordonnance de la Marine*, *Liv. IV.*, *Tit. IX.*, Art. 27, is still in force and that salvors of a derelict are entitled to one-third; (*Dalloz*, *Jurisprudence Générale*, *Tit. Propriété*, No. 223, et seq.) This court will not interfere with a discretion founded upon such a consideration.

Salvors are to be rewarded not merely for the actual services rendered, but the general interests of navigation and commerce, the fatigue and anxiety, the spirit of adventure, and the skill and dexterity, which are required by the exercise of that spirit, are all to be taken into consideration: (*The William Berkeley*, 3 C. Rob. 355.) And again not only the risk of salvors, their labour and the state of the weather are to be considered, but also the value of the property saved:

The Industry, 3 Hagg. 204;

The Raikes, 1 Hagg. 246;

The Hector, 3 Hagg. 93.

The interests of commerce require the highest possible reward, and salvage services can only be secured in the expectation of receiving a high reward. The *Syrian* (*ubi sup.*) does not overrule any of the former cases as to the ingredients of salvage reward, and the judgment there must be taken as applicable only to that particular case. A derelict at sea is certain to become a total loss unless salvors interfere.

W. G. F. Phillimore in reply.—In the present case there was no danger to life or property of the salvors which was the case in the *Blendenhall* (*ubi sup.*). It has been expressly laid down that the amount of salvage does not depend on the value of the property saved when the property is large; when the property is large, the reward ought to be adequate, not measured according to the value of the property, but chiefly according to the service, and especially with reference to the risk of life.

The James Dixon, 2 L. T. Rep. N. S. 826;

The Salacia, 2 Hagg. 263, 264.

Curr. doc. ult.

Dec. 19, 1874.—The judgment of the court was delivered by

Sir *JAMES W. COLVILLE*.—These appeals are upon a question of salvage. The vessel saved, the *Amerique*, was a very large iron screw steamer of 4600 tons register, running habitually as a passenger vessel between Havre and New York. In the afternoon of the 14th April 1874, being on her return voyage from New York, with eighty-three passengers and a very valuable cargo of merchandise, she was abandoned by her master, crew, and passengers, under the apprehension that she was sinking, and left to the mercy of the wind and waves, when about seventy or eighty miles west of Ushant.

In that condition she was first seen early in the morning of the 15th by the barque *Auburn*, which having made for her, succeeded in putting four men on board of her about 10.30 a.m. Very shortly afterwards she was also boarded by a boat's crew from the crew steamship *Spray*, consisting of the mate of that vessel and two other men, who were afterwards joined by the engineer and a fireman from the *Spray*. The *Amerique*, when first boarded, was found to be on the starboard tack, with two close-reef top sails; the foot of her mainmast was out, and she had a strong list to port. On examination it was found that she had a good deal of water in her, coming partly through a port of which the glass was out; that the pumps were choked; and that the water was too high to allow the mate and engineer to get at the machinery. From what they observed, and from the fact that her own master and crew had abandoned her, those who made the examination might fairly conclude that the condition of this derelict vessel was far worse than it afterwards proved to be. The master and crew of the *Spray*, with the aid of two men whom the master of the *Auburn* agreed to leave for that pur-

pose, nevertheless undertook the task of taking the *Amérique* to a port of safety. It is unnecessary to state in detail the measures which they adopted for this purpose. It is sufficient to say that the *Spray*, having towed the *Amérique* during the whole of the night of the 15th, at the rate of about two knots an hour, sighted the *F. T. Barry* early in the morning of the 16th, made signals to her, and ultimately agreed with her that she should assist in towing the *Amérique* to a safe port. The two steamers, with more or less of misadventure, succeeded in getting the *Amérique* safely into Plymouth on the evening of the 18th April; but she continued to be under charge of the master and crew of the *Spray* until 7 p.m. of the following day, when she was taken in charge by the collector of customs.

The admitted value of the vessel and cargo thus saved is 190,000*l*.

The *Spray* was a screw steamship of 303 tons net register, manned by a crew of sixteen hands, all told, with engines of 80 horse-power nominal, but working up to 360 horse-power. She had left Newport on the 12th April laden with coals and bound for Gibraltar. And it is pleaded that at the time of the services she was of the value of about 15,000*l*.; her cargo being of the value of 650*l*.; and her freight out and home being of the value of 1270*l*. She does not appear to have sustained any serious damage during the service, beyond breaking her hawser, and having two butts on the port side torn out. In fact, by her pleading she assesses this damage at only 60*l*.; the loss incurred by the owners by reason of the deviation from her voyage at 130*l*.; and the extraordinary expenses incurred by them at 379*l*. 6*s*. 9*d*.

The *F. T. Barry* is an iron screw steamship of the burthen of 545 tons net register, valued at about 20,000*l*., and propelled by two compound direct acting engines of 99 horse-power, working up to 400. Her crew at the time of the salvage service consisted of her master and twenty-two hands. She was homeward bound, having left Villa Real in Portugal, with a cargo of mineral ore and fruit of the value of 4,000*l*. for Newcastle on the 9th April 1874. She seems to have sustained damage to the amount of 600*l*.; and to have been delayed on her voyage for repairs for about twenty-one days. There were two distinct snits for salvage. The one by the owners, master, and crew of the *Spray*; the other by the owners, masters, and crews of both the *F. T. Barry* and of the *Auburn*. These snits were heard together before the Judge of the Admiralty Court, who awarded by way of salvage the gross sum of 30,000*l*. which he divided in the following proportion, viz. :—15,500*l*. to the *Spray*; 14,000*l*. to the *F. T. Barry*; and 500*l*. to the *Auburn*—these snits to be taken in full satisfaction of all damages and expenses, as well as in compensation for the salvage services.

The present appeal is against that decision.

That the vessel saved was a derelict, and that she and her cargo were saved by the exertions of the respondents, that their services were in a high degree meritorious, and deserved a large measure of remuneration, are propositions which are not disputed by the appellants. But they contend that the sum awarded by the learned judge is out of all proportion to those services, and, on the ground of its exorbitancy, ought to be reduced by this tribunal sitting as a court of appeal.

The jurisdiction thus invoked is one which this committee, and also, as would appear from *The Cuba* (Lushington, p. 14), the Court of Admiralty, when sitting as an appellate court, has always been slow to exercise. The general rule of non-interference has been within the last few years stated and enforced at this board in *The Clarissa* and *The Neptune* (both reported in 12 Moo. P. C. Reps. 340, 346); *The Carrier Dove* (2 Moo. P. C. N. S., p. 243); *The Fusilier* (3 Moo. N. S., 269); and *The England* (5 Moo. P. C. 344). The object of the appeal was in *The Clarissa* and *The England* to increase, in the other cases to reduce, the amount awarded. The general rule is nowhere better stated than in *The Clarissa*, in which Lord Justice Knight Bruce said :—"It is a settled rule, and one of great utility with reference to cases of this description, that the difference (that is the difference between the sum awarded, and which the appellate court may think ought to have been awarded) must be very considerable to induce a court of appeal to interfere upon a question of mere discretion." And in *The Neptune* Lord Kingsdown, after citing this passage from the judgment in *The Clarissa*, observed that the same rule must apply in diminishing the amount of compensation which is applied in increasing it.

The cases which establish and illustrate the exception to the general rule are *The Theta* (2 Knapp, 380); *The Scindia* and *True Blue* (4 Moo. N. S. 101), and *The Glenduro* (8 Moo. N. S. 22) in which the amount awarded was increased; and *The Inca*, (12 Moo. P. C. 189) and *The Chetah* (5 Moo. N. S. 178), in which it was reduced. It may be observed that in delivering judgment in *The Chetah*, Lord Chelmsford stated that "it had been agreed by the counsel on both sides that no case was to be found where, upon an appeal from a decree for salvage services, the amount awarded had ever been reduced." But this statement of the authorities was obviously inaccurate, since the case of *The Inca*, in which the amount awarded was largely reduced, and in which the judgment of this board was delivered by Dr. Lushington, was decided in 1858. Upon the authorities it cannot be doubted, nor, indeed, was it denied at the bar, that the amount awarded may be reduced if the appellate court is satisfied (to use the words of Dr. Lushington in *The Cuba*), that it "is so exorbitant, so manifestly excessive, that it would not be just to confirm it."

To establish a case for the exercise of this exceptional and delicate jurisdiction it would obviously be material to show that the judge of first instance, in estimating the amount of remuneration to be awarded, had miscarried, by allowing his judgment to be influenced by something which ought not to have influenced it at all; or else either by giving undue consideration, or by failing to give due consideration, to some circumstance fairly within his consideration. And accordingly the learned counsel for the appellants have laboured to show some such miscarriage in the judgment under appeal.

Their arguments were founded first, on the observations made by the learned judge in pronouncing against the defence, founded on alleged acts of pillage on the part of the salvors, which was originally set up by the appellants. Their Lordships, however, cannot see the slightest ground for supposing that, whatever the learned judge may have felt touching this plea, he allowed that feeling

[PRIV. CO.]

THE AMERIQUE.

[PRIV. CO.]

in any degree to affect his judgment in estimating the amount of remuneration which awarded. Another argument was more plausibly founded on the reference made by the learned judge to the French law, and to the compensation which a French court would have awarded to the salvors had they carried this derelict vessel into Brest. It must, in their Lordships' opinion, be admitted that, if the judgment of the learned judge was influenced by that consideration, it was not properly so influenced. The consideration how the courts of another country, and that the country of the owners of the vessel saved, would deal with a subject *communis juris*, like salvage, might be legitimate, and even useful, if the courts of that country proceeded upon the same principles as those which govern our courts. But where it appears that the French courts are governed by a positive rule of law which prescribes that a fixed proportion of the value of a derelict is to be awarded to the salvors, and that our courts have for nearly two centuries repudiated that hard and fast rule of proportion, it is obvious that nothing can be deduced from the French law except an inference that the appellants might have been in a worse case if their ship had been carried into a French port. It affords no ingredient which can legitimately be imported in the calculation of the sum to be decreed against them in an English court.

Their Lordships however, though unable to account altogether for this reference to the law of France, find that in the paragraph in the judgment which immediately follows it, the learned judge expressly stated that the case was to be decided by the *lex fori*; and their Lordships are, therefore, not satisfied that he did not intend to decide it upon the principles by which his own court is habitually governed without reference to the French law. They will, therefore, deal with the question before them as simply one of alleged excess or exorbitancy.

It seems to be indisputable that the amount awarded in this case is larger than any that was ever awarded by an English court of admiralty, except that given in the case of the *Thetis*. The services in that case, however, were of the highest merit. They lasted during many months; they involved the use of ingenious and complicated machinery; actual loss of life in at least one case; actual loss of health in many cases; great hardships, exposure, and privations to all actively concerned in them. In the present cases their Lordships, without wishing in the slightest degree to detract from the courage with which the salvors undertook, and the ability with which they performed, the services in question, cannot but observe that those services, considered with reference to their duration, to the danger to life incurred by the men, to the damage or risk of damage incurred by the vessels employed, and to the consequences or probable consequences of their deviations from the voyages on which they were employed, fall far short of services which in other cases and even in cases of derelict, have been remunerated by much smaller sums. It follows then, that the value of the property is the consideration on which, if at all, this exceptional award of remuneration is to be justified. And this raises the question to what extent, if any, undue effect has been given to that consideration.

It was argued on the authority of a case decided by Dr. Lushington in 1866 (*The Syrian*, reported in 2 Mar. Law Cas. O. S. 387) that the value of the property saved is material only in

so far as it supplies a fund adequate to the payment of a liberal remuneration for the services rendered; and it ought not further to affect the measure of that remuneration. The passage in Dr. Lushington's judgment which is relied upon is as follows: "In dealing with the present case, the court also hears in mind that there is a large amount of property saved; but for the single purpose of remembering that it is enabled out of an ample fund fitly to remunerate meritorious services well performed; and the court does not hold the large value of the property saved as a fund for attempting to exort from the owners of that property or from the underwriters, as the case may be, more than full recompense for such services." Their Lordships do not think that this passage can fairly be taken to import a ruling that the quantum of remuneration is not in any degree to be affected by the value of the property saved. Such a ruling would be hardly consistent with what the same learned judge has laid down in his judgment delivered by him at this board in the case of *The True Blue* (4 Moo. N. S. 104) in 1866. He then cited what Lord Stowell had laid down in *The Aquila* (1 C. Rob. p. 37) to the effect that "the proper mode of considering the question is, what is the fit and proper amount, with reference to all the circumstances, including the value of the property saved, and the risk to the property of the salvors?" And at p. 106 he assigns the value of the vessel saved as a ground on which their Lordships ought to increase the sum awarded by way of salvage remuneration by the court below. That the value of the property saved is, to some extent, to be treated as an ingredient in the calculation of the quantum of salvage remuneration is a proposition which might be supported by a long series of decisions beginning with those of Lord Stowell in *The William Beckford* (3 C. Rob. 356) and Sir John Nicholl in *The Industry* (3 Hag. 208), and coming down to the present time. And their Lordships do not conceive that it was the intention of the learned judge who decided the case of *The Syrian* to run counter to, or even to qualify the decisions of, his predecessors on this point. The rule seems to be that though the value of the property saved is to be considered in the estimate of the remuneration, it must not be allowed to raise the quantum to an amount altogether out of proportion to the services actually rendered. And this is consistent with what is said by Lord Stowell in *The Blenden Hall* (1 Dodson, p. 421): "In fixing a proportion of the value the court is in the habit of giving a smaller proportion where the property is large, and a higher proportion where the value is small, and for this obvious reason, that in property of small value a small proportion would not hold out a sufficient consideration; whereas in cases of considerable value a smaller proportion would afford no inadequate compensation."

Applying these principles, their Lordships, with the most anxious desire not to infringe the wholesome rule which allows great latitude to the discretion of the court of first instance in cases of this description, have been unable to resist the conclusion that the learned judge has given undue weight in this case to the value of the property saved, and has consequently awarded a sum which, having regard to the services rendered, their Lordships must pronounce to be excessive. Taking into consideration all the circumstances of the case, the nature and duration of the services,

and also the fact, dwelt upon by the learned judge, that the merit of the salvors was enhanced by their removing what might have proved a dangerous obstacle to navigation, and giving the utmost weight due to the value of the property saved, their Lordships are of opinion that 18,000*l.* is the utmost amount that can be given consistently with justice to the owners of the *Amérique*, and the rules which govern the ordinary practice of courts of admiralty in England. And they will humbly advise Her Majesty that the sum awarded be reduced to that amount. Following the precedents of the *Inca* and the *Chetah*, they think that each party should bear their own costs of this appeal. They do not propose to alter the proportions in which the judgment under appeal has apportioned the sum awarded amongst the different classes of salvors, and the result of their Lordships' judgment will be that the sum awarded to each class will be diminished by two-fifths.

Appeal allowed; amount reduced.

Solicitors for the appellants, *Stokes, Saunders, and Stokes*. Solicitor for the Auburn and *F. T. Barry, Thomas Cooper*. Solicitors for the *Spray*, *Pritchard and Sons*.

Dec. 3 and 12, 1874.

(Present the Right Honourable Sir J. W. COLVILLE, Sir BARNES PRACOCKE, Sir MONTAGU SMITH, and Sir R. P. COLLIER.)

THE HENRY MORTON.

Collision—Tyne bye-laws—Vessels crossing river—Vessel overtaking another.

By the bye-laws in force regulating the navigation of the river Tyne (clause 17) all vessels proceeding to sea must keep to the south side of mid Channel and (clause 20) "vessels crossing the river, and vessels turning take upon themselves the responsibility of doing so safely with reference to the passing traffic;" under these bye-laws a vessel outward bound coming at full speed out of the Tyne dock (on the south side of the river Tyne), and crossing the river to the north side whether intentionally, in violation of clause 17, or unintentionally by reason of the force of the tide, is bound to use the utmost caution to avoid the passing traffic, and to contemplate before attempting to come out any contingencies, such as tide, stoppage of the traffic, &c., which may arise, and she should only cross if it can be done without risk to that traffic; if a collision occurs by want of such caution the ship will be responsible.

Semble, that the 21st clause of the above bye-laws, providing that "when steam vessels are proceeding in the same direction but with unequal speed, the vessel which steams slowest shall when overtaken" take certain measures to allow the overtaking steamship to pass her, applies only to a vessel overtaking and passing another actually upon the same course with itself.

THESE were appeals from decrees of the High Court of Admiralty of England in cross causes of damage brought respectively by the respondents as owners of a screw steam ship called the *Harfield*, against a screw steam ship called the *Henry Morton*, owned by the appellants, for the recovery of damages in respect of a collision between the two ships, and by the appellants against the *Harfield* in respect of the damages sustained by the *Henry Morton*.

The collision happened at about a quarter-past four p.m. on the afternoon of the 21st Jan. 1874, a little below the entrance of the Tyne dock, in the river Tyne. The tide was flood, and the weather was fine. The *Henry Morton* was proceeding slowly down the Tyne in about mid-river and was following another steamer called the *Elemore*, which was also going down at the distance of about three times the length of the *Henry Morton* ahead of her. When the *Henry Morton* was nearly off the entrance of the Tyne dock, which is on the south or Durham side of the river, the *Elemore* stopped on account of a sailing vessel which was in her way, and the engines of the *Henry Morton* were also stopped.

The *Harfield*, which was proceeding to sea, came out of the Tyne dock and crossed over from the south to the north side of the river, and although the engines of the *Henry Morton* were reversed and her helm put hard a-starboard, the *Harfield*, with her port side, between her bridge and fore-rigging, came into collision with the starboard side of the stem of the *Henry Morton*. The *Harfield* then went on, and with her stem struck the *Elemore* in the centre of her stern.

The following clauses of the bye-laws for the regulation of the navigation of the river Tyne were admitted to be in force at the time and place of the collision in question in this cause:—

Clause 17.—All vessels navigating the river when proceeding towards sea shall keep to the south of mid channel; and when coming from seaward, shall keep to the north of mid channel, so that the port-helm may always be applied to clear vessels proceeding in the opposite direction.

Clause 19.—All vessels, when under weigh, requiring to pass over a part of the channel which is not within that half reserved for their navigation, for the purpose of proceeding to or from landings, moorings, or other places, must take upon themselves the responsibility of doing so in safety with reference to the passing traffic; and, any vessel, continuing its navigation after reaching such landing, mooring, or other place, must again proceed to the side of the river specified as the proper side for its navigation, so soon as practicable, and take upon itself the responsibility of doing so in safety, with respect to the passing traffic.

Clause 20.—Vessels crossing the river, and vessels turning, must take upon themselves the responsibility of doing so safely, with reference to the passing traffic.

Clause 21.—When steam vessels are proceeding in the same direction, but with unequal speed, the vessel which steams slowest shall, when overtaken, keep sufficiently to the left, or port side, and shall offer no obstruction whatever, by crossing the channel or otherwise, to the free passage of the faster vessel; and shall ease, and, if necessary, stop the engine as soon as a faster vessel comes within thirty yards; and in like manner the faster vessel shall ease its engine when it comes within thirty yards of the slower vessel, until it has passed the vessel so overtaken; and, that ignorance of the approach of the faster vessel may not be pleaded by the master of the slower vessel, it shall be sufficient intimation of such approach if the steam whistle of the faster vessel be three times sounded, but no vessel overtaking any other vessel will be justified in passing such vessel at any of the points or other dangerous turnings of the river, or at the dock entrances.

On the part of the appellants, it was contended that the *Harfield* was to blame for coming out of the Tyne dock when she did, regard being had to the positions of the *Henry Morton* and *Elemore*, and other vessels, and that the *Harfield* could and should, in accordance with the said bye-laws, and with careful navigation, have been kept on the south side of the river, and that her engines ought to have been stopped and reversed before the collision, in time to have prevented the

[Priv. Co.]

THE HENRY MORTON.

[Priv. Co.]

collision. For the respondents it was contended that the *Henry Morton* neglected to stop and reverse and improperly attempted to pass the *Harefield* contrary to the bye-laws of the river Tyne.

The case was heard in the court below on oral evidence before the learned judge, assisted by Trinity Masters.

The learned judge of the court below, however, pronounced the collision to have been solely occasioned by the improper navigation of the *Henry Morton*, and made decrees condemning the appellants, and their bail, in the damages proceeded for and in costs, and dismissing the cross suit of the appellants. The reasons for the judgment and the evidence sufficiently appear in the judgment of the Judicial Committee.

From this decree the appellants appealed for the following, amongst other reasons.

1. Because those in charge of the *Harefield* did not keep a proper look-out, and the collision was thereby occasioned.

2. Because the *Harefield* proceeded to leave the Tyne dock at an improper time and in an improper manner, without due regard to the positions of the *Henry Morton* and the *Elemore*, and the collision was thereby occasioned.

3. Because the *Harefield* did not take proper measures to keep on the south side of the river in accordance with the bye-laws as to navigation of Tyne and with careful navigation, and improperly neglected to keep on the south side of the river, and the collision was thereby occasioned.

4. Because the *Harefield* did not duly stop and reverse her engines, and the collision was thereby occasioned.

5. Because the said collision, if not wholly occasioned by the several acts and defaults hereinbefore stated, was contributed to thereby or by some of them.

6. Because the judgment and decree of the court below were in favour of the respondents, whereas they ought to have been in favour of the appellants.

Butt, Q.C. and *E. O. Clarkson*, for the appellants.
Mileard, Q.C. and *Guineford Bruce*, for the respondents.

Dec. 12, 1874.—The judgment of the court was delivered by

Sir BARNES PEACOCK.—This is a case of collision between two screw steamers which took place in the river Tyne at about 4.15 on the 21st Jan. last, a little above what is known as Whitehill point on the northern bank of the river. The weather was clear and fine; the wind westerly; and the tide about two-thirds flood, and running pretty strongly. The *Henry Morton* had come from a place called Jarrow, higher up the river. As she approached the entrance of the Northumberland dock, which is on the northern bank of the river, she had to give way to a third steamer, the *Elemore*, also outward bound, which came out of that dock; and afterwards continued her course down the river in the wake of that vessel somewhat to the north of mid-channel. Shortly before the collision the *Elemore* stopped her engines in order to avoid a brig running up the river in tow of a tug.

About the same time the *Harefield* came out of the Tyne dock, which is on the southern bank, crossed the river at full speed in a transverse direction intending to straighten her course for her passage down the river; and in so doing came in contact first with the *Henry Morton*, and afterwards with the *Elemore*.

So far the facts are undisputed. Upon the other parts of the case the evidence is very conflicting.

The case of the *Harefield* is, that she was hauling out of the Tyne dock, and was in the act of straightening down the river, her engines going ahead, and her helm being hard a-port, when the *Henry Morton* came down the river at a rapid speed, and with her stem struck the *Harefield* a violent blow on her port side, nearly amidships; and that having got clear she came on again, striking the *Harefield* a second blow on the port side further aft; and by means of this second blow forced the *Harefield* into collision with the *Elemore*.

The case of the *Henry Morton* is, that shortly before the collision she was about or nearly off the entrance of the Tyne dock, and nearly in mid-stream; that, having previously stopped in order to allow the *Elemore* to come out of the Northumberland dock, she was following the vessel at the rate of about 2 knots an hour, when the *Elemore*, having to stop on account of a sailing vessel in her way, she also stopped her engines. That in these circumstances, the *Harefield*, having come out of the Tyne dock, was seen coming athwart the river towards the *Henry Morton*, causing danger of collision; that the *Henry Morton* thereupon reversed her engines and took other means to avoid the collision or break its force; but that the *Harefield* with her port side, between the bridge and the fore-rigging, came into collision with the starboard side of the stem of the *Henry Morton*, passed on and struck the *Elemore* on her stern, and coming astern again came into collision with the *Henry Morton*. And the chief fault which the pleading of the *Henry Morton* imputes to those on board the *Harefield* is, that they improperly neglected so to navigate her as to enable her to keep to the south of mid-channel.

The learned judge of the Admiralty Court came to the conclusion that the *Harefield* was not to blame for coming out of dock at the time when she did come out; that it was the duty of the *Henry Morton*, not only by the law of the river, but also by the common rules of navigation, having the tide assisting her for this purpose, to stop to let the *Harefield* come out, in the same manner as the *Henry Morton* had stopped just before to allow the *Elemore* to come out of the Northumberland dock; that the collision was due to the want of a proper and careful look-out, and to the *Harefield* not having been seen until it was too late on the part of the *Henry Morton* to avoid the collision; and that the *Henry Morton* was alone to blame for that collision.

Their Lordships, in dealing with the appeal from this decision, propose to consider first, how far the evidence justifies the finding that the *Henry Morton* was at all to blame for this collision.

In order to arrive at a just conclusion upon this point it is necessary to determine with more or less precision two questions which were much debated at the bar, viz., what was the position of the *Henry Morton* when the *Harefield* was coming out of dock? and, at what speed she was then proceeding down the river?

The witnesses for the *Harefield* place the *Henry Morton* considerably above the entrance of the Tyne dock at the time when their own vessel came out of the dock. Some, as *e.g.* John Wood, the second mate, p. 22, and William Bird, p. 37, place her as high up the river as the Northumberland dock. In this their Lordships consider there is

[PRIV. CO.]

THE HENRY MORTON.

[PRIV. CO.]

some exaggeration. It is admitted that the *Elemore* was then below the entrance of the Tyne dock. It is sworn on the part of the *Henry Morton* that she had stopped in order to allow the *Elemore* to come out of the Northumberland dock; and the fact that she had so stopped seems to have been found by the Judge of the Admiralty Court. The witnesses on her side also depose that she afterwards followed the *Elemore* at a distance of about three ships' length; she would naturally keep as near the *Elemore* as she could with safety; and the distance between them can hardly have exceeded that at which the pilot of the *Elemore* puts it, viz., six ships' length. On the other hand, it is to be observed that in their preliminary act the owners of the *Henry Morton* have stated that "the *Harefield* was first seen coming out of the Tyne dock board on the starboard bow of the *Henry Morton*, which was a little above the Tyne dock entrance, and about or near mid-channel." And upon the whole evidence on this point their Lordships have come to the conclusion that, when the *Harefield* came out of dock, or was seen by the pilot of the *Henry Morton* as about to come out of dock, the latter vessel was still above the entrance of the Tyne dock.

As to the speed at which the *Henry Morton* was going down the river when the *Harefield* was first seen, their Lordships see no reason to doubt that it was that stated in the preliminary act, viz., about two knots an hour. It is part of her case that when the *Elemore* stopped in order to avoid the steam tug and the brig *Isabel* in tow of her, the *Henry Morton* did the same. The time at which this manoeuvre was executed is material. Her captain's evidence as to the different orders given to the engineer is confused, and almost inexplicable. That, however, of Robert Brown, the pilot in charge of the *Henry Morton*, makes it clear that it was not until after he had seen the masts of the *Harefield* coming through the piers that this second stoppage of the *Henry Morton*'s engines took place; and that between that and the previous stoppage, in order to let the *Elemore* out of the Northumberland dock, they had gone slowly ahead. The engines were not reversed and put full speed astern until the collision was imminent. And upon the whole evidence their Lordships have come to the conclusion that the *Henry Morton*, after passing the Northumberland docks, and when the *Harefield* came through the piers, was going at the rate of two knots an hour; that she afterwards stopped her engines, and immediately before the collision reversed them; but that up to and at the time of the collision she continued to have some way upon her.

Another question which was debated at the bar was whether the collision between the *Elemore* and the *Harefield* took place before or after the second collision between the latter vessel and the *Henry Morton*. There is a direct conflict of evidence on this point; but their Lordships are of opinion that the account given by those on board the *Harefield*, confirmed as it is by those on board the *Elemore*, and other independent testimony, is more credible than that of the witnesses for the *Henry Morton*; and that the *Henry Morton* and the *Harefield* were in collision twice before the latter struck the *Elemore*. They are also disposed to think that, before striking the second blow, the *Henry Morton* must have begun to go ahead again, probably in the hope of getting clear, and so proceeding to sea.

And this is consistent with what one of the witnesses has sworn as to the cry from the *Henry Morton* to the *Harefield* to put out the cork fender.

The bye-laws which govern the navigation of the river Tyne have been invoked by both parties. The particular clauses insisted upon are the 3rd, which requires all vessels proceeding to sea to keep to the south, and those coming from seaward to the north of mid-channel; the 19th and 20th, which throw upon vessels requiring to pass over a part of the channel which is not within the half reserved for their navigation, and upon vessels crossing the river, or turning, the responsibility of doing so safely, with reference to the passing traffic; and the 21st, which contains the following passage, viz., "but no vessel overtaking any other vessel will be justified in passing such vessel at any of the points, or other dangerous part of the river, or at the dock entrances."

Upon the facts as proved above, their Lordships are of opinion that the judgment under appeal, in so far as it finds that the *Henry Morton* was guilty of culpable negligence, is correct. Looking to the position of the *Henry Morton* when her pilot first saw the *Harefield*, they think that the collision might have been avoided if the *Henry Morton* had either ported so as to pass astern of the *Harefield* to the southern, which it is to be observed was the proper, side of the river; or had stopped and reversed her engines. Their Lordships think that either measure was within the power of those on board that vessel, and that it was their duty to adopt one of them. Instead of doing this they appear to have assumed that the *Harefield* would not come so far across the river, and to have paid no attention to her movements until the collision was imminent. In this their Lordships think they were not justified, whether the *Harefield* was or was not to blame for coming so far across the river, a point to be considered presently. The evidence of the different pilots examined in the cause satisfies their Lordships that the practice of so crossing the river, whether right or wrong, is so frequent, that the contingency of the *Harefield* doing so was one which those on board the *Henry Morton* ought to have contemplated, and therefore that they were not justified in neglecting to take the means in their power of avoiding its probable consequences. It is further to be observed that her master himself, and her chief mate, admit that the collision might have been avoided if the course of the *Harefield* had been observed in time. Their Lordships think it right to say that they have come to the conclusion that the *Henry Morton* was in fault, independently of the 21st clause of the bye-laws, which they are disposed to think applies only to a vessel overtaking and passing another actually upon the same course with itself.

Their Lordships have now to consider whether there was not also contributory negligence on the part of the *Harefield*.

It is admitted that the proper course for an outward bound steamer leaving the Tyne dock is to straighten her course as soon as possible, so as to proceed down the river on the southern side of mid-channel. There is a strong body of evidence corroborated by proof of what the *Anne Webster* did to show that this may be done without running, like the *Harefield*, across the mid-channel.

The judgment under appeal assumes that it was the duty of the *Harefield* to get to the south side

PRIV. CO.] EDWARDS V. ABERAYRON MUTUAL SHIP INSURANCE SOCIETY (LIMITED).

[Q. B.]

as soon as possible, but finds that she was delayed in doing so by accidental circumstances, of which one was the presence of the raft of which much was said in the argument. This raft, notwithstanding what was urged by Mr. Bruce, their Lordships must take upon the evidence to have ultimately gone up the river. It is not likely that it should have been towed against the tide down the river. Their Lordships, however, conceive it to be possible that, in order to allow the *Harefield* to pass it, it may in the first instance have been towed towards the eastern pier of the basin into the slack-water there. If this be so it would not very materially affect the subsequent movements of the *Harefield*, which is pretty well proved to have come out from between the piers with her head N.E. by E. Had the raft really altered the course of the *Harefield* it would, their Lordships apprehend, have been a grave question whether she ought not to have waited until that obstacle was out of the way. But on the whole their Lordships are disposed to think that the raft had little or nothing to do with what subsequently happened.

Then it is said she came out with her head in the right direction, but the action of the tide on her starboard bow gave her a swing, which carried her more to the northward, and impeded the action of her port helm. There does not, however, seem to have been anything exceptional in the strength of the tide on that day.

Either she intended, or she did not intend, to go as far across the river as she went. In either case the bye-laws seem to cast upon her the responsibility of crossing the river, or of going out of her prescribed ground without danger to the passing traffic. If she did this intentionally (and the fact that all three steamers are found on the northern instead of the southern side of mid-channel begets a suspicion that vessels may intentionally violate the 17th clause in this part of the river in order to escape the strength of tide) she was doubly bound to caution. If she were forced into that position by the tide, she ought to have contemplated that contingency. But in either case it seems to their Lordships that those in charge of her ought to have watched their opportunity for crossing the river at full speed, and to have observed carefully what passing traffic was likely to come in her way. Had they done this they would have seen that the *Elemore* was but a little below, and the *Henry Morton* but a little above the opening of the dock; and they ought further to have contemplated the contingency, which actually happened, of the downward course of these vessels being arrested by vessels ascending the river, as they ought to ascend it, on the northern side. Upon the evidence, those on board the *Harefield* seem to have paid very little attention to the movements of the other two vessels. And their Lordships cannot acquit them of having recklessly crossed the river at the risk of collision with one or both. Nor are they satisfied that if the *Harefield* had carefully observed the movements of the two other steamers, and seen that they had been stopped by the brig, she might not have extricated herself from the position in which she had placed herself without further danger by reversing her engines. Upon the whole, therefore, their Lordships cannot acquit the *Harefield* of blame, and they have come to the conclusion that it will be their duty to advise Her Majesty to reverse both the judgments under

appeal, and in each suit to pronounce both vessels to blame, and to direct that each party shall bear their costs, both in the Court of Admiralty and on this appeal.

Judgments reversed and appeals allowed.

Solicitors for the appellants, Gellatly, Son, and Warton.

Solicitor for the respondent, H. C. Coote.

COURT OF QUEEN'S BENCH.

Reported by J. SHORTT and M. W. McKELLAR, Esqrs.,
Barristers-at-Law.

Tuesday Jan. 19, 1875.

EDWARDS V. ABERAYRON MUTUAL SHIP INSURANCE SOCIETY (LIMITED).

Policy of marine insurance—Risk or adventure—Time policy—Member by estoppel—Agreement to decide disputes—Condition precedent—30 & 31 Vict. c. 23.

Plaintiff had an equitable interest in a ship, and afterwards received a transfer of the legal interest from the registered owner, who was a member of the defendants' society. The owner insured the ship with the defendants in the plaintiff's name by a policy incorporating the rules of the society, and providing among other things that every insurance effected should be valid and binding from noon on that day until noon of the 1st Jan. then next following; by the rules, persons became members only by signing the articles, and none but members could insure their ships. The rules also required certain notice upon sale of a ship or shares thereof. The plaintiff had never signed the articles, nor given notice of the transfer to him of the legal interest, but had paid contributions claimed from him as owner by the society. It was also provided by the rules that the directors should decide claims and disputes of members, and that aggrieved members might appeal for reconsideration of decisions, first to the directors themselves, and then to the whole society; and also that no member should be allowed to bring or have any action, suit, or proceeding, or other remedy against the society for any claims or demands upon or in respect of the society or the members thereof, except as therein provided.

Upon loss of the ship plaintiff was refused his claim upon this policy by the directors twice, but made no appeal to the whole society.

Held: That the above clauses in the policy was a sufficient compliance with sect. 7 of the Stamp Act 1867; that the defendants were estopped from disputing the plaintiff's interest in the policy, and his right as member to sue upon it; but that the clause for settlement of disputes rendered a resort to all the appeals provided therein a condition precedent to an action against the society by a member.

This was an action brought to recover the sum of 1000*l.* in respect of a total loss of a vessel called the *Hermione*, alleged to have been insured for that amount by the defendants. The cause came on for trial at the sittings after Hilary Term 1873, before the Lord Chief Justice Cockburn and a special jury, when by the consent of the parties, and by order, the following case was stated for the opinion of the court.

The plaintiff is a farmer residing at Troedyrhiw, between Aberayron and Aberystwith, in

Q. B.]

EDWARDS v. ABERAYRON MUTUAL SHIP INSURANCE SOCIETY (LIMITED).

[Q. B.]

Cardiganshire, and the defendants are a mutual society, incorporated under the Joint Stock Companies' Acts, and established at Aberayron in the same county. A copy of the memorandum and articles of association accompanied the case, and was to be taken as part thereof. In the month of December 1868, the plaintiff's brother-in-law Daniel Davies, was about to purchase the vessel *Hermione*, and the plaintiff agreed to make him advances to enable him to purchase and repair the vessel. The terms upon which the advances were agreed to be and were afterwards made were embodied in a written agreement, dated 22nd Dec. 1868; a copy of this agreement accompanied the case, and was to be taken as part thereof, but it is not material to the questions raised. The vessel was insured for the first time with the defendants' society in January 1869. The insurance was effected by Daniel Davies, who gave directions to the defendants' secretary that the policy should be made out in the plaintiff's name and be handed to him. Davies did not inform the defendants of the arrangement made with the plaintiff. The document, a copy of which accompanies this case, marked "C," was afterwards forwarded by post by the defendants to the plaintiff. It is the usual form of policy issued by the defendants to their members.

In Jan. 1870 the vessel was on a foreign voyage under the command of Daniel Davies, and the plaintiff in his absence applied for a renewal of the insurance with the defendants. The premium of 17l. 10s. was paid by the plaintiff, and in March 1870 the defendants forwarded by post to the plaintiff the document a copy of which marked "D," accompanied this case, and was to be taken as part thereof. No copy of the rules or articles of the association was furnished to the plaintiff, and it is to be taken for the purposes of this case that he had not read, and did not know of the provisions contained in them until after the loss of the vessel. In March 1870 an application was made to the plaintiff for a sum of 17l. 10s., being the contribution to the losses of the year 1869, payable in respect of the vessel *Hermione*. This amount was paid by the plaintiff on the 31st March 1870. Copies of the notice of call, and of the receipt, marked E and F, respectively, accompanied this case, and were to be taken as part thereof, but need not be further referred to. In Oct. 1870 a further call was made on the plaintiff for the losses in 1870, and the plaintiff paid the amount and obtained a receipt. The notice of call had been mislaid, and a copy of the receipt, marked "H," accompanied the case, and was to be taken as part thereof, but need not be further referred to. On 14th May 1870 Daniel Davies, by bill of sale, which was soon afterwards registered, transferred the *Hermione* to the plaintiff. No notice of this transfer was given to the defendants. In June 1870 Daniel Davies made a claim upon the society for the amount of the loss of an anchor and chain of the *Hermione*. The claim was for 200l., and was resisted by the society on the ground that the loss was one which should be contributed for in general average, and that the ship's proportion was only 7l. A copy of the rules was then furnished to Daniel Davies by the defendants' secretary, and the sum of 7l. was ultimately received by the plaintiff in payment of the claim.

The *Hermione* was wrecked and became a total loss off Pernambuco in Nov. 1870. On the

2nd Dec. 1870 the plaintiff sent in to the defendants a claim for the amount of the insurance of the *Hermione*, viz., 1000l., and soon after Daniel Davies was requested to attend a meeting of the board of directors on the 6th Jan. 1871. He attended accordingly, and was questioned as to the circumstances of the loss of the vessel. The directors expressed to Davies their opinion that his account of the wreck was not satisfactory, and that the loss was not shown to have been caused by perils of the seas. When he had withdrawn from the room they came to the resolution "That the owners of the *Hermione* had no claim upon the society." The plaintiff had no notice of the meeting, and neither Davies nor the plaintiff had notice of this resolution, or was required to attend the directors on any subsequent occasion. On the 6th April 1871 a notice, signed by ten members of the association, but not signed by the plaintiff or Davies, was sent to the defendants' office. This notice was submitted to the next quarterly meeting of the directors. No notice to attend was given either to the plaintiff or Davies, and in their absence the directors, without further inquiry, came to the same resolution as before, viz., that the owners of the *Hermione* had no claim upon the society. The defendants now admit the total loss of the vessel by perils of the seas, but contend that they are not liable in this action on several grounds—amongst others, upon the ground that the document upon which the plaintiff brings this action does not specify the risk, and is therefore void as a policy of insurance under 30 & 31 Vict. c. 23, ss. 7 & 9. They also contend that the rules and articles of association are to be treated as incorporated with the policy, and that under the rules the plaintiff is not a member of the defendants' society, and is not entitled to recover in respect of any loss. There was no evidence to show that persons insuring with the society were always required to sign the articles of association, and neither Davies nor the plaintiff had been requested to do so, either before or after the registration of the society. The defendants also contend that the resolution came to by the directors was a decision upon the plaintiff's claim, and that, not having been appealed from in the manner pointed out by rule 84, the decision has become final and binding.

It was agreed that the court should have power to draw all such inferences of fact as might have been drawn by a jury. It was also agreed that the court should have power to make all such amendments as may be made under the Common Law Procedure Acts, and to amend the particulars if the court should think fit, so as to enable the plaintiff to recover all or any of the moneys paid by him to the defendants.

The question for the opinion of the court was whether or not the plaintiff has any cause of action against the defendants. If the court should be of opinion in the affirmative, the judgment was to be entered for the plaintiff for such amount as the court should direct, with costs of suit. If the court should be of opinion in the negative, then judgment of nonsuit was to be entered with costs.

The memorandum and articles of association were printed together, and it appeared from the third paragraph of the former that

The objects for which the company is established are the mutual insurance of ships belonging to members of the company, and the doing of all such other things as

[Q. B.]

EDWARDS V. ABERYON MUTUAL SHIP INSURANCE SOCIETY (LIMITED).

[Q. B.]

are incidental or conducive to the attainments of the above objects.

By Article 3.

Every person shall be deemed to have agreed to become a member of the company who insures any ship or share in a ship in pursuance of the regulations hereinafter contained.

By Article 4.

That no person, except the persons who have signed the copy of these articles kept for that purpose at the office of the company, previously to the complete registration of the society, shall become a member of the society, until his admittance shall have been consented to by a board of directors, and he shall have signed the copy of these articles kept for that purpose at the office of the company.

By Article 39.

That the directors shall have full power to enter into and execute, and also to modify, alter, or release any contract or agreement respecting any matter in which the society may be interested; and to adjust, settle, and decide all claims and demands upon the society by the members thereof; or to decide and determine all disputes, controversies, and matters arising between the society and members of the society concerning insurance or claims upon or liabilities by and to the society, and concerning the laws, rules, regulations and bye-laws of the society; and the decision of the directors shall be final and conclusive, as well upon the society as the members thereof; and no member of the society shall be allowed to bring or have any action, suit, or proceeding or other remedy against the society or the members thereof, for any claims or demands upon or in respect of the society or the members thereof, except as is provided by these presents; but no director who shall be interested in the particular matter which shall be referred to the directors, further or otherwise than a general member of the society, or whose claims upon the society shall be submitted to the decision of the directors, shall be allowed to vote or interfere in such matter or claims; and in case any question shall arise as to any director being allowed to vote in such matter or claim, such question shall be finally decided by the directors present at any board, exclusive of the director whose vote shall be questioned; and the directors may, if they shall think fit, cause any of such claims and demands, and the amount to be paid to any member of the society, to be submitted and referred to the decision of any person practising as an average adjuster of marine insurances, who shall be attended by, and have the same powers of calling for, and enforcing the attendance of claimants and other evidence, as the directors would; and the directors or any person on the part of the society, and the claimant, or any person on his behalf, shall be at liberty to attend and produce any evidence before such average adjuster; and in every such case the decision or award of such average adjuster shall be final and conclusive on the society and claimant, and every person interested in such claim, and no appeal shall be allowed therefrom.

By Article 63.

That if any member of the society shall sell any vessel, or shares of any vessel insured by the society, his claims upon the society, and liability to contribute to the losses or damages of other members of the society in respect of such vessel or shares shall cease as soon as the possession of such vessel or shares shall be delivered to the purchaser thereof, or the sale shall be otherwise completed, and notice in writing of the sale shall have been given by the member so selling to the secretary, but not before; and the purchaser of such vessel or shares, if not a member of the society, shall have no claim upon the society in respect thereof; and if the purchaser be a member of the society, such member shall have no claim upon the society in respect thereof, until he shall have entered such vessel or shares in his own name in the books of the society, and in all respects have conformed to the laws, rules, and regulations of the society in respect of such vessel or shares.

By Article 74.

That every vessel insured in the society shall have an agent or ship's husband, whose name and address shall be delivered by the owner or owners thereof to the secretary, and be entered by him in the books of the society;

and every such agent or ship's husband shall have full power to transact and settle all matters of business with the society relating to such vessel, and to pay and receive and give discharges for all moneys which shall be payable from, or receivable by, the owner or owners of such vessel to or from the society; and to whom all notices and demands affecting the owner or owners of such vessel may be delivered, and when delivered shall be binding on such owner or owners.

By Article 83.

That in all cases of any vessel or shares thereof insured by the society being lost, wrecked, stranded, burnt, abandoned, captured, damaged, or injured, by being run down, or otherwise injured by any other vessel, the owner, master, or mate, or some of the crew, shall as soon as circumstances will permit, give notice thereof to the secretary of the society, who shall thereupon, by letter to the several directors, enjoin a board of directors on the first convenient day, not exceeding seven days from the receipt of such notice; and the directors shall proceed to examine the owner, master, and mate, and such of the crew as they shall think necessary, as to the cause of such loss or damage, and shall make such further inquiries, and take such measures and make such decisions and regulations thereon, as in their judgment the case shall require; and the owner or master of any vessel so lost, wrecked, stranded, burnt, abandoned, captured, damaged, or injured, shall not commence any repairs except such as shall be deemed necessary for the immediate safety of such vessel, or settle or compromise any claims or disputes, or prosecute or defend any action or suit in relation thereto, without the previous consent of the directors.

By Article 84.

That if any member of the society shall be dissatisfied with the decision of the directors as to the settlement of any loss or damage sustained by such member, or as to any claim or other matter settled or adjusted, or decided by the directors; and such member so dissatisfied shall procure ten other members of the society, not being directors, to join with him in a written requisition to the directors to reconsider and revise their decision. The directors shall thereupon call a Board of Directors of not less than ten, and reconsider and revise such decision; and in case such member shall be dissatisfied with the further decision of such Board of Directors, such member so dissatisfied, together with twenty other members of the society, may, by writing under their hands, require the secretary to summon a Special General Meeting of the Society, to be held at any time not exceeding fourteen days from the receipt of such writing by the secretary, and such Special General Meeting shall have full power to confirm or vary the decision of the directors, and whatever shall be decided by the Special General Meeting shall be final and binding, as well upon the society as upon all the parties interested in the decision.

The policy marked C, referred to the articles of association, but contained no specification of the particular risk or adventure other than,—"This every insurance effected shall be valid and binding from twelve o'clock of the noon on that day on which the insurance shall be effected until twelve o'clock of the noon of the first day of January then next following."

The document marked D was the same printed policy as C. The part following the printed sentences was, when filled up, as follows:—
No. 1. Offices, Quay-parade, Aberystroth.

This is to certify that Mr. Evan Edwards, as ship's husband for the *Heracles*, 103 tons, A 1, red, whereof is master at the present time Daniel Davies, has this day paid 17l. 10s. for the insurance of fifty-two shares, 1000l. on the said vessel.

Value of whole ship, as per rule for this class, 17l. 10s. per ton, 13l. 15s. 1000l.

(J. N. EVANS, Chairman.

Feb. 24, 1870.

Signature of Directors.

Premium 17l. 10s.

Duty 5s.

17l. 10s.

(W. J. BARNES,

Secretary, JOHN JAMES,

Treasurer, THOMAS JONES.

Q. B.]

EDWARDS v. ASERATRON MUTUAL SHIP INSURANCE SOCIETY (LIMITED).

[Q. B.]

The following were the plaintiff's points of argument: First, that the vessel *Hermione* was in fact insured by the defendants; secondly, that the plaintiff had a sufficient interest in the vessel to sue on the contract of insurance; thirdly, that the plaintiff is entitled to sue on the contract of insurance on behalf of Daniel Davies; fourthly, that the defendants are estopped from denying that they had insured the ship, or that the plaintiff or Daniel Davies had an insurable interest; fifthly, that the plaintiff is a member of the defendants' association, and is entitled to recover; sixthly, that there is nothing in the rules or articles of the defendants' association disentitling the plaintiff to recover; seventhly, that there has been no such proper and final decision of the directors as disentitles the plaintiff to recover.

The following were the defendants' points of argument: First, that the document upon which the plaintiff sues in this action is void as a policy of insurance, because it does not specify the risk insured against (30 & 31 Vict. c. 23, ss. 7 and 9); secondly, that the alleged policy was issued subject to the rules and articles of defendants' society, and that the plaintiff, not having been a member of the said society, is not entitled to recover in this action (see Article 3 of Memorandum of Association, and Rules 3, 4, and 63); thirdly, that the defendants never received notice of any assignment of Daniel Davies' interest in the vessel to the plaintiff, and that the plaintiff, after such assignment, never having become a member of the society, is not entitled to recover, (see Rule 63); fourthly that the defendants dealt with the plaintiff as ship's husband, and never as the owner of the vessel, or as a member of the said society, (see form of alleged policy, and rule 74); fifthly that the decision of the directors given in this matter against the claim for the loss of the *Hermione* made upon the society, not being appealed against in the way provided by the rules, is conclusive, (see Rules 39, 83, and 84.)

Kneelm Digby argued for the plaintiff.—The words of the 7th section of the Stamp Act 1867, upon which the defendants' first objection is based are:—"No contract or agreement for sea insurance shall be valid unless the same is expressed in a policy; and every policy shall specify the particular risk or adventure, the names of the subscribers or underwriters, and the sum or sums insured, and in case any of the above mentioned particulars shall be omitted in any policy, such policy shall be null and void to all intents and purposes." This, however, is a time policy, and it cannot be maintained that more than the description of the exact time covered by the insurance is required by this section. If the particular voyage were required, it would be impossible generally to enter into time policies, and the following section shows that it was not intended to abolish them. [BLACKBURN, J.—This policy seems clearly to satisfy that enactment. At all events, you need say no more on that point until we have heard the other side.] As to the defendants' second point of argument, I do not dispute the assertion that the policy was issued subject to the rules and articles of the defendants' company, but I contend there is nothing in them to prevent the plaintiff recovering in this action. The defendants are estopped from denying his being a member of their company. By the 3rd rule, "Every person shall be

deemed to have agreed to become a member of the company who insures any ship or share in a ship, in pursuance of the regulations hereinafter contained." Although the plaintiff had not signed the articles as required by Rule 4, yet the defendants twice called upon him to pay contributions, and he was accepted by them as the insurer of the ship. Lindley, in summing up the cases on estoppel, says (p. 139 of *The Law of Partnership*, Vol. 1):—"These cases show conclusively that companies cannot, any more than individuals, take advantage of the non-observance of formalities which they have not insisted upon, and have tacitly at least dispensed with; and they show further, that if the directors of a company, in transacting such business of the company as they are authorised to transact, neglect to observe the formalities prescribed by the regulations of the company, and treat an informal act as a formal one, and thereby induce others to do the same, the company is estopped from afterwards disputing the validity of what has been treated as valid by all parties." (LUSH, J.—Besides, if the defendants enter into a policy of insurance with a non-member, why should they not pay?) Another defence is based on Rule 63 of the articles, which requires certain formalities upon the sale of a ship. What was done in this case was a mere transfer of the legal interest, the equitable interest being in the plaintiff before. [BLACKBURN, J.—That rule does not seem to touch this transaction.] Another defence is raised upon Rules 39, 83, and 84, and it is contended that, however right the plaintiff may be, he cannot enforce his claim by action, but in the first place the case finds that the plaintiff had no notice of the directors' meetings. [BLACKBURN, J.—Notice to Davies was notice to plaintiff, and Davies was present.] In the next place, no contract is valid which ousts the jurisdiction of the Superior Courts. [BLACKBURN, J.—Is not the adoption of the course provided merely a condition precedent to an action?] The words of Rule 39 are absolute; "the decision of the directors shall be final and conclusive as well upon the society as the members thereof; and no member of the society shall be allowed to bring or have any action, suit, or proceeding, or other remedy against the society or the members thereof, for any claims or demands upon or in respect of the society or the members thereof, except as is provided by these presents." The principle of law was laid down in *Scott v. Avery* (6 H. L. Cas. 811), that parties cannot by contract oust the courts of their jurisdiction; but any person may contract that no right of action shall accrue till a third person has decided on any difference that may arise between himself and the other party to the covenant. In that case the decision of arbitrators, who were to ascertain the sum to be paid to an insurer for loss, was declared a condition precedent to the maintaining of an action; and it was held that was a lawful condition. Subsequent cases have also gone to increase the exceptions to the principle, but none of them have been decided on words so clearly ousting the jurisdiction as these do. The strongest case of exception is *Elliot v. The Royal Exchange Assurance Company* (L. Rep. 2 Ex. 237), where a covenant in a policy of fire insurance provided that "in case any difference shall arise touching any loss or damage, such difference shall be submitted to arbitrators,

Q. B.]

EDWARDS v. ABERATRON MUTUAL SHIP INSURANCE SOCIETY (LIMITED).

[Q. B.]

whose award in writing shall be conclusive and binding on all parties; but if there shall appear any fraud or false swearing, the claimant shall forfeit all benefit of his claim." Bramwell, B., dissented from the conclusion of the majority, that this was only a covenant to pay the adjusted loss, and that the plaintiff had no cause of action. The article in this case goes further than that; and if it prevents this action, it will render the decision of the directors final on the question of whether the ship was lost. Before *Scott v. Avery*, the cases are still more opposed to any effect being given to such an answer to an action as this. In *Thompson v. Charnock* (8 T. Rep. 139), it was held that to a covenant in a deed, made for the performance of several matters, the defendant cannot plead that in the deed there is a covenant that in case any difference should arise between the parties respecting any part of the agreement, it should be settled by three arbitrators, and that he offered to refer the matter in dispute, but that the plaintiff refused. The previous cases were all dismissed, and Lord Kenyon afterwards said: "It is not necessary now to say how this point ought to be determined if it were *res integra*, it having been decided again and again that an agreement to refer all matters in difference to arbitration is not sufficient to oust the courts of law or equity of their jurisdiction." The covenant in *Horton v. Sayer*, (4 H. & N. 643), was held to be an absolute agreement to oust the Superior Courts of their jurisdiction, and therefore void; the form of it was very similar to this, except that it did not constitute so absolute an agreement to oust the jurisdiction; it was that if any difference, variance, controversy, doubt, or question should arise between the parties touching or concerning any covenant, clause, proviso, matter, or thing in the said indenture of lease contained, then all and every such matter in difference should be discussed, resolved, and finally ended by arbitrators chosen as therein provided, and that the parties should not prosecute any suit or seek any remedy either in law or equity for relief in the premises without first submitting to such arbitration and reference. In *Roper v. Lendon* (1 E. & E. 825), an agreement to resort to arbitration was held to be merely collateral to the agreement to pay. Lord Campbell said: "The court will not, therefore, treat the agreement to refer as ousting their jurisdiction until there has been a reference. The distinction between the present case, and cases like *Scott v. Avery* is plainly pointed out in the judgment there delivered in the House of Lords. The present case does not fall within that decision, and the defendant could have enforced the agreement to refer only by an application under the Common Law Procedure Act 1854, s. 11." Here the word of the 39th article neither express a collateral agreement nor make a reference a condition precedent to an action; they absolutely oust the jurisdiction of the courts. (BLACKBURN, J.—*Trudeau v. Holmes* (1 H. & C. 72), seems to be very like this case. That was an action for a total loss against a Mutual Marine Insurance Association, one of the rules of which was that all average claims and claims of abandonment should be adjusted and settled by arbitration, the award to be final, and that no action at law should be brought until the arbitrators had given their decision. It was held that no action could be maintained on the policy for a total loss until the claim

had been adjusted and settled by arbitration in pursuance of the rule.) That clause made arbitration a condition precedent to an action, but here all action is excluded entirely. If this article is held to be a bar to legal proceedings, the court will be going beyond any case hitherto decided. At all events the resolution of the directors to be a binding decision must have been upon notice to the plaintiff. (BLACKBURN, J.—If resort to the directors and the general company is a condition precedent, it cannot matter to you whether there was an improper decision or none at all. At all events there has been no appeal to a general meeting.)

B. T. Williams (with Lush) for defendants.—"No interpretation has been put upon these words, 'risk or adventure,' in the Stamp Act 1867; but if the court consider this form of policy sufficient I will not press the objection. (BLACKBURN, J.—It is manifestly a dishonourable point to take, and the proceeding is aggravated by the point being untenable.) With regard to the plaintiff being entitled to recover, the case finds that his name appears on all the documents issuing from the company only as ship's husband; until after the loss the defendants had no information of any other interest he had in the ship. The insurance was effected by Davies. (BLACKBURN, J.—But two contributions were claimed upon and made by the plaintiff; the defendants are therefore estopped from denying his interest, and from taking advantage of any informality.) The important point, no doubt, is as to the decision of the directors. This 39th article contains an important condition of the formation of the society; it would be impossible to transact their business without an arrangement for settling the claims and disputes of the members. (BLACKBURN, J.—You may take it that the policy and the rules are to be read together, and also that it was in the defendants' power to make their mode of reference a condition precedent to this action; the question is whether it is so made by this rule.) By section 84 two appeals are given to a member dissatisfied with the first decision of the directors, and for this reason the cases relied on by the plaintiff have no application. Further, *Tvedesen v. Holman* is exactly in point.

Digby in reply.—In all the cases where arbitration has been held to be a condition precedent to an action, it has been so stated in the agreement, *a. g.*, *Braunstein v. Accidental Death Assurance Company* (1 B. & S. 782). Here, on the contrary, the 39th rule distinctly provides that there shall be no appeal to any other tribunal than the directors.

BLACKBURN, J.—I think in this case, on the whole, our judgment must be in favour of the defendants, and a nonsuit must be entered. There are four points which have been raised.

As to the first, we think this is a time policy, which is not affected by this provision of the Stamp Act. The point ought not to have been raised by the defendants, and is, moreover, a bad one.

The second point is raised upon the articles of association, which are incorporated into the contract, by the references to them on the policy. The memorandum of association states the objects for which the company was established to be the mutual insurance of ships belonging to members of the company; and the

Q. B.]

EDWARDS v. ABERATHON MUTUAL SHIP INSURANCE SOCIETY (LIMITED).

[Q. B.]

fourth article requires persons, before they become members, to sign the articles. Now, it appears that the plaintiff had an equitable interest in the ship, but his name was not entered on the register; Davies, the registered owner, acting for the plaintiff, effected this insurance with the defendants in his own name. The company made calls yearly upon the members, and twice the plaintiff was asked for and made payments for calls. The second point was that the plaintiff never having signed the articles of association was not a member, and therefore had no contract with the defendants; but the answer is, the defendants by their claiming calls upon the plaintiff, and receiving payment from him as owner of the ship, are estopped from saying that he is not a member.

The third point is that, by the 63rd article, even if the plaintiff were at any time a member of the society, he forfeited his rights by the transfer of the legal interest in the ship to him by Davies, and his neglect afterwards to take the steps required. That article, however, only relates to when any member of the society shall sell any vessel, or shares of any vessel, insured by the society; and, to my mind, this transfer of the legal interest was no such sale of the ship.

These three points we determine in favour of the plaintiff, but the fourth must go the other way.

Amongst the rules of the society incorporated in the contract are the 39th, 83rd, and 84th; by the first of these the directors are empowered to execute contracts, "and to adjust, settle and decide all claims and demands upon the society by the members thereof; or to decide and determine all disputes, controversies and matters arising between the society and members of the society concerning insurances or claims upon, or liabilities by or to the society, and concerning the laws, rules, regulations, and bye-laws of the society; and the decision of the directors shall be final and conclusive, as well upon the society as the members thereof;" then comes the clause, the effect of which we must decide as bearing upon this fourth objection—"and no member of the society shall be allowed to bring or have any action, suit, or proceeding, or other remedy against the society or the members thereof for any claims or demands upon or in respect of the society or the members thereof, except as is provided by these presents." Further on the article provides that "the directors may, if they shall think fit, cause any of such claims and demands, and the amount to be paid to any member of the society to be emitted and referred to the decision of any person practising as an average adjuster of marine insurances," who shall bear evidence; "and in every such case the decision or award of such average adjuster, shall be final and conclusive on the society and claimant, and every person interested in such claim, and no appeal shall be allowed therefrom." Article 83 provides for the investigation of any loss by the directors, and their decision thereon. And by the following Article 84, if any member be dissatisfied with a decision of the directors, he may procure ten members of the society to join in a written requisition to the directors to reconsider and revise such decision, and if dissatisfied with the directors' further decision, he may, if twenty members will join him in a requisition, obtain the decision of a

special general meeting of the society," which shall be final and binding as well upon the society as upon all parties interested in the decision."

Taking these provisions together, what did the parties who formed the society really mean by them? *Scott v. Avery* decided that an agreement to refer a disputed amount of claim did not necessarily mean to oust the courts' jurisdiction, and was not, therefore void; but if it was intended that no action should lie except for the amount which must be previously fixed by an arbitrator, a reference was made a condition precedent only, and the agreement was valid; in which case the action must fail unless the amount of claim has been fixed by arbitration. Here the articles say an aggrieved member may, with the help of ten others, go to the directors a second time, and if he likes he may, with the help of twenty others, take the opinion of a general meeting. It seems to me that the members of this Mutual Insurance Society have agreed that all three steps shall be taken before a member shall resort to law or equity. I think the case of *Tredwen v. Holman* is very near this, and the decision is applicable here. The special case finds that the plaintiff has not exhausted all the power to appeal provided by the 84th article, and therefore the present action will not lie. I see nothing to prevent the plaintiff from now going to a general meeting of the society, nor from obtaining a reconsideration of what is now admitted to have been a wrong decision of the directors.

MELLOR, J.—I am of the same opinion. Mr. Digby has disposed successfully of all points except the last. *Tredwen v. Holman* is, I think, applicable to that point, and rightly decided. It is quite competent to a society for mutual insurance to agree to do their utmost to settle their own differences. The language of these rules is somewhat obscure, and there is some difficulty in collecting its meaning; but I think the members must have intended to require a reference, first to the directors again, and then to a general meeting, as a condition precedent to action. The plaintiff was bound to abide by those rules, and therefore a nonsuit must be entered. I agree with my brother Blackburn, that now it has been discovered there really was a loss of the ship, the decision of the directors ought to be reconsidered.

LUSH, J.—I am of the same opinion. I agree with what has been said on the first three points, and I have, especially, no doubt that after what has occurred, the defendants are estopped from disputing the plaintiff's being a member of the company. The real question in the case is what was the nature of the contract concerning the settlement of differences. I think that the articles do not form an absolute agreement to oust the jurisdiction of the courts, but merely impose the condition of appealing first to the two tribunals of their own, before a member can resort to litigation against the society. I agree that there seems to be nothing to prevent now the appeal to a general meeting which the plaintiff has omitted.

Judgment for defendants.

Attorneys for plaintiff, Paterson, Snow, and Burney.

Attorneys for defendants, Hayes, Twissden, Parker, and Co.

ADM.]

THE LEMINGTON.

[ADM.]

COURT OF ADMIRALTY.

Reported by J. F. ASHFALL, Esq., Barrister-at-Law.

Monday, Nov. 30, 1874.

THE LEMINGTON.

Collision—Ship wholly under control of charterers—Proceeding in rem—Liability of the res.

A ship, chartered by her owners so that the whole control and management of ship and crew are vested in the charterers, is liable in a proceeding in rem for damage done to another ship by the negligence of her crew, although they are the charterers' servants. (a)

THIS was a cause of collision instituted on behalf of the owners of the steamship *Conservator* against the steam wherry *Lemington*, and her owner intervening. The petition, so far as is material, was as follows:—

1. At a little after 4 a.m., on the 23rd July 1874, the screw steamship *Conservator*, of 580 tons' register, was lying in the locks of the Tyne Dock, moored fore and aft to the quay.

2. At such time the above-named vessel *Lemington* drove against, and with her stern struck the *Conservator* on her starboard side, between the bridge and the fore rigging, and did her considerable damage.

3. The said collision was occasioned by the *Lemington* having been inefficiently and insecurely moored or fastened, and otherwise by the neglect of those in charge of her, to take proper measures for keeping her clear of the *Conservator*.

The answer filed by the defendants alleged that the *Lemington* was a screw wherry of about forty tons, and was manned by a crew of two hands, one Joseph Forster being master, and one Edward Forster engineer; that the collision was occasioned by neglect of the dock master of the Tyne Dock in casting off the *Lemington's* mooring ropes and opening the sluices of the dock, and that the dock master was in charge under the Harbour, Docks, and Piers Clauses Act 1847, and so far as the *Lemington* was concerned, the collision was an inevitable accident; the second and sixth articles of the answer were as follows:

2. At the time of the said collision, and for some time previously, the *Lemington* was and had been let by the defendants to, and hired from the defendants, by the said Joseph Forster, for the purpose of carrying cargo on the river Tyne, under an agreement by which the said Joseph Forster agreed to and did pay to the defendants one-fifth part of the gross earnings of the said wherry, and all disbursements and expenses incurred and connected with the management, working, employment, and navigation of the said wherry were agreed to be and were paid by the said Joseph Forster, and the said Joseph Forster had absolute control over the management, working, employment, and voyages of the said wherry, and over the navigation of the said wherry during the said voyage; and the wherry was not in any way under the control of the defendants during the said letting and hiring, and the said Joseph Forster, in the said manage-

(a) It being a fact in the case that the *Lemington* was not a sailing vessel, it was contended on behalf of the defendants that no maritime lien attached for damage done by her, because, previous to 3 & 4 Viet. c. 65, s. 6, the High Court had no jurisdiction within the body of a county, and that consequently there was no maritime lien enforceable by the law of England for damage done within the body of a county, and that the above Act gave no maritime lien for such damage, and if there were no such lien there was only a personal liability, and the owners were not personally responsible for the negligent acts of other persons' servants. The learned judge, however, held that the point was not sufficiently raised upon the pleadings, and refused to entertain it. He at the same time declined to express any opinion upon it either one way or the other.—Ed.

ment, working, employment, and navigation acted on his own behalf as principal, and not in any way as agent or servant of the defendants in that behalf.

6. The *Lemington* was not under the management or control of the defendants, so as to render them liable for any loss or damage sustained by the plaintiff in the said collision.

The plaintiffs now moved the court to reject the second and sixth articles of the answer, upon the ground that they disclosed no ground of defence to the action, and were irrelevant.

E. C. CLARKSON, in support of the motion.—Assuming the facts stated in the second article of the answer to be true, the *Lemington* was in effect chartered to Joseph Forster so as to be actually demised to him for the time being. The question then arises, does a ship so chartered continue to be responsible for damage done negligently whilst she is in the possession of the charterer. I admit that the owners would not be personally responsible, but I submit that the demise of the ship does not take away the responsibility of the res. A maritime lien attaches to a ship for damage done through the negligence of those who are in charge of the ship, unless they are acting unlawfully or out of the scope of their authority. This lien cannot be displaced by means of chartering the ship, otherwise every owner would entirely avoid liability by demising his vessel to another person. Although this question has never been decided formally, Dr. Lushington has clearly intimated his opinion on it in *The Ticouderoga* (Swab. 215); that case was a cause of damage instituted against a vessel which was chartered to the French Government during the Crimean war, and by the terms of the charter-party she was bound to employ a particular tug for towage purposes, and the tug, whilst towing her, negligently brought her into collision with the plaintiff's vessel, and the owners of the *Ticouderoga* sought to contest the liability of their ship, upon the ground that the negligence was not that of those on board the *Ticouderoga*, but of the steamer attached to her, which was not in "any sense her servant; Dr. Lushington there said: "Supposing a vessel is chartered so that the owners have divested themselves, for a pecuniary consideration, of all power, right, and authority over the vessel for a given time, and have left to the charterers the appointment of the master and crew, and suppose in that case the vessel had done damage and was proceeded against in this court—I will admit, for the purpose of argument, that the charterers and not the owners would be responsible elsewhere, although I give no opinion upon that point—but still I should say here to the parties who had received the damage, that they had by the maritime law of nations, a remedy against the ship itself;" and it was held that the *Ticouderoga* was liable for the acts of the tug. Again, in *The Ruby Queen* (Lush. 266), a yacht, doing damage through the negligence of the servants of a yachting agent in whose hands she had been placed for sale, was held liable in rem. Owners cannot divest their ships of liability by any voluntary acts of their own, and the possession of charterers is the possession of the owners where a question of liability for acts of negligence occurring in the ordinary course of the ship's employment arises. When a maritime lien once attaches to a ship, it cannot be got rid of by change of ownership; consequently, when the owners resume possession of their ship out of the hands of the charterers—as they have done for the purposes of this case by appearing as owners absolutely—they

take it back subject to the lien which attaches to it. The charterers are nothing else but *pro hac vice* owners, and their acts as owners bind the ship. The charterers must be in the position either of agents for the owners or of absolute owners for the time being, and in either case their acts will render the ship responsible.

James P. Aspinall, for the defendants, in support of the answer.—It being admitted that the defendants would not be liable in an action *in personam* for the damage sustained by the plaintiffs, the only question is, whether their ship is liable in a proceeding *in rem* in respect of that damage. To give a right of proceeding *in rem* against the ship, as apart from the right of proceeding *in personam* against the owners, the plaintiffs must have a maritime lien upon the ship for the damage done; otherwise the proceedings *in rem* would be a mere process of the court to enforce a personal liability which does not exist. It was decided in *The Bold Buccleugh* (7 Moore P. C. C. 267), that a ship damaging another in collision is subject in respect of that damage to a maritime lien, which travels with the thing into whosesoever possession it may come, but that decision only applies to cases where the lien has attached. In this case, I submit, that no lien has attached upon this ship. No lien attaches upon a vessel for damage done, unless that damage is done by the default of persons who are at the time of the damage the owners or their servants, and so done that the owners would be personally responsible for what is done. A lien which has attached to a vessel before it comes into the possession of owners, no doubt continues whilst in their possession; but if damage be done whilst they are owners, their ship is only responsible if they themselves would be responsible in an action *in personam*. In *The Druid* (1 W. Rob. 392, 398), Dr. Lushington says: "Now in some cases it is obvious that a ship may be liable where the owners would not be personally responsible, as, for instance, in cases of lien upon a ship for seamen's wages or bottomry bonds, when the lien has been acquired before the existing owners made their purchase. Against such liabilities the purchasers must protect themselves by caution or by contract at the time of sale, as against the enforcement of the outstanding lien in a proceeding against the ship, in this court they would have no legal defence upon the plea that the existence of the lien was unknown to them at the time the purchase was effected. Again, it might possibly be that an innocent purchaser may be liable to have his ship arrested and sold for the payment of damages in a case where the former owners would have been responsible, and the damage was occasioned before the purchase was made; but upon this point I give no opinion whatever. In the case above mentioned, it is to be remembered that the liability must be assumed to have attached upon the ship prior to the time when the ownership rested in the existing owners. In all the cases of action which may arise from circumstances occurring during the ownership of the persons whose ship is proceeded against, I apprehend that no suit could ever be maintained against a ship where the owners were not themselves personally liable, or where their personal liability had not been given up, as in bottomry bonds, by taking a lien on the vessel. The liability of the ship, and the responsibility of the owners in such cases, are convertible terms. The ship is not liable if the owners are not respon-

sible; and *vice versa*, no responsibility can attach upon the owners if the ship is exempt, and not liable to be proceeded against." The collision here complained of occurred during the ownership of the defendants, and it is conceded that they are not personally liable; hence it follows from *The Druid* that their ship is not liable. It is true that in the case of *The Druid* the master was acting illegally, as well as out of the scope of his authority; but in *The Orient* (3 Mar. Law Cas. O. S. 321) it was held that an agent for the completion and sale of a ship, who, acting out of the scope of his authority, had placed the ship into a certain position to assert his own right to foreshore, and had so damaged another vessel, was not the agent of the owners for that purpose, and did not by his act render the vessel liable; in that case there was no illegality; simply an unauthorized act of an agent, and yet the ship was not responsible, and clearly upon the ground that there was no personal responsibility on the part of the owners. The cases cited by the plaintiff cannot be taken as overruling the considered judgment in *The Druid* and the judgment in *The Orient*. Moreover, they are distinguishable upon two grounds: First, that they are really not decisions upon the point now under discussion; secondly, because they relate to cases in which the person doing the damage was an agent of the shipowner, whilst in the present case there was no such agency. *The Ticonderoga* (Swabey, 217) is not a decision in point; what was said in that case, as to ships in the hands of charterers, was entirely an *obiter dictum*, and had nothing to do with the decision which proceeded upon the ground that the shipowner, by entering into the charter-party, had undertaken voluntarily to employ as his servant, and to assist him in performing his contract, a tug named by the French Government, and that the ship was responsible for the negligence of that tug. But I submit that even that ground of decision is erroneous; the mere voluntary entering into an agreement, which obliges a shipowner to obey the orders of another person, will not render him responsible for the acts of that other person; an owner whose ship is chartered to the British Government as a transport, and is bound to obey the orders of the officer in command of a transport fleet, is not responsible for damage done through obeying the orders of that officer: (*Hodgkinson v. Fernie*, 2 C. B., N. S., 415.) *The Ticonderoga* does not apply in any way to the present case, save in so far as it expresses an unnecessary opinion, and that opinion is in direct contradiction to the considered judgment in *The Druid* (*ubi sup.*) *The Ruby Queen* (Lush. 266) is wrong upon the same grounds, and, moreover, the question of liability *in rem* was not raised upon the pleadings, and only arose incidentally, and the court declined to entertain it at the hearing upon that ground.

The charterers, in such a case as the present, are not in any sense the agents of the shipowners, but they rather hold the position of independent contractors who undertake the whole management and working of the ship, free from the control of the owners; for such contractors the shipowners cannot be held responsible, even through their ship. In the case of towage contracts the general rule in this country is that the tow is responsible for the negligence of the tug, but that proceeds upon the ground that the tug remains during the performance of the

ADM.]

THE LEMINGTON.

[ADM.]

service under the control of the master or pilot of the tug, and is obliged to obey his orders. But in a case where a tug is voluntarily employed by shipowners to tow their vessel under such circumstances that the tug has the absolute control over the navigation of both tug and tow, and in fact acted as both tug and pilot, I submit that the tow would not be liable for the negligence of the tug. In *The American and The Syria* (31 L. T. Rep. N. S. 42; 2 Asp. Mar. Law Cas. 350) it was held that a disabled steamship, towed by another in such a manner that the "governing power" was wholly in the towing ship, was not liable for the negligence of the towing ship, and several American cases holding this doctrine were approved. In *The Owners of the brig James Gray v. The Owners of the ship John Fraser and the steamer General Clinch* (21 Howard U. S. Sup. Ct. Rep. 184) it appeared that the brig was at anchor in harbour, and the ship coming into harbour in tow of the steam tug ran into her, and it was found that the collision was occasioned by the sole default of the steamer, and that the steamer was not under the control of the ship; the proceedings were in rem against the ship and steam tug. It is there said by the court: "It is true that the *John Fraser* was the *res*, or thing which struck the *James Gray*, and did the damage. But the mere fact that one vessel strikes and damages another does not of itself make her liable for the injury; the collision must in some degree be occasioned by her fault. . . . And as this collision was forced upon the *James Fraser* by the controlling power and mismanagement of the steam tug, and not by any fault or negligence on her part, she ought not to be answerable for the consequences." In *Sturgis v. Boyer* (24 Howard, 110, 121), which was also a proceeding in rem, it appeared that a ship was negligently towed into a lighter by a tug, which had the sole control over her for the purpose of removing her from one part of a harbour to another, the crew of the ship not being on board; it is there said: "Cases arise, undoubtedly, where both the tow and tug are jointly liable for the consequences of a collision; as when those in charge of the respective vessels jointly participate in their control and management, and the master or crew of both vessels are either deficient in skill, omit to take due care, or are guilty of negligence in their navigation. Other cases may well be imagined when the tow alone would be responsible, as where the tug is employed by the master or owners of the tow as the mere motive power to propel their vessels from one point to another, and both vessels are exclusively under the control, direction, and management of the master and crew of the tow. Fault in that case cannot be imputed to the tug, provided she was properly equipped and seaworthy for the business in which she was engaged; and if she was the property of third persons, her owners cannot be held responsible for the want of skill, negligence, or mismanagement of the master and crew of the other vessel, for the reason that they are not the agents of the owners of the tug, and her owners in the case supposed do not sustain towards those entrusted with the navigation of the vessel the relation of principal. But whenever the tug, under the charge of her own master and crew, and in the ordinary course of such employment, undertakes to transport another vessel, which, for the time being, has neither her master nor crew on board,

from one point to another over waters where such accessory motive power is necessary or usually employed, she must be held responsible for the proper navigation of both vessels; and third persons suffering damage through the fault of those in charge of the vessels must, under such circumstances, look to the tug, her masters or owners, for the recompense which they are entitled to claim for any injuries that vessels or cargo may receive by such means. . . . Vessels engaged in commerce are held liable for damage occasioned by collision, on account of the complicity, direct or indirect, of their owners, or the negligence, want of care or skill on the part of those employed in their navigation. Owners appoint the master and employ the crew, and, consequently, are held responsible for their conduct in the management of the vessel. Whenever, therefore, a culpable fault is committed, whereby a collision ensues, that fault is imputed to the owners, and the vessel is just as liable for the consequences as if it had been committed by the owner himself. No such consequences follow, however, when the person committing the fault does not, in fact or by implication of law, stand in relation of agent to the owners. Unless the owner and the person or persons in charge of the vessel in some way sustain towards each other the relation of principal and agent, the injured party cannot have his remedy against the colliding vessel. By employing a tug to transport their vessel from one point to another, the owners of the tow do not necessarily constitute the master and crew of the tug their agents in performing the service. They neither appoint the master of the tug or ship the crew; nor can they displace either the one or the other. Their contract for the service, even though it was negotiated with the master, is, in legal contemplation, made with the owners of the vessel, and the master of the tug, notwithstanding the contract was negotiated with him, continues to be the agent of the owners of his own vessel, and they are responsible for his acts in her navigation: (*Sproul v. Hemmingway*, 14 Pickering, 1; 1 Parsons on Maritime Law, 208; *The brig James Gray v. The John Fraser*, et al., 21 How. 184). . . . Without repeating the testimony, it will be sufficient to say that it clearly appears in this case that those in charge of the steam tug had the exclusive control, direction, and management of both vessels, and there is not a word of proof in the record either that the tug was not a suitable vessel to perform the service for which she was employed, or that anyone belonging to the ship either participated in the navigation or was guilty of any degree of negligence whatever in the premises." If, then, a tug having the sole control of a ship she is towing is not the agent of the ship-owners so as to render their ship liable for damage done by the ship through the negligence of the tug, charterers having the sole control of the ship they hire are equally not the agents of the owners of the ship, and cannot by their negligent acts render the ship responsible. There can be no distinction between persons controlling a ship by a motive power outside of her, and persons controlling her by means of her own motive force; if owners by their ship are not responsible for the acts of persons they employ to render towage services they cannot be responsible for the acts of persons who are in no way employed by them, but who are wholly independent of their control.

[ADM.]

THE MAGNET; THE DUKE OF SUTHERLAND; THE FANNY M. CARVILL.

[ADM.]

I submit that the second paragraph of the answer shows a good defence to the action.

E. C. Clarkson in reply.—*The Druid* (*ubi sup*) was a decision proceeding upon the peculiar circumstances of the case; besides when Dr. Lushington spoke of "owners" he must be taken to have meant not merely the actual owners, but *pro hac vice* owners, that is to say, persons whom the owners allow to be in position of owners for a reward to themselves. If the owners are damnified by this suit they will have their remedy over against the charterers. The American tug cases are distinguishable because there either tug or tow was responsible, and there was therefore a *res* to satisfy the damage done; here, however, if the ship is not liable for the act of the charterers there will be no *res* as security for the plaintiffs and the defendant cannot to deprive the plaintiffs of their security by chartering their vessel.

Sir R. PHILLIMORE.—I think the law was correctly laid down by Dr. Lushington, and the elaborate and ingenious argument of Mr. Aspinall has not availed to convince me that I ought to come to a decision at variance with that given in the case of *The Ticonderoga* (*ubi sup*).

The words of Dr. Lushington in that case are these:—"We must recollect that this is a proceeding *in rem*. I am not aware, where there has been any proceeding *in rem*, and the vessel so proceeded against has been clearly guilty of damage, that any attempt has been made in this court to deprive the party complaining of the right he has by the maritime law of the world of proceeding against the property itself?" This is the language in the year 1867 of that learned and experienced judge, and must be taken to be his deliberate opinion upon the law applicable to the subject. He goes on to say as if anticipating this very case:—"Supposing a vessel is chartered so that the owners have divested themselves, for a pecuniary consideration, of all power, right, and authority over the vessel for a given time, and have left to the charterers the appointment of the master and crew, and suppose in that case the vessel had done damage, and was proceeded against in this court—I will admit, for the sake of argument, that the charterers, and not the owners, would be responsible elsewhere, although I give no opinion upon that point;—but still I should say to the parties who had received the damage, that they had, by the maritime law of nations, a remedy against the ship itself." Then Dr. Lushington refers to the case of compulsory pilotage as being the only case in which a vessel is exempt from the damage he has inflicted, on the ground that the pilot, being forced on the owners by compulsion, is by implication of law not the latter's servant; and then he says: "It is impossible to contend that because a person has entered into a voluntary contract, by which he is finally led into mischief, that that can relieve him from making good the damage he has done."

It is true that in *The Druid* (*ubi sup*), Dr. Lushington said, "the liability of the ship and the responsibility of the owners are convertible terms. The ship is not liable if the owners are not responsible. And vice versa no responsibility can attach upon the owners if the ship is exempt and not liable to be proceeded against." In that case however it should be remembered that the learned judge was dealing with damage done by the ship through the act of a mere servant or

agent acting not only without authority but unlawfully. And moreover the true interpretation of the general proposition of law, there laid down, depends very much upon the sense in which the word "owners" is used. A vessel placed by its real owners wholly in the control of charterers or hirers, and employed by the latter for the lawful purposes of the hiring, is held by the charterers as *pro hac vice* owners. Damage wrongfully done by the *res* whilst in possession of the charterers is, therefore, damage done by "owners" or their servants, although those owners may be only temporary. Vessels suffering damage from a chartered ship are entitled *prima facie* to a maritime lien upon that ship, and look to the *res* as security for restitution. I cannot see how the owners of the *res* can take away that security by having temporarily transferred the possession to third parties. A maritime lien attaches to a ship for damage done, through the negligence of those in charge of her, in whosever possession she may be, if that damage is inflicted by her whilst in the course of her ordinary and lawful employment, authorized by her owners. Whether the damage is done through the default of the servants of the actual owners, or of the servants of the chartering owners, the *res* is equally responsible, provided that the servant making default is not acting unlawfully, or out of the scope of his authority. I am of opinion that the second and sixth articles of the answer must be struck out.

Solicitors for the plaintiffs, Gellatly, Son, and Warton.

Solicitors for the defendants, Clarkson, Son, and Greenwell.

Dec. 19 1874, Jan. 15, 16, and 19, 1875.

THE MAGNET.

THE DUKE OF SUTHERLAND.

THE FANNY M. CARVILL.

Collision—*Merchant Shipping Act 1873* (36 & 37 Vict. c. 85) s. 17—*Infringement of regulation for preventing collision at sea*—*Materiality to case*—*Lights*—*Visibility of*—*Obstruction of*—*Screens*.

A ship, to be deemed in fault under the Merchant Shipping Act 1873 (36 & 37 Vict. c. 85) sect. 17, for having infringed any of the regulations for preventing collisions, must have infringed those regulations in such a manner that the infringement is material to the case before the court, and is such as might by possibility have caused or contributed to the particular collision; a mere infringement which by no possibility could have anything to do with the collision, will not render the ship liable.

A ship carrying side lights which are visible only at the distance of about a mile, instead of at a distance of two miles, as required by the regulations, infringes those regulations so as to make her liable to be deemed in fault under the statute.

Seem, that a ship carrying such lights must be deemed in fault, whether the deficiency of the light did or did not contribute to the collision.

Seem, that where lights are so fixed that they are partly obscured from a particular point right ahead by the catheads of a ship carrying them, but are visible both above and below the catheads, there is no such infringement within the statute as will render the ship liable in a collision with

ADM.]

THE MAGNET; THE DUK OF SUMERLAND; THE FANNY M. CARVILLE.

[ADM.]

another ship approaching broad on the starboard bow of the former.

The regulation as to the length of the screens of the ship's side lights, being for the purpose of preventing those lights from being seen across the bows of the ship carrying them, and being merely subsidiary for the purpose of securing the visibility of each distinct light, a ship carrying screens shorter than those required by the regulations, is not guilty of any infringement within the meaning of the Act, if the lights are not, in fact, even across her bows, and it is shown that by reason of the construction of the ship, she could not have carried larger screens with safety.

A steamer seeing lights close ahead of her, carried by some ship, and being unable to make out those lights, or the course of the ship carrying them, should slacken speed until she is able to ascertain the meaning of the lights, and to avoid the vessel carrying them.

THERE were three cases of collision, in which the main question was the construction of the 17th section of the Merchant Shipping Act 1873 (36 & 37 Vict. c. 85). By that Act (sect. 33), the 29th section of the Merchant Shipping Act 1862 (25 & 26 Vict. c. 63), the section which enforces the observance of the regulation for preventing collisions at sea, is repealed, and the following enactment is substituted therefor:—

Sect. 17.—If in any case of collision it is proved to the court before which the case is tried, that any of the regulations for preventing collision, contained or made under the Merchant Shipping Act, 1854 to 1873, has been infringed, the ship by which such regulation has been infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the court that the circumstances of the case made a departure from the regulation necessary.

THE MAGNET.

This was a case of damage instituted on behalf of the owners of the Swedish bark *Eugenie*, against the British steamship *Magnet* and her owner intervening.

The case on behalf of the barque was, as appeared by their petition, as follows:—At about 12.30 a.m. on the 15th Nov. 1874, the *Eugenie*, a barque of 398 tons English measurement, bound upon a voyage from Liverpool to Buenos Ayres with cargo, was about four or five miles to the eastward of the north-west lightship, off the entrance of the river Mersey. The wind was about N.W. by W., a strong breeze, the tide was flood, the weather was dark and rainy, and the *Eugenie* was close hauled on the port tack, heading N by E, and going about eight knots an hour. Her proper regulation lights were duly exhibited and burning brightly, and a good look out was kept. At such time the mast head and green lights of two steam ships, about a quarter of a mile apart, were seen at the distance of about two miles from the *Eugenie*, and bearing broad on her port bow. The *Eugenie* was kept close hauled on the port tack, and the headmost of the two steamers passed clear ahead of her, but the sternmost one, which proved to be the *Magnet*, instead of taking proper measures for keeping out of the way of the *Eugenie*, improperly attempted to pass ahead of her, and rendered a collision inevitable, and, although the helm of the *Eugenie* was put up to ease the blow, the *Magnet* with her starboard side came into violent collision with the port bow of the *Eugenie*. The *Magnet* subsequently towed the *Eugenie* into the Mersey. The allegations of negligence against the *Magnet* were

that she improperly neglected to keep out of the way of the *Eugenie*; that she improperly attempted to go ahead of the *Eugenie*; and that the *Magnet* did not duly observe and comply with the provisions of Article 16 of the Regulations for Preventing Collisions at Sea.

The case on behalf of the *Magnet* appeared in the defendant's answer, which, so far as is material, was as follows:—

1. The *Magnet* is a screw steamer belonging to the port of Dublin, of the registered tonnage of 378 tons. A little before 9.40 a.m. on the 15th day of November, 1874, the *Magnet*, navigated by a crew of 20 hands, all told, was proceeding in the prosecution of a voyage from Dublin to Liverpool between the North-West Lightship and the Bar Lightship.

2. There was fresh breeze from the West North West, with thick cloudy weather and showers of rain, and a heavy sea was running. The *Magnet* was proceeding at full speed, heading about East South East, having her regulation lights duly exhibited and burning brightly, and a good look-out being kept on board her.

3. At the time and under the circumstances aforesaid, those on board the *Magnet* observed a faint glimmer or reflection of a ship's light a little on the starboard bow of the *Magnet*, but it immediately disappeared. The master of the *Magnet* supposed the light to be the light of a vessel proceeding in the same direction as the *Magnet*, and yawing in the heavy sea, and he ordered the helm of the *Magnet* to be starboarded, and the course of the *Magnet* was altered about a point under the starboard helm.

4. When this had been done, the port light of a vessel, which proved to be the *Eugenie*, suddenly opened out close to the *Magnet* on her starboard bow. The helm of the *Magnet* was immediately put hard-a-starboard, but it was too late to avoid a collision, and the two vessels came into contact, the bowsprit of the *Eugenie* striking the *Magnet* on her starboard side at the fore part of the bridge. The *Eugenie* dragged along the starboard side of the *Magnet*, tearing away the rails, bulwarks, and davits of the *Magnet*, and causing other damage to her.

5. The *Eugenie* neglected to have her side lights properly exhibited, according to the regulations in force for preventing collisions at sea, and was in fault for such neglect.

6. The said collision was occasioned by the negligence of those on board the *Eugenie*.

7. The said collision was not occasioned or contributed to by any negligence of those on board the *Magnet*.

8. The allegations contained in the petition save as admitted by this answer are denied.

Dec. 19, 1874.—The case came on for hearing before the Judge, assisted by Trinity Masters. The case stated by the plaintiffs in their petition was substantiated by their evidence. The plaintiffs' witnesses were chiefly cross-examined with a view to show that their lights were defective.

The defendants' witnesses proved the facts stated in their answer. In cross-examination the master and mate of the *Magnet* admitted that the glimmer of the lights of the *Eugenie*, mentioned in the pleadings, was seen from half to three quarters of a mile away on the *Magnet*'s starboard bow, and that no step, except starboarding a point, was then taken to get out of the way of the *Eugenie*, the master of the *Magnet* believing the *Eugenie* to be going in the same direction as himself, and yawing about. As the *Magnet* was going ten knots and the *Eugenie* eight knots, and the vessels going nearly at right angles to each other, the time between the sighting of the *Eugenie*'s light and the collision, was not more than three minutes. The defendants called two Board of Trade surveyors who had inspected the *Eugenie*'s lights after the collision; they gave evidence as to the position and as to the visibility of the lights. As to the visibility, they said that the lights were deficient;

ADM.]

THE MAGNET; THE DUKE OF SUTHERLAND; THE FANNY M. CARVILLE.

[ADM.]

the lamps themselves were of a proper size, but by reason of the smallness of the wicks and the want of proper reflectors, the lights would not show at a greater distance than one mile from the ship; as to the position of the lights they said that the lights were fixed abaft the broadest part of the ship, and were, in consequence thereof, obscured partly by the dead eyes of the foremast backstays, and partly by the body of the ship, and could not be seen right ahead of the barque; when lights are so fixed, the Board of Trade regulations always require them to be removed; they also said that the screens were too short by six inches. The effect of this evidence is sufficiently stated in the judgment hereafter.

It was objected on behalf of the plaintiffs that the fifth article of the defendant's answer did not sufficiently apprise them that any question as to the smallness or non-visibility of the *Eugenie's* light would be raised, and that the *Eugenie* being a foreign vessel, was not subject to the new enactment. The court desired the question of the liability of the two vessels, apart from the Merchant Shipping Act 1873, to be argued before going into the construction of that statute.

Dec. 18 and 19, 1873.—*Butt, Q.C. (E. C. Clarkson with him)* for the plaintiffs, contended that the lights of the *Eugenie* were visible to the *Magnet* at a sufficient distance to have enabled that vessel to keep out of the way of the *Eugenie*, and that she was solely to blame for having neglected to keep out of the way.

Milward, Q.C. (Gainsford Bruce with him) for the defendants, contended that the *Eugenie* was solely to blame, apart from the statute, because those on board the *Magnet* were entitled to have the lights of the *Eugenie* visible for at least two miles, and the collision was occasioned by the default of the *Eugenie* in not giving the *Magnet* the opportunity of seeing the light distinctly at a greater distance than three quarters of a mile, when owing to faintness of the light and the speed of the two vessels, sufficient time did not elapse before the collision to enable the *Magnet* to take the necessary steps to keep out of the way of the *Eugenie*.

Butt, Q.C., in reply.

Sir R. Phillimore, after shortly stating the facts:—The steamer was clearly bound to keep out of the way of the sailing vessel. The steamer has admitted that she saw the glimmer of a light about two points on her starboard bow, about half a mile or three-quarters distant, and she seems to have continued her course and to have gone at the same speed without taking any precaution to ascertain what the glimmer was by easing or stopping, or taking any precautions at all to get out of the way on seeing the glimmer, as she says, about half a mile off on her starboard bow. But upon the evidence I am satisfied, first of all, that the barque carried a perfectly good port light—that is to say so far as concerns this part of the case—and that it was visible at least a mile off. Upon that point I think that there can be no doubt at all, because the master of the steamer has himself very properly admitted that when he saw the light it was a very good light; and the master also said, "The light looked very well. I saw no difference between that and any other light." Whether the light came within the prescription of the regulations in the sailing rules is another question which will have to be hereafter

discussed. At present I am satisfied upon the evidence, and the Elder Brethren agree with me, that the red light of the vessel ought to have been visible at least a mile off on the starboard bow of the steamer, and that she ought to have ported and got out of the way. I must therefore pronounce, so far as this part of the case is concerned, that the steamer is to blame for this collision. Whether the subsequent argument may convince me in regard to the statute and the sailing rules, that the other vessel is also to blame, I say nothing. At present I pronounce under the advice of the Trinity Masters, that the steamer is to blame for not getting out of the way of the barque.

The question of the liability of the *Eugenie* under the statute then came on for argument.

Milward, Q.C. and Gainsford Bruce for the defendants.—The question of fact to be considered here is not whether these lights were in accordance with the Board of Trade instructions, but whether they were in accordance with the regulations for preventing collisions which alone are of binding authority. By Arts. 3 & 5 of the regulations, sailing ships under weigh must carry side lights "so constructed as to show an uniform and unbroken light over an arc of the horizon of ten points of the compass; so fixed as to throw the light from right ahead to two points abaft the beam; and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least two miles;" and that the side lights "shall be fitted with inward screens, projecting at least three feet forward from the light, so as to prevent these lights from being seen across the bow." The Merchant Shipping Act, 1862 (25 & 26 Vict. c. 63), sect. 29, enacted that if it should appear that a collision "was occasioned by the non-observance of any regulation," the ship by which such regulation has been infringed should be deemed to be in fault. This enactment is repealed, and the Merchant Shipping Act 1873 has substituted for it sect. 17, by which the mere infringement of the regulation, although not occasioning the collision, renders a ship to blame. The Legislature has imposed a penalty on vessels infringing the sailing rules, the effect of which is that although their infringement does not contribute to the collision, they cannot recover anything at common law, and in this court can only recover half the damage done, if the other vessel is also to blame. An infringement, however small or minute, entails the penalty. According to the evidence, these lights were not visible from right ahead in consequence of their position in the ship; although the *Magnet* was broad on the port bow of the *Eugenie*, and this infringement could not in any way have occasioned the collision, we submit that, it being an infringement, the *Eugenie* must be held to blame therefor. But in addition to this the lights were not so constructed as to show a light for a distance of two miles; a mile was the longest distance they would show. This is an infringement of the regulations bearing upon this very case. In *The Hibernia* (ante p. 454; 31 L. T. Rep. N. S. 805) the Privy Council found as a fact that the sailing vessel's lights were not burning, but that the steamer ought to and could have avoided her, and consequently that the want of lights did not contribute to the collision; it was nevertheless held that the sailing vessel was liable to be condemned, because she had no lights, and

ADM.]

THE MAGNET; THE DUKE OF SUTHERLAND; THE FANNY M. CARVILL.

[ADM.]

the tendency of the decision is to show that any infringement is enough to cause a vessel to be found in fault. It is admitted here that the screens are not too short. [Sir R. PHILLIMORE.—Suppose this rule is not complied with, and yet the lights are not seen across the bow, what follows?] Even if they were an inch too short, that would be an infringement making the ship in fault. It is absurd, however, to suppose that these screens must be parallel; if they were, there would be some point between the lights from which, however far off a person might stand, he could not see the lights; the screens must incline inwards so as to allow the rays of light to meet at some point well ahead of the bow. [Sir R. PHILLIMORE.—But even granting that there is an infringement of the regulations which would be enough to condemn an English ship, can this affect a foreign ship?] The plaintiffs have come to this court; they have chosen their own forum, and must therefore be bound by the *lex fori*. The court is not asked to condemn the plaintiffs for the breach of a rule which the Legislature has made and can make binding only on British ships when outside British waters, but it is asked to condemn the ship for the breach of a rule which is of international obligation. The breach of the rule is not contested, but it is said that the consequences of that breach ought not to be visited on a foreign ship; the consequences of a breach of the law are essentially such as we prescribed by the *lex fori*, and this law the court must administer.

The Amalia, 1 Moore, P.C.C. N.S. 484;

The Halley, L. Rep. 2 P.C. 196; 18 L. T. Rep. N.S. 879; 3 Mar. Law Cas. O.S. 131;

The Guildford, L. Rep. 2 Adm. & Ecc. 325; 19 L. T. Rep. N.S. 741; 3 Mar. Law Cas. O.S. 201;

The Explorer, L. Rep. 3 Adm. & Ecc. 289; 3 Mar. Law Cas. O.S. 501.

Butt, Q.C. and *E. C. Clarkson* for the plaintiff.—First, the section does not apply to foreign vessels. Sect. 17 of the Merchant Shipping Act 1873 was substituted for the 29th sect. of the Merchant Shipping Act Amendment Act 1862, which was incorporated with the Merchant Shipping Act 1854, and became part of the fourth part of that Act; by sect. 291 of the latter Act, the fourth part of the Act applies to all British ships; no mention is made of foreign ships. In the Merchant Shipping Act 1873, wherever it is intended that a section shall apply to foreign ships, the words, "any vessel British or foreign" are used. Moreover, this is a statutory penal clause, and it is out of the power of the British Legislature to impose a penalty upon a foreign ship for an act committed out of British jurisdiction. [Sir R. PHILLIMORE.—The clause imposes a penalty, no doubt, but it is a penalty for the breach of a rule binding by international arrangement. The plaintiff has chosen to come to a court which enforces that international rule in a manner peculiar to itself. Must not the plaintiff submit to the *lex fori*? In *The Halley* (*ubi sup.*) it was held that although the obligation to employ a pilot in foreign waters was couched by the foreign law with liability for his acts, the foreign law did not apply, but that the *lex fori*, which exempted owners from the consequences of his act, did apply. If the consequence of the act or omission in the case of pilotage is to be governed, not by the law applicable to the particular ship by the universal law, but by the *lex fori*, the consequence of the breach of the sailing rule must be governed by the *lex fori*.]

The Halley was a mere question of agency; a question of responsibility for the acts of a third person; this case, however, turns upon the question whether a foreign ship can be, under a British statute, held liable for an act for which she would not be responsible, either by the common law of England, or by the maritime law of nations.

Secondly, there has been no such infringement of the rules as will render the plaintiff's ship in fault within the meaning of the statute. It is impossible to comply absolutely with the regulations as to lights; by the rules the lights must be seen from right ahead to two points abaft the beam, and at the same time they must be so screened as not to show across the bows; if this latter regulation as to screens is strictly complied with the screens ought to be parallel, so as to prevent the lights showing across the bows, but if the screens are parallel there will be some point right ahead of the vessel at which neither light can be seen, and however far off you go from the vessel, keeping that point and the vessels bows in a line, the lights will be invisible; hence it is clear that the screens must converge on some point ahead of the vessel in order that the lights may be seen from right ahead, but this is not a strict compliance with the regulations, hence we contend that the act requires only a substantial compliance with the regulations. An infringement to bring a vessel within sect. 17 of the last Act must be a breach of the regulations which is immaterial to the cause being tried, and is material in fact or substantial; an infringement which might possibly have contributed to the collision. The section ought to be read with the former enactments. By the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), sect. 298, it was provided that if it should be proved to the court that the collision was occasioned by a non-observance of a rule, the owner of the ship by which such rule was infringed should not be entitled to recover any recompence for the damage sustained unless it was shown to the satisfaction of the court that the circumstances of the case rendered a departure from the rule necessary. This was repealed, and the 29th section of the Merchant Shipping Act Amendment Act 1862, substituted therefor, and it was enacted that if the collision was occasioned by the non-observance of any regulation, the ship by which such regulation was infringed should be deemed in fault, unless, &c. The last enactment was unnecessary, as it was only expressive of the common law, and the 17th section of the Act of 1873 was no doubt intended to more strongly enforce the regulations, but it was not intended to render a ship to blame for a breach of the regulations which could by no possibility have occasioned the collision. For instance, a vessel approaching another in such a way that she could only show her port light, could not be to blame for not carrying a proper starboard light. If there has been a material infringement which might have contributed to the particular collision in question, then the ship would be within the terms of the Act, but not otherwise. In this case the light itself could not have contributed to the collision as it was visible a mile away, nor could its position as the defendant's ship approached the plaintiff's ship broad on her port bow, nor could the screens for the same reason. In the *Hibernia* (*ubi sup.*), the want of lights did contribute to the collision, and the case

[ADM.]

THE MAGNET; THE DUKE OF SUTHERLAND; THE FANNY M. CARVILL.

[ADM.]

did not rule that where there was an infringement not contributing a vessel is to blame. The pleadings do not raise the question of inefficiency of the *Eugenie's* lights as to give us due notice.

Mileard, Q.C., in reply.—There are no words in the Act which say that the infringement must be material or contributing to the collision. I submit that it was intended to lay down a hard and fast rule, that if a ship did not comply with the regulations she must take the consequence.

Cur. adv. vult.

THE DUKE OF SUTHERLAND.

This was a cause of collision instituted on behalf of the owners of the sailing ship *Maggie Trimble* against the steamship *Duke of Sutherland* and the London and North-Western Railway Company, her owners intervening.

According to the plaintiff's petition, the *Maggie Trimble* was an iron ship of 786 tons register. She left Liverpool on the 23rd Aug., 1873, bound for Valparaiso with a cargo of coal, and at about 12.30 a.m. on the 24th Aug. she was off Holyhead, proceeding on her voyage, her regulation lights being duly exhibited and burning brightly, and a good look out on board her. The wind was a moderate breeze from the south-east, and the night was fine, but dark, with a slight haze. At such time, those on board the *Maggie Trimble* observed, about four points on her starboard bow, at a distance of about three miles, a bright light, which proved to be the masthead light of the *Duke of Sutherland*, and soon afterwards the red side light of the *Duke of Sutherland* came into view. The *Maggie Trimble* was kept on her course, but the *Duke of Sutherland* approached her under a port helm, so as to render a collision inevitable. The helm of the *Maggie Trimble* was thereupon put hard down in order to ease the blow, but the *Duke of Sutherland* with her port paddle box struck with great violence the starboard side of the stem and starboard bow of the *Maggie Trimble*, and did considerable damage. The *Duke of Sutherland* was charged with neglect in not keeping a proper look-out, and, as a steamer, in not keeping out of the way of the *Maggie Trimble*.

According to the answer of the defendants, the *Duke of Sutherland* was a paddle-wheel steamer, of 409 tons register, and 270 horse-power nominal; she carried goods and passengers between Dublin and Holyhead, and left Dublin on Aug. 23rd, 1873, bound for Holyhead. At about 12.50 a.m. on Aug. 24th the *Duke of Sutherland* was in St. George's Channel, the South Slack bearing about S.E. by E., five or six miles distant. The wind was then blowing a fresh breeze from the E. by S. The *Duke of Sutherland* was then steering her course for Holyhead, S.E. by E. $\frac{1}{2}$ E., her speed being about twelve knots; her regulation lights were burning brightly. In those circumstances, those on board the *Duke of Sutherland* observed three bright lights about four points on the port bow of the *Duke of Sutherland*, and took them to indicate a vessel in tow of a steamer going the other way, and while examining them, made out that they were being carried by a ship under sail, which turned out to be the *Maggie Trimble*. The *Maggie Trimble* was then close under the port bow of the *Duke of Sutherland*, but no other lights were sighted on board the *Maggie Trimble*, which was heading S.S.W., or thereabouts. The helm of the *Duke of Sutherland* was put hard-a-port as soon

as the *Maggie Trimble* was seen to be a sailing vessel, but immediately afterwards the *Maggie Trimble* ran into the *Duke of Sutherland*, the cut-water of the *Maggie Trimble* striking the spring beam of the after port sponson of the *Duke of Sutherland*, and doing considerable damage to the latter vessel. The engines of the *Duke of Sutherland* were thereupon stopped, and an order was given to reverse, but the master of the *Duke of Sutherland* finding that the *Maggie Trimble* was doing still further damage, ordered his engines to go ahead to get clear, and this was immediately done. The defendants charged the *Maggie Trimble* with not carrying the lights required by law, with carrying lights other than those allowed and required by law, and with neglecting to take the proper measures in due time to warn those on board the *Duke of Sutherland* of the proximity of the *Maggie Trimble*.

Jan. 15, 1875.—The cause came on for hearing before the Judge, assisted by Trinity Masters. The facts alleged in both the petition and answer were substantially proved and there was little dispute about the facts save as to the *Maggie Trimble's* lights. All the plaintiffs' witnesses positively swore that the *Maggie Trimble's* regulation lights were burning and that they had no other lights on deck or in use before and at the time of the collision. The defendants proved that they had a good look out, but none of the crew on board of the *Duke of Sutherland* ever saw any lights, except the three white lights mentioned, on board the *Maggie Trimble*. A passenger on board the *Duke of Sutherland* spoke of seeing the green light of the *Maggie Trimble* as the *Duke of Sutherland* approached her. A ship's surveyor in the employ of the ship's husband of the *Maggie Trimble*, was called by the plaintiffs, and asserted that, although the Board of Trade surveyor had ordered the position of the lights to be altered, he considered they were in a proper position before the alteration, but he could not say positively that they would show an unbroken light from right ahead to two points abaft the beam on either side. The defendants called the Board of Trade surveyor, who ordered the position of the lights to be altered after the accident; he said that he had surveyed the ship and that he had found that the lamps were right, but that they were so fitted on the break of the foremast that they were obscured from right ahead to about a point and a half on either bow by the catheads, which stood in front of them; the lights would only be observed by any person right ahead of the ship and in a line with the catheads; they could be seen above and below the catheads. The *Duke of Sutherland* was approaching the *Maggie Trimble* four points on the latter's starboard bow, and therefore there was no obstruction to prevent those on board the *Duke of Sutherland* from seeing the *Maggie Trimble's* lights.

The defendants contended that the *Maggie Trimble* had no regulation lights burning at the time of the collision, but that she was carrying some white lights on deck to enable the ship's decks to be put in order and that these lights deceived those on board the *Duke of Sutherland*; but that even if the *Maggie Trimble* did carry her regulation lights, they were so placed that the *Maggie Trimble* was a ship infringing the regulations for preventing collisions at sea within the meaning of the Merchant Shipping Act 1873

ADM.]

THE MAGNET; THE DUKE OF SUTHERLAND; THE FANNY M. CARVILL.

[ADM.]

(36 & 37 Vict. c. 85.) s. 17. The arguments were the same as in the last case.

Milcord, Q. C. and Gainsford Bruce for the plaintiffs.

Butt, Q. C. and James P. Aspinall for the defendants.

Sir R. PHILLIMORE (after setting out the facts as given above).—There is no disputing that it was the duty of the steamer to get out of the way of the *Maggie Trimble*. The collision took place, however, by the port paddle box of the steamer coming in contact with the starboard side and port bow of the *Maggie Trimble*. The defence which the *Duke of Sutherland* sets up, is that the *Maggie Trimble* carried no side lights, and that she ought to have shown a green light in the position in which she then was. I am of opinion that this defence entirely fails, as it is proved upon the evidence, to the satisfaction of myself, and, I believe, of the Elder Brethren of the Trinity House, that the light was there. I should observe besides, that, taking the defence shown in the evidence of the master of the *Duke of Sutherland*, namely, that he saw some bright lights on his port bow, and did not understand what they were, it became his duty, whilst he was in that state of indecision, to have taken steps to get out of the way of the vessel carrying those lights, and to give her a wider berth; if he was uncertain whether he ought to have ported or starboarded, he should have slowed his engines until he had ascertained what course the vessel carrying the ambiguous lights was upon; the evidence shows, beyond all possibility of contradiction, that he took no steps whatever, that he did not port—the mode he adopted of getting out of her way—until he was close upon her. Upon this evidence, there is no question that he did not execute the manœuvre which the law required him to do, and that the *Duke of Sutherland* is therefore alone to blame for this collision, unless, indeed, the construction of the Merchant Shipping Act 1873 (36 & 37 Vict. c. 85), sect. 17, should render the *Maggie Trimble* liable to be also condemned. That is a question which depends upon the construction the court may put the statute in the case of *The Magnet*, heard last sittings, and in which judgment will be given on Tuesday next. If I should be of opinion that there has been no infringement on the part of the sailing vessel in respect of the position of her lights, such as under the statute properly construed will prevent the *Duke of Sutherland* from being held alone to blame, it will not be necessary to go into this part of the case. Therefore, for the present, I pronounce that the *Duke of Sutherland* is to blame for the collision, reserving the question of law as to the liability of the other ship.

Cur. adv. vult.

THE FANNY M. CARVILL.

This was a cause of damage instituted on behalf of the owners of the Swedish barque *Peru*, against the British barque *Fanny M. Carvill* and her owners intervening.

According to the case set up in the plaintiffs' petition, the *Peru*, a barque of 569 tons register, was, shortly before 9.30 p.m., on the 13th Nov. 1874, about fifteen miles from Beachy Head, which bore about N.N.W., and was proceeding on a voyage from the Tyne to Monte Video with a cargo of coals. The wind was about W.N.W., the weather was fine and clear, and the *Peru* under easy sail, was sailing close hauled

on the starboard tack, heading S.W., and making about three knots an hour, with her proper regulation lights duly exhibited and burning brightly. At the time and under these circumstances, the green light of a vessel, which afterwards proved to be the *Fanny M. Carvill*, was seen at the distance of about a mile and a half, and bearing about two points on the port bow. The *Fanny M. Carvill* was on the port tack, and the *Peru* was kept close hauled on the starboard tack in the expectation that the *Fanny M. Carvill* would keep out of her way as she ought to have done; but the *Fanny M. Carvill* approached, and although loudly hailed from the *Peru*, ran into and struck the *Peru* upon the port side, about amidships, and did her so much damage that she was compelled to proceed to the Downs, and afterwards to be towed to London for repairs. The plaintiffs charged those on board the *Fanny M. Carvill* with neglecting to keep a good look out, and with improperly neglecting to take in due time proper measures for getting out of the way of the *Peru*.

According to the defendants' answer the *Fanny M. Carvill* was a barque of about 592 tons register; and at about 9.30 p.m., on the 13th Nov. 1874, whilst on a voyage from London to Barcelona with a cargo of deals was about fourteen miles off Beachy Head. At such time there was a strong breeze from W. to W. by N., the weather was clear, the *Fanny M. Carvill* was close hauled on the port tack under easy sail, heading about N.N.W., and sailing at the rate of two and a half knots per hour, her regulation lights were duly exhibited and burning brightly, and a good look-out was being kept. Under these circumstances the red light of a vessel, which afterwards proved to be the barque *Peru*, was seen about four points on the starboard bow of the *Fanny M. Carvill*, and distant about two miles. Almost immediately afterwards the green light came into view. Those on board the *Fanny M. Carvill* continued to watch the *Peru* which approached, showing both lights, broad on the starboard bow of the *Fanny M. Carvill*. About ten minutes after the lights had been first seen, and while the two vessels were a considerable way apart, those on board the *Fanny M. Carvill* showed a flash light, and shortly afterwards the red light of the *Peru* was shot in, and the two vessels would have passed clear of each other, starboard side to starboard side; but, when within a short distance of the *Fanny M. Carvill*, the *Peru* shot in the green and again opened the red light, causing immediate danger of collision. Thereupon the helm of the *Fanny M. Carvill* was put hard aport, and her main-yard squared, but she was unable to clear the *Peru*, and the two vessels came into collision, the bluff of the port bow of the *Fanny M. Carvill* striking the *Peru* amidships on the port side, doing considerable damage to both vessels. The defendants charged those on board the *Peru* with neglecting to keep a good look-out, and with improperly neglecting to keep their course; that the lights of the *Peru* were improperly fixed and screened; that the collision was occasioned by the improper and negligent navigation of those on board the *Peru*, and by the defective condition of the side lights of the *Peru*; and that the *Peru* was in fault within the true intent and meaning of the 17th section of the Merchant Shipping Act 1873, for infringing the regulations

ADM.]

THE MAGNET; THE DUKE OF SUTHERLAND; THE FANNY M. CARVILL.

[ADM.]

for preventing collisions, by neglecting to carry proper side lights.

Jan. 16, 1875.—The cause came on for hearing before the judge assisted by Trinity Masters. There were only three points in dispute in this case; first, whether the *Peru* continued her course on approaching the *Fanny M. Carvill*; secondly, whether the green light of the *Peru* was seen by those on board the *Fanny M. Carvill*, and led to the collision; thirdly, whether the lights of the *Peru* were fixed and screened in accordance with the regulations. Evidence was given upon all these points; upon the first two there is an express finding on the part of the court appearing in the judgment below; in the third point there were witnesses called on both sides. For the plaintiffs it was proved that the lamps of the *Peru* were fixed 8ft. forward of the foremast, on the top of the covering board at the break of the forecabin on each side, and just on the bluff of the bows; they were on a level with the rail; the screens were 2ft. 5in. long and 17in. high, and ran as nearly as possible parallel to the middle line of the ship; the length of the lamps from aft to forward was 5in.; the lights could not have been put further aft than where they were unless they had been put abaft the foremast, and they would then have been obscured by the foresail and the foregigging; and the screens could not have been made longer without either placing the lamps further inboard, or allowing the fore end of the screen to project over the side of the ship; and in the first case the lamps would have been obscured by the cat-head, and in the second case there would have been risk of the screens being washed away in bad weather. After the arrival of the ship in the Thames the lights were tested at night on behalf of the plaintiffs, and it was then proved that at the distance of a mile and a half away the green light of the *Peru* showed at half a point across the port bow of that vessel, but that neither light would show at a greater bearing than half a point across the opposite bow. The defendants called some Board of Trade Surveyors, who stated that they had inspected the *Peru* after the collision, and that they were able to see the *Peru*'s starboard light from the port side of her bowsprit, which would make the light visible about a point and a half to two points across the bows of the *Peru* at a distance of a mile and a half.

Butt Q.C. (R. E. Webster with him) for the defendants, applied to the court to order an inspection by the Elder Brethren in order that it might be ascertained whether it was or was not true that the lights of the *Peru* could be seen across her bow and whether the light could be seen, as stated by the Board of Trade surveyor, cutting the bowsprit; that was the whole point in the case, and the vessel was still in the port of London; the court had before it the sworn evidence of the surveyor, who stated that he had inspected the ship, and had found the light showing across her bows, and if so the light would be visible to the other vessel considerably across her bows; that was the main question in the case and it was important to have it settled.

Milward, Q.C. (E. C. Clarkson with him), for the plaintiffs, opposed the application on the ground that the defendants had had ample opportunity of inspecting the ship before the hearing.

Sir R. PHILLIMORE.—I think it is a very inconvenient practice for the Board of Trade surveyors

to be sent down to inspect vessels, and afterwards to be examined as witnesses in this court; it seems to me very questionable, and worthy of the consideration of the Board of Trade, whether they should be allowed to inspect a ship on the application of a party to the cause, and afterwards be called by him as witnesses. I don't think any injustice has been done in this case, but it is an inconvenient practice that the functions of the Board of Trade should be put in action by a party to a cause. But, however, I think this is a case in which I ought not to accede to the present application. It appears upon the evidence already given by the look-out-man of the *Fanny M. Carvill* that these vessels were allowed to come within five ships' lengths of each other before the *Fanny M. Carvill* made any attempt to bear away. He says he saw the green light for the first time within five ships' lengths; even if he is speaking the truth on that point, in my opinion that was an improper navigation of the ship; but if I am called upon also to pronounce at this stage as to whether the green light was visible or not, I am ready to do so, but I would rather hear Mr. Butt upon that point first. There remains also the question of the liability of the *Peru* under the statute, if she has infringed any regulation. That is a question of law that must be reserved till next Tuesday, when I shall give judgment in the other cases. I refuse the present application. I don't think it is a proper case for doing what is very rarely done by this court. I must call upon Mr. Butt upon the two questions I have indicated.

* Butt, Q.C., for the defendants.—I submit that, upon the facts, the *Peru* improperly altered her course; that she showed her green light in such a way as to deceive the *Fanny M. Carvill* as to her course, and that she so contributed to the collision. Upon the question of law I submit that, even if the light was not in this case visible, the *Peru* was to blame upon the facts proved, because she had screens too short by nearly a foot, and her side lights showed to some extent at any rate across her bows. This is a breach of the regulations which will bring her within the Merchant Shipping Act 1873. By the Regulations for Preventing Collisions at Sea, Arts. 3 and 5, certain side lights are provided for sailing vessels; and by Art. 3 (d), these side lights must be fitted "with inboard screens, projecting at least three feet forward from the light, so as to prevent these lights from being seen across the bow." This is a positive regulation as to the length of the screens; they must be 3ft. in front of the light; the screens of the *Peru* were only 2ft. 5in. long altogether, and only about 2ft. in front of the lights. Moreover it was proved by the defendants' witnesses, and in effect admitted by the plaintiff, that the lights would show across the bows of the *Peru*, and this again is expressly contrary to the regulation. On this ground I submit that the *Peru* must be held to blame, even though she did not contribute to the collision.

Milward, Q.C., for the plaintiff.—I submit that the *Peru* did not in any way contribute to this collision by reason of her course or her lights. On the question of law, I submit that the object of Art. 3 (d) is simply to prevent a ship's lights from being visible across the bow, and if this object is substantially attained, there is no infringement that will bring the ship within the statute. The evidence sufficiently shows that the lights

ADM.]

THE MAGNET; THE DUKE OF SUTHERLAND; THE FANNY M. CARVILL.

[ADM.]

would only be slightly visible across the bows, and this must always be the case in every ship at some point ahead of her, otherwise there would be some space right ahead where no lights could be seen at all. If the screens were exactly parallel, there would be a certain space between them in which, however far ahead of the ship a person might be, the rays of light could not be seen. The screens must be slightly inclined inwards, so that at some point both lights may be seen at the same time. If the screens are so fitted that the lights cannot be seen across the bows in such a way as to deceive an approaching vessel, there is a substantial compliance with the regulations. The mere length of the screens is immaterial; the only question to be considered is whether they prevented the light from being improperly seen across the bows, and I submit that in this case they did so.

SIR R. PHILLIMORE.—I am of opinion that the *Peru*, the starboard tack vessel, continued her course without alteration up to the time of the collision, and it is untrue as stated by the witnesses for the defendants, that the *Peru* came up into the wind two and a half points, with her sails aback. I am of opinion that the green light of the *Peru* was not seen by those on board the *Fanny M. Carvill*, and did not lead to the collision. The *Fanny M. Carvill* was aware that the *Peru* was a starboard tack vessel, and the *Fanny M. Carvill* waited too long before she got out of the way of the *Peru*. Whether on account of the deficiency in the length of the screens of the *Peru* she is also to blame, although she never altered her bearings, is a question I reserve until I give judgment in the other cases on Tuesday.

Cour. adv. vult.

JAN. 19.—SIR R. PHILLIMORE.—The first question which I have to decide as affecting all these cases is the true construction of a clause in the last Merchant Shipping Act, and to do so it is necessary to consider the previous enactments on the subject.

By the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), sect. 298, it is enacted: "If in any case of collision it appears to the court before which the case is tried that such collision was occasioned by the non-observance of any rule for the exhibition of lights, or the use of fog signals issued in pursuance of the power hereinbefore contained, or of the foregoing rule as to the passing of steam and sailing ships, or of the foregoing rule as to a steamship keeping to that side of a narrow channel which lies on the starboard side, the owner of the ship by which such rule has been infringed, shall not be entitled to recover any recompense whatever for any damage sustained by such ship in such collision, unless it is shown to the satisfaction of the court that the circumstances of the case made a departure from the rule necessary." This was repealed.

The next enactment on the subject was the Merchant Shipping Act Amendment Act 1862 (25 & 26 Vict. c. 63) sect. 29, which provided that "if in any case of collision it appears to the court before which the case is tried that such collision was occasioned by the non-observance of any regulation made by or in pursuance of this Act, the ship by which such regulation has been infringed shall be deemed to be in fault unless it is shown to the satisfaction of the court that the circumstances of the case made a departure from the regulation necessary."

The next enactment on the subject was The Merchant Shipping Act 1873 (36 and 37 Vict. c. 85), which repealed the last-mentioned enactment, and (sect. 17) provided as follows: "If in any case of collision it is proved to the court before which the case is tried that any of the regulations for preventing collision contained in or made under The Merchant Shipping Acts 1854 to 1873 has been infringed, the ship by which such regulation has been infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the court that the circumstances of the case made departure from the regulation necessary."

It has been contended that any infringement of any regulation made under the authority of the statute compels the court to pronounce the vessel which is guilty of such infringement to be in fault unless the infringement was in the circumstances necessary; that is to say, to give an instance, that a vessel carrying a perfect starboard light, and ran into on the starboard side by a vessel which ought to have avoided her, is nevertheless in fault, if she have no port light, or a deficient one; or that a vessel directly ahead of another, which overtakes her and runs into her stern, is nevertheless in fault if she has deficient or no side lights, which lights could not possibly have been seen by, or have in any way affected the overtaking vessel. I say nothing as to the injustice of applying such a construction of an English statute to foreign vessels; but, irrespective of any such consideration I decline as at present advised to put a construction which appears to me fraught with absurdity and injustice upon the statute, even with respect to British vessels. I think the infringement spoken of must mean an infringement not indeed necessarily causing the collision, but connected with it—an infringement material to the case, and by possibility causing or contributing to the collision; not an infringement wholly immaterial to the case, and which by no possibility could have anything to do with the collision. I do not think that this construction of the statute is at variance with the decision of the Privy Council in *The Hibernia* (*ante*, p. 454; 31 L. T. Rep. N. S. 805), which I have carefully perused.

And here it may be convenient to say a word on the legal effect of instructions given by the Board of Trade to their surveyors, a matter much discussed before me in cases of this description. Such instructions may be prudent and proper, though it appears that they are frequently changed, but, except in so far as they are authorised by statute, they can have no binding effect upon English, much less upon foreign vessels. The regulations for preventing collisions are of a different character, and, being adopted by foreign states, have by virtue of treaties or conventions, an international obligation.

There are three cases now before the court in which I have reserved for consideration the construction of this statute, and I now proceed to apply to them the provisions of the statute construed upon the principles which I have stated. The first is *The Magnet*; the second *The Duke of Sutherland*; the third *The Fanny M. Carvill*.

In each of these cases I have condemned one vessel; the question as to the culpability of the other being reserved.

The Magnet was a case of collision between the Swedish barque the *Eugenie* and the *Magnet*, an Irish screw steamer, which happened off the

ADM.]

THE MAGNET; THE DUKE OF SUTHERLAND; THE FANNY M. CARVILL.

[ADM.]

entrance to the Port of Liverpool somewhere between the north-west and the Bar Light-ship, between twelve and one on the night of the 15th Nov. last. The *Eugenie* was heading N. by E., close hauled on the port tack, going at a speed of about eight knots an hour. The *Magnet* was proceeding at full speed, about ten knots an hour, heading E.S.E. They were crossing ships. The pilot of the *Eugenie* saw the white light of the *Magnet* four or five miles off five points on her port bow, and then he saw the masthead and green light of two vessels both on the port bow a quarter of a mile apart. He kept on his course. The foremost of the steamers passed clear ahead of him, but the sternmost, which was the *Magnet*, starboarded shortly before the collision, and came with her starboard side into the port bow of the *Eugenie*.

The defence of the *Magnet* is that she only saw the faint glimmer of a ship's light two points on her starboard bow. It did not continue in sight, and a red light opened almost alongside of her. The master of the *Magnet* supposed, he says, the vessel to be going in the same direction as he was, ahead of him, and by yawing to have shown her light. He ordered first starboard a little, and then hard a starboard. The answer on behalf of the *Magnet* states that the *Eugenie* neglected to have her side lights properly exhibited according to the regulations.

At the hearing two points were discussed. First, whether the red light of the barque was visible at a sufficient distance to apprise the steamer that she ought to get out of the way. This point I decided in the affirmative, and adversely to the *Magnet*, which I, therefore, held to be in fault for the collision. The second point was, whether the *Eugenie* was not also in fault under the provisions of the 36 & 37 Vict. c. 85, s. 17, for having violated the regulations in not carrying proper lights properly placed. It was not denied by the counsel for the *Magnet* that the lamps were of the proper size, but it was contended that they were not fitted with proper magnifying and reflecting power, and that they were not of proper capacity. Scientific evidence was produced on this point, but the captain of the *Magnet* admitted that when he saw the red light it was a very good light, and that both lights burnt well. The second mate said he saw no difference between them and any other lights, and the captain of the *Eugenie* swore that when on board the *Magnet* after the collision he saw them more than two miles; while none of the witnesses produced on behalf of the *Magnet* were interrogated as to whether the lights of the *Eugenie* were not burning brightly after the collision.

It was further contended that the lights which were in the fore part of the mizen rigging on the channel boards and level with the rail were not so placed so as to be visible according to the regulations, because they were abait the broadest parts of the ship, because they were obscured by the foretopmast backstay, and a dead eye came before the lens of the lamp. There was some argument respecting the length of the screens, which I think was not insisted upon.

With regard to the obscuring of the lights there was a conflict of scientific and positive testimony, and after some consideration and conference with the Trinity Masters, I determined on putting into execution the authority which the statute (24 Vict.

c. 10), s. 18, gives me of requesting them to inspect the ship, and make the proper experiments for ascertaining whether the lamps were of a proper character to be visible at a proper distance, and whether they were not obscured by any part of the rigging. In taking this course, I may have given too favourable a construction to the pleading of the *Magnet*, in which the question as to the position of the lamps was perhaps not raised with sufficient distinctness.

The Elder Brethren have reported that having been requested by me to report on the sufficiency of the side lights of the *Eugenie*, and to examine the said vessel for the purpose of ascertaining whether there is anything in her construction or in the position of her tackle or furniture which would prevent the said lights from being seen when placed in their respective positions:

"We proceeded to Long Reach on the afternoon of the 30th ult. (Dec. 1874), and, anchoring a vessel abreast the lower mile mark, made arrangements whereby we could accurately fix the range of the lights. The evening was starlight, clear overhead, and perfectly calm, but hazy over the water. At 6 p.m., it being quite dark, the *Eugenie's* lights were placed on each quarter of the vessel so stationed. We proceeded in a boat up the Reach, with the reflectors of the lights turned directly upon us, thereby giving every advantage to the *Eugenie*, when the green light disappeared to the naked eye at half-a-mile, and the red light at a cable's length short of the mile. Upon a perfectly clear night we are of opinion that the green light might have been seen a quarter, and the red light half-a-mile further. "The lights of the *Eugenie* have been tested as to their photometric power with the following results:—

Naked flame	31 Candles.
<i>Idem</i> , aided by the reflector.....	90 "
Power of light with red shade.....	11 "
<i>Idem</i> , with green ditto	02 "

which, in our opinion, is considerably less than the lanterns now in use, and perfectly insufficient.

"Having received information from the Registrar that the *Eugenie* would be ready for our inspection on the 12th instant, we proceeded to Liverpool on the 11th, and visited that vessel on the following morning; when the screens were placed in their regular positions, and the distance across the ship from light to light was found to be exactly 24ft.; at a corresponding height above the water, abreast the foretopmast backstays, the width across the ship from backstay to backstay was found to be 24ft. 6in., showing that an obstruction of 3in. intervenes on each side directly in front of the lights."

Adding to the evidence already before me, this report of the Trinity Masters, and considering the whole evidence together, I must pronounce the *Eugenie* to be also, in the language of the statute, in fault for non-observance of the regulations respecting the sufficiency of lights.

With respect to the case of the *Duke of Sutherland*, it was not, I think, contended that the lamps were not "so constructed," and of such a character as to comply with the regulations. The dispute was as to their position. The Board of Trade Surveyor required their position to be altered; this may have been prudent, but I am not satisfied upon the evidence that the lights were previously "so fixed" as to infringe the regulation with re-

Q. B.]

SMITH v. STEELE.

[Q. B.]

spect to their visibility. I pronounce, therefore, the *Duke of Sutherland* alone "in fault."

With respect to the case of *The Fanny M. Corvill*, the evidence was that the screens projected 2ft. 5in. instead of 3ft. The object of the regulations with respect to screens is to prevent the side lights from being seen across the bow; for this purpose it directs the screen to project at least 3ft. It is, so to speak, a subsidiary regulation for the purpose of securing the visibility of the distinct light, the general visibility of the light being already provided for in the former regulations.

I have stated in my former judgment, at the hearing of the last case, that I am satisfied the green light was not seen across the bow by those on board the *Fanny M. Corvill*, and, according to the evidence, if the length of the screens in this ship had extended further outside of the bow, a sea might have washed them away. Upon the whole I think that I am not compelled to say that the deficiency in the length of the screens was an infringement of the regulations according to my construction of the statute, and that therefore the *Peru* is legally in fault for a collision which her non-observance of the regulation certainly did in no way occasion. I pronounce the *Fanny M. Corvill* alone in fault.

Solicitors in *The Magnet*: for the plaintiffs, Bateson and Co.; for the defendants, Jenkins and Rao.

Solicitors in *The Duke of Sutherland*: for the plaintiffs, Wood and Tinkler; for the defendants, R. F. Roberts.

Solicitors in *The Fanny M. Corvill*: for the plaintiff, Thomas Cooper; for the defendants, Stokes, Sanders, and Stokes.

COURT OF QUEEN'S BENCH.

Reported by J. BOWEN and M. W. McKELLAR, ESQs.,
Barristers-at-Law.

Jan. 12 and 25, 1875.

SMITH v. STEELE.

Negligence by servants—Pilot compulsorily employed—Liability of owners for injury to pilot—17 & 18 Vict. c. 104.

A pilot was engaged by the defendants under the compulsory clauses of the Merchant Shipping Act 1854, for a voyage in a vessel of which they were owners. Whilst giving directions on board for coming out of dock, before the voyage commenced, the pilot was killed by the fall of a boat, in consequence of the negligence of defendants' servants.

Held, in an action by the personal representatives, that there is no implied contract that a pilot under such circumstances shall take upon himself the risk of injury by the shipowners' servants; and that, therefore, the action lay against the defendants.

This was an action tried before Lush, J., at the Sussex Spring Assizes 1874. The verdict was found for the plaintiffs, leave to the defendants being reserved to enter a verdict or nonsuit.

The plaintiff sued as executrix of one J. G. Smith, deceased, formerly a Thames pilot. The declaration stated that the defendants were possessed of a certain sailing vessel, and of a certain boat slung upon the same, which sailing vessel and boat were then under the care and manage-

ment of certain servants of the defendants, and that J. G. Smith then was, by the consent and invitation of the defendants, and by virtue of their retainer, upon the sailing vessel for the purpose of piloting the same down the River Thames. Nevertheless the defendants, by their servants, so carelessly, negligently, and improperly slung, suspended, and managed the boat, that through their carelessness, negligence, and unskillful conduct whilst J. G. Smith was upon the vessel under the circumstances and for the purpose aforesaid, the boat fell upon J. G. Smith and injured him, inasmuch that he in a few days afterwards died.

The defendants pleaded: First, not guilty; and, secondly, that J. G. Smith was on board the vessel in the defendants' employment as pilot, for the purpose of piloting the vessel down the River Thames, for which he was so retained for reward payable to him, and the injury to J. G. Smith was not in any way occasioned by any act, neglect, or default of the defendants personally, but was solely occasioned by the negligence of the servants of the defendants; and the servants of the defendants were persons of reasonable skill and care, and reasonably competent to sling, suspend, and manage the boat, and the servants of the defendants and J. G. Smith were engaged in one common employment with a common object, to wit, in the navigation and management of the vessel; and the injury to J. G. Smith was one of the risks incident to the employment of J. G. Smith as such pilot; and the alleged carelessness, negligence, unskillful, and improper conduct of the servants of the defendants were wholly unauthorised by the defendants.

At the trial it appeared that a vessel belonging to the defendants was lying in a dock in the River Thames ready to proceed to sea, and that she was within a district within which pilotage is compulsory upon her under the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), s. 376, viz., the London district of the Trinity House. It was also shown that it was customary for a pilot to go on board the vessel, which he is engaged to pilot onwards, whilst she is in dock in order that he may give instructions to the crew whilst getting the vessel out of dock, and that, whilst the deceased was so giving orders, one of the ship's boats, which had been negligently slung by the crew, fell upon him and killed him.

A rule nisi was obtained by the defendants in pursuance of the leave reserved, on the ground that they were not responsible for the negligence of their servants under the circumstances proved.

Willis showed cause.

Thesiger, Q.C. and Wood Hill supported the rule.

The several clauses of the Merchant Shipping Acts 1854 and 1872, relating to pilotage, and the following cases were cited and fully discussed:

Indemnity v. Dumas, 14 L. T. Rep. N. S. 484; L. Rep. 1 C. P. 274; in error, 16 L. T. Rep. N. S. 203; L. Rep. 2 C. P. 311.
Morgan v. Vale of Neath Railway Company, 5 B. & S. 570; in error, 13 L. T. Rep. N. S. 514; L. Rep. 1 Q. B. 140.
Wilson v. Merry, 19 L. T. Rep. N. S. 30; L. Rep. 1 So. App. 326;
Degg v. Midland Railway Company, 1 H. & N. 773;
General Steam Navigation Company v. British and Colonial Navigation Company, 19 L. T. Rep. N. S. 357; L. Rep. 4 Ex. 238; 3 Mar. Law. Cas. O. S. 108, 237.

Cur. adv. vult.

Q. B.]

SMITH v. STEELS

[Q. B.]

Jan. 25.—The judgment of the court (Cockburn, C.J., Blackburn, Mellor, and Lush, JJ.), was delivered by

BLACKBURN, J.—This was an action under Lord Campbell's Act to recover damages in respect of the death of the plaintiff's testator, who was her husband.

At the trial before my brother Lush, the following facts were proved: The defendants were the owners of a vessel lying in dock about to proceed on a voyage in which the employment of a pilot was compulsory. The testator was a pilot who was engaged for that voyage. He (in compliance with what it was proved was always the practice of pilots) went on board the vessel in dock to give directions to the crew when getting the vessel out of dock. Whilst doing so, a boat which had been negligently slung fell on him and killed him. The defendants did not personally interfere in the matter. From the way the case comes before us on a point reserved, we must take it as a fact that the accident was occasioned by the negligence of the servants of the defendants in slinging the boat, without contributory negligence on the part of the deceased.

Leave was reserved to enter the verdict for the defendants, or a nonsuit, on the ground that the defendants were not responsible for the negligence of their servants under the circumstances proved in evidence. A rule nisi was obtained accordingly, against which case was shown in this Term before my Lord Chief Justice, my brothers Mellor, Lush, and myself, when the case was very ably argued by Mr. Willis for the plaintiff, and by Mr. Thesiger and Mr. Wood Hill in support of the rule, and the court took time to consider its judgment.

The law is to a certain extent determined by the case of *Indermaur v. Dames* (*ubi sup.*) There is an obligation on the part of the occupier of property, whether fixed or movable, to those who at his invitation, express or implied, come on that property to take by himself and servants reasonable care that the person so coming shall not be exposed to unusual danger; and that obligation extends to the workmen sent by a tradesman to repair part of the machinery. Mr. Justice Willes, in delivering judgment in that case, after referring to the undisputed law that there was such an obligation on the part of a shopkeeper to his customer, and that there was no such obligation to a servant, proceeds to give the reason of the judgment in these terms: "The class to which the customer belongs includes persons who go not as mere volunteers, or licensees, or guests, or servants, or persons whose employment is such that danger may be considered as bargained for, but who go upon business which concerns the occupier, and upon his invitation express or implied." In *Morgan v. Vale of Neath Railway Company*, (*ubi sup.*) which was earlier in date than *Indermaur v. Dames*, the reason why a servant cannot sue his master for negligence of a fellow servant was put on the ground that it was an implied part of the contract between master and servant that the servant should, as between them, take upon himself such risks. In the more recent case of *Wilson v. Merry* (*ubi sup.*), the House of Lords in a Scotch case decided that the owners of a colliery were not responsible to their servants for an injury occasioned by the negligence of the general superintendent of the mine

to whom the defendants had delegated their whole power and authority. It does not appear from the report that the cases of *Morgan v. Vale of Neath Railway Company* (*ubi sup.*), and *Indermaur v. Dames* (*ubi sup.*), were brought to their Lordships' notice; but the Lord Chancellor (Lord Cairns) seems to us to have arrived, by independent reasoning, at the principle that the exemption from liability was derived from the contract between the master and his servant, and to base his judgment upon it. He says (p. 332), "The master is not and cannot be liable to his servant unless there be negligence on the part of the master in that which he (the master) has contracted or undertaken with his servant to do. The master has not contracted or undertaken to execute in person the work connected with the business . . . At all events, a servant may choose for himself between serving a master who does and a master who does not attend in person to his business."

In the present case, the accident happened before the actual commencement of the voyage; but it is clear that the deceased was on board only because he was going on that voyage as a pilot, and under the same terms as to risk as if the voyage had begun. We think, therefore, that the question in the present case is reduced to this, whether there is between the owners of a ship and the pilot whom they are compelled to employ, an implied contract that the pilot shall take upon himself the risk of injury from the negligence of the shipowners' servants. *Indermaur v. Dames* decides that there is no such implied contract between the owner of machinery and those who are sent by their masters to repair it. And we think that there is no such implied contract in the case of a pilot. The law as to pilots is now regulated by the Merchant Shipping Acts. The pilot is, by 17 & 18 Vict. c. 104, s. 365, subject to a penalty if he refuses to take charge of the ship. The master is, by sect. 353, bound under a penalty to employ the pilot. "The rate of remuneration is, by sect. 358, neither to be more nor less than the fixed rate, though both parties should agree. And by sect. 388, the owner is not to be liable for the pilot as his servant. By a subsequent enactment (35 & 36 Vict. c. 73, s. 9), power is given by bye-laws to modify sect. 356, so far as to allow any pilot or class of pilots any rate less than the rate for the time being demandable by law, but no power is given to enable a pilot to demand more. He cannot, therefore, make any special bargain to receive larger pay in consideration of his taking this risk upon him. An ordinary servant has, as Lord Cairns points out (at least theoretically), the power of choosing whether he will enter into the employment of a master who does not agree to act personally in the management of his business, or as an alternative, to be responsible for the negligence of those he employs. The pilot has no such choice, he must conduct the ship on the terms fixed by the statutes which regulate pilotage, and we can find nothing in those statutes to justify the conclusion that the pilot is to take upon himself the risk.

We therefore think that the rule should be discharged.

Rule discharged.

Attorney for plaintiff, G. Hebbell.

Attorneys for defendants, Edwards, Layton, and Juque.

[Ex.]

FLOWER v. BRADLEY.

[Ex.]

COURT OF EXCHEQUER.

Reported by T. W. SUTCLIFFE and H. LEIGH, Esqrs.,
Barristers at Law.

Thursday, Nov. 19, 1874.

FLOWER v. BRADLEY.

Negligent navigation by a pilot—Action for—County Court Jurisdiction—Admiralty cause—31 & 32 Vict. c. 71; 32 & 33 Vict. c. 51.

An action against a pilot for negligence in navigating a vessel whereby it came in collision with another vessel which it damaged, is not an admiralty cause within the meaning of "The County Courts Admiralty Jurisdiction Act 1868" (31 & 32 Vict. c. 71) sect. 3, sub-sect. 3, and may therefore be brought in any County Court, though such court be not one appointed under the Act for the trial of admiralty causes.

This was a rule calling upon the County Court Judge of Kent, sitting at Gravesend, and upon the defendant, to show cause why a *mandamus* should not issue to the former commanding him to hear and determine this case on the ground that it was properly brought in the said County Court. The plaintiff was a common law plaintiff in the before mentioned court, and the particulars were as follows:

"The plaintiff claims the sum of 14*l.*, being damages and loss sustained by him to his sailing barge *Janus*, which said barge was run foul of and damaged by the ship or vessel *Sunny-side*, on the 7th Aug. last off Deptford Creek, in the river Thames, such damage having been caused by the negligence of the defendant, who was then in charge of the said ship or vessel by law, as a licensed Trinity House pilot."

Upon the plaintiff coming on for hearing at the Gravesend County Court, and the plaintiff's attorney having opened his facts, the County Court judge interposed, saying, that upon the particulars and facts stated, the cause was an admiralty cause, and that he had no jurisdiction sitting at Gravesend to hear it, although he had jurisdiction at Rochester in admiralty, and the place where the damage occurred was for admiralty purposes within the district of the Rochester County Court. The attorney contended that the cause was a common law and not an admiralty cause, but the judge held to his opinion, and therefore nonsuited the plaintiff (*n*).

(a) By the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71) power is given to the Crown, by sect. 2, to appoint certain County Courts courts for admiralty purposes; and under this enactment the Rochester County Court was appointed for the district within which the collision in question took place.

Sect. 3 enacts that "Any County Court having admiralty jurisdiction shall have jurisdiction and all powers and authorities relating thereto, to try and determine, subject and according to the provisions of this Act, the following causes, in this Act referred to as admiralty causes:—"

(3) As to any claim for damage to cargo, or damage by collision—any cause in which the amount claimed does not exceed £300."

Sect. 5 enacts that no County Court other than that appointed is to have jurisdiction.

By the County Courts Admiralty Jurisdiction Amendment Act 1869 (32 & 33 Vict. c. 51) it is enacted by sect. 4 that "the third section of the County Courts Admiralty Jurisdiction Act 1868 shall extend and apply to all claims for damage to ships, whether by collision or otherwise, when the amount claimed does not exceed £300."

Bolland showed cause.—The County Court judge was right in refusing to try the cause, and in nonsuitting the plaintiff, for the Gravesend County Court had no admiralty jurisdiction, and the suit being an admiralty one it should have been brought in the Rochester County Court. The nature of the causes over which certain County Courts have acquired admiralty jurisdiction, and the extent of that jurisdiction, appears from the County Courts Admiralty Jurisdiction Acts (31 & 32 Vict. c. 71, and 32 & 33 Vict. c. 51). The Queen in council is empowered (sect. 2 of the former Act) to appoint any County Court to have admiralty jurisdiction, and to define the area of its jurisdiction, and to include in that area the district of any other County Court. The Rochester County Court for admiralty purposes has jurisdiction over the district of the Gravesend County Court—the latter having no admiralty jurisdiction. The County Courts having admiralty jurisdiction have power to try (*inter alia*) "as to any claim for damage by collision—any cause in which the amount claimed does not exceed 300*l.*" (sect. 3, sub-sect. 3); and it is further enacted (sect. 5) that "no County Court other than the County Court so appointed shall have jurisdiction within that district in any admiralty cause." The jurisdiction so conferred may be exercised either *in rem* or *in personam* (32 & 33 Vict. c. 51, s. 3), and by the 4th section of that Act the jurisdiction conferred by the former Act is extended to "all claims for damage to ships whether by collision or otherwise." This is a cause of damage by collision occurring by the negligence of the defendant, and is therefore an admiralty cause within the very words of these Acts. Over such a cause the common law jurisdiction of the County Courts has been taken away. [KELL, C.B.—Is this an admiralty cause? If it is a cause over which the Admiralty Court would have no jurisdiction, has the County Court sitting in admiralty jurisdiction? *R. E. Webster*, for the plaintiff.—It has been expressly decided in the *Alexandria* (ante, vol. 1, p. 464; L. Rep. 3 Adm. & Ecc. 375), that there is no admiralty jurisdiction in a cause against a pilot *in personam*. CLEASBY, B.—In that case it was held that the Court of Passage had not jurisdiction to entertain a suit against a pilot in admiralty, and hence it follows that the Admiralty Court has no such jurisdiction.] But the judge of the Admiralty Court said that if the matter were *res integra* he should be disposed to hold the contrary, but that he was bound by the decision in *The Urania* (1 Mar. Law Cas. O. S. 156; 10 W. R. 97), supported as it was by *Eccard v. Kendall* (3 Mar. Law Cas. 391; L. Rep. 5 C. P. 428), and *Simpea v. Blues* (ante, vol. 1, p. 326; L. Rep. 7 C. P. 290). But these cases are practically overruled by *Cargo ex Argos* (ante, vol. 1, p. 519; L. Rep. 5 Priv. Co. 134), in which the Privy Council holds that the County Court Admiralty Jurisdiction is not confined to the jurisdiction possessed by the High Court of Admiralty. Whatever is fairly within the words of the above Acts must be held to be within the admiralty jurisdiction of the County Courts; and it is only reasonable to presume that the Legislature intended to enlarge the jurisdiction of certain County Courts in admiralty or nautical matters, so that all small causes of that nature might be tried before a tribunal competent to try them; and the provision for nautical assessors makes these County Courts fully competent, which

[Ex.]

MACKENZIE v. WHITWORTH.

[Ex.]

they would scarcely be if the judge sat alone at common law.

Webster, in support of the rule, was not called upon.

Kelly, C.B.—I am of opinion that we ought to make this rule absolute. Were it not for the cases cited, which are directly in point, I should have difficulty in thus deciding upon a mere rule to set aside a nonsuit in the County Court, there being no appeal from our judgment; especially as it cannot be denied that to a great extent our decision may appear to conflict with that of a court of high authority, although its decisions are not strictly binding on us. In *Everard v. Kendall*, *Simpson v. Bliss*, and *Smith v. Brown* (*ubi sup.*), the struggle was to extend the admiralty jurisdiction, and not to give the County Courts an entirely new jurisdiction. These cases were all discussed in *The Alexandria* (*ubi sup.*), which was an admiralty suit instituted in the Court of Passage in Liverpool against a pilot for collision, and Sir R. Phillimore, upon the high authority of the decision of Dr. Lushington in the *Urania* (*ubi sup.*), held that the court had no jurisdiction as a court of admiralty to entertain such a suit. We have, therefore, a direct decision upon the point—*The Alexandria* in the Admiralty Court; and against this decision we have only a suggestion of a different opinion expressed by the Judicial Committee of the Privy Council, in the case of *Cargo ex Argos* (*ubi sup.*), which is certainly not upon all fours with the present case; and, moreover, whilst we show great respect for the Privy Council decisions, they are not binding upon us even when in point, and, under these circumstances, we must give effect to the weight of authority, showing that the cause in question was not an admiralty cause, and was, therefore, maintainable in the court and in the manner in which it was instituted. If we make this rule absolute, it will be competent to the defendant to move for a prohibition to the County Court if it proceeds, and then another court may review the decisions; whilst, if we discharge it, there will be no means of doing so.

CLEARY, B.—I am of the same opinion. And although I think that the County Court judge ought to have heard the evidence, I am not surprised that he refused to do so, for the case in the Privy Council is strongly in favour of his view. The question is, what is the proper course for us to pursue? In some cases good reasons may be shown on both sides, but in such a case as the present, where the question might be perpetually raised, there is no other solution but that which is derived from authority. Now we have two decisions in support of the plaintiff's contention—*The Alexandria* in the Admiralty Court, and that in the Common Pleas (*Everard v. Kendall*) both precisely in point. We cannot in the face of those decisions do otherwise than make this rule absolute.

AMBLETT, B., concurred.

Rule absolute.

Attorney for the plaintiff, *J. A. Farnfield*.

Attorneys for the defendant, *Walter, Son, and Field*.

Feb. 9 and 10, 1875.

MACKENZIE v. WHITWORTH.

Marine insurance—Re-insurance—Insurable interest—What necessary to be stated in policy—Interest in subject-matter—Fact of re-insurance—Concealment—Material fact—19 Geo. 2, c. 37, s. 4—27 & 28 Vict. c. 56 s. 1—30 & 31 Vict. c. 50.

An assured may effect reinsurance directly on the subject-matter of insurance against the risks or any part thereof insured against in the original policy, without being bound to disclose in the policy or otherwise that it is a reinsurance.

The plaintiff, an underwriter, in effecting with another underwriter an ordinary policy on certain goods, on board a named vessel, for a specified voyage, omitted to state, as the fact was, that it was a re-insurance of a risk already taken by the plaintiff as an assured; and the jury, in an action by him on the policy, having found that the fact of its being a re-insurance was immaterial, and that there had been no concealment, the verdict was entered for the plaintiff, with leave to the defendant to move to enter the verdict for him, on the ground that the plaintiff being only interested as a re-insurer, was not entitled to recover on the policy sued on; and it was

Held, that an underwriter, when he effects a policy of insurance on a risk already assured against by him, is not, in law, bound, unless challenged so to do, to disclose the fact of its being a re-insurance, and that the plaintiff, therefore, was entitled to recover.

The case of Glover v. Black (3 Burr. 1394) discussed, explained, and distinguished.

This was an action upon a policy of marine insurance for 500*l.* upon a cargo of cotton on board a vessel called the *Southampton*, on a voyage from New Orleans to Revel, and it was brought by the plaintiff, the assured, against the defendant, the assurer, to recover the sum of 200*l.*, being the amount for which the defendant had underwritten the said policy. The first count in the declaration set out the policy (dated 24th April 1873) in *extenso*, and proceeded to aver that the defendant, in consideration of a certain premium paid to him, became an insurer to the plaintiff, and duly subscribed the said policy as such insurer to the plaintiff, in the sum of 200*l.* upon the said goods in the said policy mentioned; and the said goods were shipped on board the said ship at New Orleans aforesaid, to be carried therein on the said voyage. And the United States Lloyd's and individual underwriters of New York, were then, and until and at the time of the loss, thereafter mentioned, interested in the said goods to a large value and amount, to wit, to the value and amount of all the moneys insured thereon; and the said insurance was made for the use and benefit, and on account of the persons or companies so interested; and the said ship with the said goods on board thereof sailed on the said voyage, and afterwards, whilst the said ship with the said goods on board thereof, was proceeding on the said voyage, and during the continuance of the said risk, the said goods were, by the perils so insured against as aforesaid, and not by any of the excepted perils, wholly lost; and all conditions, &c. Yet the defendant has not paid the said sum of 200*l.* The second count was the ordinary money count.

[Ex.]

MACKENZIE v. WHITWORTH.

[Ex.]

The defendant pleaded various pleas in answer to the action, on all of which issue was taken and joined; but the only pleas which, at the trial, became material were—

Plea 1. Denying that the defendant became an insurer or subscribed the said policy.

Plea 8. Which alleged that at the time of the defendant's alleged subscribing the said policy, and becoming such insurer as alleged, that is to say, on the 20th April 1873, the plaintiff and his agents and the said United States Lloyd's, and underwriters of New York respectively, wrongfully and improperly concealed from the defendant certain material facts and information which the defendant did not know, and had not received, and could not be presumed to know or have received, and had not the means of knowing or receiving, and which the plaintiff and his agents, and the said Lloyd's and underwriters respectively, before then and there knew, and had received, that is to say, that the said insurance in the said first count mentioned, was and is only a re-insurance; that is to say, a re-insurance made by the plaintiff and his agents, and the said Lloyd's and underwriters respectively, and that the plaintiff and the said Lloyd's and underwriters respectively before and at the time of the defendant becoming such insurer and subscribing the said policy, had become and were insurers for the said sum of 200*l.* upon the said goods and against the identical perils and risks in the said policy mentioned, to other persons; which said matters, and the circumstances and facts which induced the plaintiff and the said Lloyd's and underwriters to make such re-insurance were material to the said perils and risks in the said policy mentioned, and were concealed by the plaintiff and his said agents, and the said Lloyd's and underwriters from the defendant, and would have otherwise raised the rate of premium at which the said policy could and would have been effected by the defendant, or which would have otherwise deterred the defendant from entering into or making the said policy, and accepting the said risks, and which ought to have been communicated by the plaintiff, his agents, and Lloyd's and underwriters, to the defendant.

The facts of the case as they appeared at the trial, before Pollock, B. and a special jury, at the last summer assizes, 1874, at Liverpool, were shortly as follows:

The plaintiff is a merchant at Liverpool, who also acts as agent for certain New York underwriters. The defendant is one of the firm of Messrs. B. Whitworth and Brothers, who carry on business at Manchester as merchants, and who have a department there called the Insurance Department, in which the business of an underwriter is carried on. Messrs. Pickford Brothers, who are insurance brokers at Liverpool, having an agent in Manchester of the name of Forrester, have been in the habit of introducing insurances on ships and cargoes to the defendants, from whom they received, on affecting such introduction, a commission beyond the usual broker's commission, which they retained to themselves, handing over to the broker who introduced the insurance to them his usual fee. Messrs. Tyson and Co. are also insurance brokers at Liverpool.

It appeared from the admissions signed between the parties before the trial: First, that Messrs. Pickford, in whose name the policy was made out,

as the brokers or agents of the defendant, by letter of the 14th Jan. 1873, effected with Messrs. Tyson and Co., an insurance policy for 5000*l.* on cotton, per ship *Southampton*, from New Orleans to Revel, particulars to be afterwards declared; secondly, that Tyson and Co., who acted on behalf of the plaintiff, who was acting in the matter for and on behalf of the United States Lloyd's and the individual underwriters of New York, subsequently (to wit) on a day and time to be proved, declared the particulars; thirdly, that on 24th April 1873, the defendant subscribed the policy in the declaration set out for 200*l.*; fourthly, that the name of Pickford Brothers was inserted in the policy as representing the plaintiff who was the agent of the said Lloyd's and underwriters, the persons interested in causing the said policy in the declaration set out to be made; fifthly, that the insurance referred to by the above-mentioned letter of the 14th Jan. 1873, was intended by the plaintiff to be a re-insurance for and on behalf of the United States Lloyd's and the individual underwriters of New York, being part of an insurance or insurances by them on cotton to the value of 80,000*l.*, to be shipped by Messrs. Fatman and Co., of New Orleans, on board the ship *Southampton*, on the said voyage in the declaration mentioned; and the said Lloyd's and underwriters, at the time of the said insurance, and of the said loss in the said declaration mentioned, had a very large interest as insurers in respect of the said original insurance or insurances over and above all the re-insurances (including that made or intended to be made by the policy in the declaration set out), made or caused to be made on their behalf; sixthly, that the total amount of re-insurances on the said cotton for the said voyage made or caused to be made by or on behalf of the said Lloyd's and underwriters, including the re-insurance made or intended to be made by the policy in the declaration mentioned, was 24,000*l.*; seventhly, that the said cotton of the said value so insured by the said Lloyd's and underwriters as aforesaid, was shipped on board the said ship *Southampton* at New Orleans, and the said ship, with the said cotton on board, sailed from New Orleans on the said voyage on the 28th Feb. 1873, and the said ship was, together with the said cotton, afterwards (to wit) on the 19th March 1873, burnt and destroyed, and the said companies, by reason thereof, sustained a total loss in respect of their original insurances, amounting to 4000*l.*, which they have paid, and part of which was re-insured, as aforesaid; eighthly, that it was not disclosed that the said re-insurance was a re-insurance, except by the receipt by Messrs. Pickford of the memorandum (B) herewith annexed.

The following is the letter of Messrs. Pickford, of the 14th Jan. 1873, referred to in the above admission (No. 1.)—

Liverpool, 14th Jan. 1873.

Messrs. J. D. Tyson and Co.,

Dear Sirs,—We have opened on your account a provisional policy for 5000*l.* on cotton, average ten bales "F. G. A." per *Southampton*, from New Orleans to Revel, at 5 per cent. (Particulars to be declared hereafter.) Yours truly,

PICKFORD BROTHERS.

The following letter was from Pickford's agent, Forrester, at Manchester, to the defendant:—

Messrs. B. Whitworth and Brothers,

Manchester, 24th April 1873.

Particulars for closing.

Please insure 5000*l.* on cotton valued 1*l.* premium

[Ex.]

MACKENZIE v. WHITWORTH.

[Ex.]

5 percent. average ten bales "F. G. A." name of vessel Southampton, at and from New Orleans to Revel. When to sail. Yours truly,
S. P. M. FORRESTER.

On the 25th April, 1873, Pickfords wrote to Forrester, returning the stamp, and requesting the policy to be altered in accordance with a "press copy," which they inclosed in their letter, and which copy was the memorandum (B) referred to in the above-mentioned admission (No. 8), and was as follows:—

(B)
Copy of policy asked for. For full particulars see usual printed copy.

Colin Mackenzie, agent.

50000, Pickford.

New Orleans to Revel.—Southampton.

Being a re-insurance, subject to the same clauses and conditions as the original policy or policies, and to pay as may be paid therein. On option valued as per original policy or policies. Average payable on each ten bales, running loading numbers, general average as per foreign statement if claimed.

On the 26th April 1873, the defendant wrote or telegraphed to Pickfords, saying: "The Southampton looks queer, sailed Feb. 24th, declaring now, object to make our interest a re-insurance, and shall wait proof of interest before we admit any claim." It was not until after the loss that the defendant became aware that it was a re-insurance which the plaintiff had meant to effect, and he then objected to being held liable, and wrote as above-mentioned to Pickfords. Subsequently, in March 1874, the defendant delivered a policy in the terms of the original slip (see the before-mentioned letters of 14th Jan. and 24th April 1873), with, at the same time, a distinct intimation that he did so under protest, and that the policy was not delivered as a binding and valid instrument, but only in order to enable the plaintiff to assert any right he might have without any difficulty being raised under the Stamp Acts.

Merchants and underwriters were called as witnesses on both sides. Those for the plaintiff said that the fact of its being a re-insurance was immaterial to be known, and more particularly when, as in the present case, the ship had not sailed, and that it would make no difference in the rate of premium. The defendant's witnesses, on the other hand, declared it to be a material fact; and some of them said that they would not themselves have accepted the risk had they known it to be a re-insurance. The witnesses, however, on both sides, and the plaintiff himself, admitted that it was usual in practice to state the fact of its being a re-insurance in the slip and in the policy.

The learned Baron in his summing up to the jury, after stating the issue to be determined, and the evidence on both sides, said, "It is a matter entirely for you whether you think there has been a withholding by the plaintiff and those who effected the insurance for him, of that which was substantially a material fact, which he was bound to disclose to the underwriter or his agent. If it was material, he was bound to tell it in point of law. The laws of insurance are exceptional. A person is not only bound to answer questions, but to come forward and tell all that he himself knows, or that his agents, who are putting forward the insurance, know; to tell all that is material to the risk, or calculated to affect the mind of the person to whom it is offered in the sense which I have stated. If you think that the plaintiff has told all that is material, and that this fact is immaterial, the plaintiff is entitled to recover. If on the other

hand you think it was material to the risk, or would have altered the amount of the premium, and was withheld, then this policy would be defeated and the plaintiff would not be entitled to recover."

The jury found that the fact, that it was a re-insurance, was not material, and that there was no concealment; and thereupon the verdict was entered for the plaintiff, for 2111. 3s., with interest; and leave was reserved to the defendant's counsel to move.

Hereschell, Q.C., accordingly, in Michaelmas Term last, moved for and obtained a rule nisi on behalf of the defendant, to set aside the above-mentioned verdict for the plaintiff, and to enter a verdict for the defendant, on the ground that the plaintiff being only interested as a reinsurer, was not entitled to recover on the policy sued on, and against that rule.

Benjamin, Q.C., and Myburgh, for the plaintiff, now showed cause.—The question for the decision of the court was whether, upon a re-insurance being effected by an underwriter or insurer, it is requisite or necessary, as a matter of law, that the fact of its being a re-insurance should be stated or declared by him to the insurer at the time when the policy of re-insurance is executed by him? It is contended on behalf of the plaintiff, in opposition to that which will be argued on the other side, that it is not necessary or requisite so to do, and more especially is it not so in the present case, where the jury have expressly found that the fact was not a material one to be known by the insurer, thus negating the fact that there was any concealment, so that the question now is purely one of law. Undoubtedly, the fact of its being a re-insurance of the risk already insured was not mentioned by the plaintiff; and though it may be admitted that it is usual to mention the fact on such an occasion, it is not such a necessary legal obligation as that the omission to mention it would render the policy void. It is immaterial to the risk, because the risk means the arrival in safety of the ship with the goods, which would not and could not in any way be affected by the fact that it was a re-insurance. The 19 Geo. 2, c. 37, s. 4, prohibited all re-assurances with a certain exception, namely, "unless the insurer shall be insolvent, become a bankrupt, or die; in either of which cases such assurer, his executors, administrators, or assigns, may make re-assurance to the amount of the sum before by him assured, provided it shall be expressed in the policy to be a re-assurance." But of recent years the old restrictions on re-assurance have been removed; thus the 27 & 28 Vict. c. 36, s. 1, after reciting that it was expedient to remove the restriction imposed by the Act of Geo. 2, enacted that notwithstanding anything contained in the said Act of Geo. 2, it should be lawful "to make re-assurance upon any ship or vessel, or upon any goods, merchandise, or other property, on board of any ship or vessel, or upon the freight of any ship or vessel, or upon any other interest in or relating to any ship or vessel, which may lawfully be insured; and such re-assurance shall be deemed to be the insurance of interests which may be lawfully insured within the meaning of the Acts imposing stamp duties on policies of sea insurance." It is true that the proviso in sect. 4 of 19 Geo. 2, requiring the fact of its being a re-insurance to be expressed in the policy, was left untouched by the 27 & 28 Vict., and but for the Act next mentioned,

[Ex.]

MACKENZIE V. WHITWORTH.

[Ex.]

would still be now in force; but by "The Statute Law Revision Act 1867" (30 & 31 Vict. c. 59) sect. 4 of 19 Geo. 2, c. 37, is wholly repealed, and therefore re-insurance is now lawful under the 27 & 28 Vict., whilst the necessity for stating it to be so on the policy no longer exists. As a matter of course, the fact always was stated during the period that the proviso in sect. 4 of the Act of Geo. 2 was in force; but the stating it was not the result of a custom, but simply in compliance with the statutory injunction. The case of *Glover v. Black* (3 Burr, 1384), on which the defendant relies strongly, is distinguishable from the present one. That was a case of interest on *respondentia* and *bottomry*, and although it was held that such an interest must be expressly mentioned in the policy, Lord Mansfield, at p. 1402 of the report, declared the ground of that decision to be that "the law and practice of merchants had established that *respondentia* and *bottomry* must be mentioned in the policy;" but he declared at the same time that the court did not mean to determine generally that no special interest in goods might be given in evidence in other cases if the circumstances admitted of it. [BRAMWELL, B.—Has a person who guarantees the payment for goods to the venditor an insurable interest?] There is no doubt that he has. It was found by the jury that it was not material to state the fact here, and, therefore, since the not stating it was found to be no *non est* concealment of a material fact, its statement was clearly not necessary. The motive of the party insured in effecting an insurance is not material to the underwriter, who look only to the goods and the vessel containing them, and the voyage on which the insurance is proposed to be effected. The law on the subject is well and correctly stated by Mr. Arnould in his *Law of Marine Insurance*, 4th edit., by Maclellan, vol. 1, p. 46, where he says, "although a policy must in all cases state correctly, and in some specifically, what is insured, there is no authority for saying that the reason why the party insures should also be expressed in the policy. The true proposition is, that although the subject matter of the insurance must be properly described, the nature of the interest may in general be left at large," and he cites as authority for that, per Lord Tenterden in *Crawley and others v. Cohen* (3 B. & Ad. 478; 1 L. J. N. S., 158, K.B.). That was the case of carriers on a casual, and it was held by the Court of King's Bench that an insurance on goods was sufficient to cover the interest of carriers in the property under their charge belonging to other persons. So Mr. Phillips (American), in his treatise on the same subject, says (vol. 1, par. 424, p. 220, 5th edit.) "The interest of carriers in consequence of their liability to the owners of the goods carried, may be insured under a general description of the goods, without specifying the particular interest intended to be covered." And further on, in the same vol., at p. 264, par. 498, he discusses the subject of re-insurance, and the question "whether an insurer may effect reinsurance on the insured subject generally, without specifying his interest in the policy;" and after stating various cases, and the opinions of text writers on both sides of the question, he says that he "considers the better doctrine to be that an assured may effect reinsurance directly in the insured subject against the risks insured against in the original policy, without any disclosure in the policy or otherwise

that it is a reinsurance." There is another case also in 3 Burr. (*Reed v. Cole*, at p. 1512), which is an authority in favour of the present plaintiff. [BRAMWELL, B.—In that case the plea was that the plaintiff had parted with all his interest in the ship before the loss, and so had none at all; but in the case now before on the plea substantially is this, that the plaintiff had no interest in the goods or in their arrival, but solely the risk which he had previously insured, and that he ought to have insured that previous risk in so many words expressly.] No doubt the defendant will so contend, but the authorities are, it is submitted, not in his favor. The "nature of his interest may be left at large," as was expressly said by Lord Tenterden, in *Crawley v. Cohen* (*ubi sup.*). [AMPLETT, B.—That was not a case of reinsurance, which was not then permitted, but a mere question of interest.] An insurance by a carrier is equivalent in point of fact to a reinsurance. There are various cases in which persons having special or qualified interests may insure. A creditor with a lien on property for his claim has an insurable interest to the extent of his claim; and therefore the mortgagee of a ship or goods may insure the mortgaged subject generally without specifying his interest to consist in a mortgage; and he may recover on a policy effected for his benefit, averring the interest to be in himself; whilst the equitable title of the mortgagor is at the same time an insurable interest in him, which he may protect by a separate policy, and to the full value of the mortgaged property; for, notwithstanding its loss, he is still liable for the mortgage debt (see 1 Arnould, pp. 75, 76; 1 Phillips, ch. 5.) Very little will serve to create an insurable interest, as is shown by the case of *Anderson v. Morice*, in the Common Pleas (*ante*, p. 424; 31 L. T. Rep. N. S. 605; L. Rep. 10 C. P. 58; 44 L. J. 10, C. P.). On all these grounds the plaintiff is entitled to recover, and the defendant's role should be discharged.

Herschell, Q.C. and Baylis for the defendant, *contra*, contended that their rule should be made absolute.—In the first place, the policy did not contain a proper description of the subject matter, or indeed any description of it at all; for it cannot be contended that, under the words "on goods" in a policy, a contract of indemnity would be understood, or could be held to have been effected. Re-insurance is altogether a separate and distinct matter from the original insurance, and has always been so treated by merchants and others desiring to be insured, and also by the underwriters who insure them; and indeed some underwriters, as was proved in evidence here, will have nothing to say to a re-insurance. Again, the intention of the parties must be taken into consideration in construing the contract between them, and it is clear that the defendant never contemplated re-insuring a previously insured risk. It is no mere formal or fanciful objection, for there are substantial difficulties in practice involved in the question; as, for instance, the fact that others than the defendant will have the settling and adjusting of the loss in their hands. [BRAMWELL, B.—Why did not the defendant protect himself, as he might easily have done, by inserting in the policy the words "warranted not a re-insurance?"] The fact of its being a re-insurance may not be material to the risk in one sense, but it is material to the under-

[Ex.]

MACKENZIE v. WHITWORTH.

[Ex.]

writer to know it. It may reasonably be very important to him to be acquainted with the character of the party originally insured, and with all the circumstances connected with the insurance, and, it being the usual practice, both in England and in foreign countries, to mention the fact, he might be well misled by the statement of the fact being withheld from him; and moreover the knowledge might have increased the rate of premium. The authorities are not so entirely in favour of the plaintiff as has been contended on the other side. For instance, in 1 Arnould, p. 225, chap. 5, part 1, sect. 3, it is said, "It is a rule, founded on very sound principles, that every contract of insurance ought distinctly to specify the subject intended to be insured, whether it be ship, goods, freight, profit, money advanced on bottomry and respondentia, or other interest," thus showing that the fact of its being a re-insurance ought to be mentioned. The conclusion drawn by Mr. Phillips, in par. 498, that "the better doctrine is that the fact need not be mentioned," is relied upon by the plaintiff; but it is submitted that the cases cited by the writer do not fully bear out or support his conclusion. In a former part, too, of that same section (498) he quotes Mr. Christian as saying (2 Blackst. Com. 460 n.), "a re-insurance must be expressly mentioned to be a re-insurance in the policy"; (*Andres and others v. Fletcher*, 2 T. Rep. 161). (BRAMWELL, B.—Supposing goods in charge of a carrier are destroyed by means which relieve him from all liability, would he be able to recover their value on an insurance effected by him? Certainly he would. He could, without setting up the special defence, recover the value and pay it over to the owners. Carriers have a special property and possession as bailees in goods entrusted to them for carriage, and as such bailees may maintain trover, and it is as such bailees that they may insure the goods: (*The London and North Western Railway Company v. Glyn*, 1 El. & El. 652; 28 L. J. 128, Q. B.) The case of *Anderson v. Morier*, cited on the other side, is merely a decision that there was an insurable interest in the plaintiff in that particular case. (POLLOCK, B.—Here the plaintiff contends that if the subject matter of the insurance is fairly stated to the underwriter, it is immaterial to him who the owner is, or whether he knows who he is or not.) There is a plain, broad, and well recognised distinction between a first insurance on goods, and a re-insurance of the previous risks, and the latter amounts to an indemnity on an indemnity. The case of *Glover v. Black* in 3 Burr., is strongly in favour of the principle contended for by the defendant, as is also the American case of *New York Bowers Insurance Company v. New York Fire Insurance Company* (17 Wendell Rep. 359). It would be monstrous to hold a man bound when he never meant to be, and would not have entered into the contract at all had he known the real fact. The plaintiff is not the owner of and has no interest in the goods themselves; but the language of the policy means, and all merchants and underwriters would understand it to mean, by usage and custom, an interest in the goods themselves, and not a mere interest in the safe arrival of the ship. The learned judge, in construing the words "material to the risk," said that "the risk" meant anything affected by the question of the completion of the adventure in safety; but the defendant contends it was material to the risk in this way, that, without affecting the defendant's

mind with respect to the risk whether the goods arrived in safety or not, yet it might be material in this sense, that persons are unwilling to take re-insurances owing to the practical difficulties which arise in settling the claim.

Cur. adv. vult.

Subsequently, in the course of the day, the following oral judgments were delivered:

BRAMWELL, B.—We think that the defendant's rule should be discharged. It is undoubtedly a case in which, if we took a longer time to consider our judgment, a considerable amount of research and learning might be expended upon it; but we think it better, having made up our minds upon the question, and believing that further inquiry and research would not alter the conclusion at which we have arrived, to express our opinion as once, which is, as I have already said, that this rule should be discharged.

It must be admitted, as a general rule, that what should be contained in a policy of marine insurance is, the subject matter insured, the risk, the voyage, and the perils insured against, and then the assured, if challenged, must show what his interest is. Now a policy of insurance is a document which is said to have a meaning attached to it only by custom; but if one were to prepare a new document of the kind, one would say that on consideration of so much paid by the assured to the underwriter, the latter undertakes that if certain goods do not arrive in safety he will pay 100*l.*, or that to the extent of 100*l.* he will be an insurer to the assured for the amount of his loss against certain perils. That means, as I said before, that there should be stated in the policy the subject matter insured, the risk, the voyage, and the perils, insured against. Now that has been done in this case, because the plaintiff says "What I want to be guaranteed against is the non-arrival of, or danger to, certain goods upon a certain voyage, in respect of certain perils."

It is, therefore, rather for the defendant to make out that in this case there is some cause for an exception to that general rule, than for the plaintiff to make out that he has done all that is necessary. It is a presumption that the plaintiff has in his favour, and it is for the defendant to make out the exception. The defendant seeks to make it out upon the ground which, if it exists, is, to my mind, rather a ground which goes to the proof of interest than anything else. He seeks to make the exception out in this case by saying that the plaintiff ought to have stated what the assurance was on, and that goes to the question of concealment. He says "It is true that you, the plaintiff, were interested in the safe arrival of these goods, and that you would be damaged by their non-arrival, or their arrival in a damaged condition; but you have concealed from me a material fact—namely, that your interest was not what I supposed it to be—namely, that you were the owner of the goods; but that your interest was that of a re-insurer of them."

Now, I cannot help thinking that the case is in this sort of dilemma: If that is a good reason for the underwriter to advance, then the jury ought to have found for the defendant upon the ground of concealment, and I can certainly imagine that there may be some very good reasons why a jury should so find, and find that it was material for an under-

[Ex.]

MACKENZIE V. WHITWORTH.

[Ex.]

writer to know that he was insuring not the value of the goods in which the assured was solely interested, but that the plaintiff was the underwriter himself, and already the assumer of the goods. If it is immaterial, then clearly one cannot very well see why it should be stated in any shape, and we ought not to be ready to introduce another anomaly into the law of assurance, when the withheld fact is an immaterial one; and more especially that ought not to be done when it is borne in mind that the underwriter, if he thinks fit, for what may be called a whim, or for a consideration which a jury may think to be immaterial or unimportant, may insert in the policy the words "Warranted not a re-insurance." The case then stands thus:—If it is material the jury ought to have found against the assured, on the ground of concealment; and if it is immaterial an anomaly ought certainly not to be introduced, as confessedly this would be one, into the law of insurance, especially when the underwriter, if he saw fit to do so, might have guarded against what he chooses to take either a real or fanciful objection to.

But now, what is the state of the authorities on this subject? It appears to me that they are strongly in favour of the plaintiff. We have the case of a carrier, who is at liberty to insure goods without stating the nature of his interest in the things insured, in the same way that the owner of them would do, and without stating his insurance to be in respect of his liability over to the owner of the goods. I say that the insurance is in respect of that, because I have not forgotten the ingenious argument addressed to us first by Mr. Baylis, and then by Mr. Herschell, that he is a bailee of the goods, and has property in them, and may maintain trover, and all that sort of thing. I think the answer to that is this, that if he insured nothing but what might be called his proprietary or possessory interest in the goods, and if he did sustain damage, he could recover a nominal amount only; but the fact that he is entitled to recover a substantial amount shows that he is insuring in respect of his interest as insurer himself, and as a person liable over to the owner of the goods. Then there are the other authorities that have been cited. There are the cases of mortgagor and mortgagee of a ship. They are not both owners. In truth the mortgagee of a ship is only interested in having lent money on the ship, and having a sufficient title in him to enable him to insure. It is not necessary to multiply cases. It must be admitted that the general rule is that which I have stated, namely, to specify the subject-matter in the safety of which you are interested, and not your interest in it. Then there are the authorities which Mr. Benjamin referred to, and particularly the authority of Phillips; where it is said that this is the general law, as undeniably it is the law in America. Now the only authority relied upon by the defendant to the contrary of that proposition is a case that we must treat with great respect; but the principle of the decision in which, I declare I do not quite see or rightly understand. I can see the convenience of it, as I can see the convenience of the statement here; but I do not see or rightly understand its principles. I mean the case of *Glover v. Black* (3 Burr. 1394), where it was held that respondentia must be insured *eo nomine*, and that it is not sufficient to insure the goods. That was so held

under very peculiar circumstances, namely, in consequence of there being an understanding amongst merchants that when one insured respondentia, it was done *eo nomine*, and it was not said that it was the safe arrival of the goods that was insured. The court there held, and Lord Mansfield said (I believe my brother Pollock has looked into that case more minutely than I have done) that after consulting with many merchants it was so understood; and I dare say that, at that time of day, if it was thought that a wrong had been done, they were not so particular in looking at the issues raised. But, however, I do not see how the practice of merchants made the statement in the policy an erroneous one. However, there it is. If this were a case of respondentia, we should be bound by that decision, and we should act upon it, and leave a court of error to deal with it; but this is not a question of respondentia, and Lord Mansfield himself, in that case, expressly stated that it was not to be supposed that they were laying down any general rule; and that case certainly has not been acted upon as laying down any general rule; for, if it had been, the case of a carrier insuring must have been cited.

It seems to me that we are now invited to introduce what Lord Mansfield in that case called a second anomaly, and I do not see any sufficient reason for our so doing; and, therefore, in my judgment, the defendant's rule ought to be discharged.

POLLOCK, B.—I also am of opinion that the plaintiff is entitled to our judgment in this case.

The finding of the jury was that there was no concealment on the part of the plaintiff, whose clerk put forward the insurance, by reason of his not stating that it was a re-insurance; and this carries with it considerable weight, because it excludes any argument that might arise, in fact or in substance, on the part of the plaintiff, which would tend to show that there was any substantial increase of the risk or anything to increase the rate of insurance in consequence of that fact being withheld. That, therefore, is a starting point. Then comes the real question, which has been argued very fully in this case, whether, by the known practice of underwriters, or by the law of England, a person who is going to re-insure goods that he himself has already insured, is bound to state that it is a re-insurance. It is said that he ought to state that fact. Now, is there any authority for so saying? So far as I have been able to find there is none.

Re-insurance certainly is a thing which must have been known from the time that insurance itself was first known, and, with the exception of our municipal law, which, for some reason, for a certain period of time, prohibited re-insurance, re-insurances have taken place all over the mercantile world. Now, so far as I know, the necessary parts of a contract of insurance on the part of the assured are, that he shall state the subject-matter, or, as it is called by the old French writers, the "aliment" of the insurance, which, I suppose, means the subject-matter; and, before he can proceed to recover the fruits of his insurance, he is bound to go further and show what the interest is. Now I find it laid down in vol. 1 of Emerigon's *Traité des Assurances*, chap. 8, sect. 14, tit. "Re-assurance," that it shall be lawful for the assurers to re-assure with others the effects which they shall already have assured.

[Ex.]

MACKENZIE V. WHITWORTH.

[Ex.]

The learned author does not say to assure their interest, but to assure "the effects" already insured; and he cites for that proposition old French and Spanish "ordinances," and several old French authorities, as Guidon de la Mer (ch. 2, art. 19), Valin, and Pothier's *Traité du Contrat d'Assurance*. The same law is laid down also in the Code de Commerce, art. 342, "Des Assurances"; and the same authorities and others are there referred to. In the English law we have many illustrations of this. We have, as my brother Bramwell has mentioned, the case of carriers, who have a special interest; the cases of vendor and vendee, of whom it might be predicated that only one could be the real possessor of the goods, but as to whom, substantially, there might be a very great question who was in possession of the real property of the goods at the time. No such point has been taken as that the vendor or the vendee ought to have insured according as the property was in the one or the other. Then there is the case of mortgagor and mortgagee. These are not conflicting but independent interests. And further than this, we have the case of *Glover v. Black* (ubi sup.), and the case cited by Mr. Benjamin of *Reed v. Cole* (3 Burr. 1512), in which a person who was a member of an insurance club, had actually parted with his vessel. It was held that he was entitled upon the re-insurance to recover because he was still a member of the club, and, therefore, was an insurer; but his interest was that he himself had undertaken and agreed to pay 500*l.* if a loss happened within three months. Now, in that sense, he was no more the owner of the vessel than any other person; he was a perfect stranger. He had, at the time of the sale, undertaken to pay 500*l.* if the vessel was lost. Lord Mansfield, who was then a member of the court, and it was a very short time after the earlier decision in *Glover v. Black*, came to the conclusion that he was entitled to recover, although there was no mention in the policy of anything except the ship. That satisfies me that in the present case there was properly set forth the subject-matter of the insurance, and that that was all that was required.

Our attention was called to the earlier decision of Lord Mansfield in the case of *Glover v. Black*, and in that case, no doubt, it was held that persons who advanced money on respondentia could not insure without stating who was the lender of the money upon respondentia, nor by merely stating the fact that it was upon goods. It is worth while, perhaps, to observe, with all respect to a decision like this, that long before that there had been great jealousy, apparently not unnatural, with regard to insurance, both by those who borrowed and those who lent money on bottomry and respondentia, because it was a very common thing, not merely to borrow money for the exigencies of the voyage, but a merchant would very often ship goods as a mere adventurer, and borrow money which he was able to take advantage of, and would then insure himself, having all the while no interest in the voyage. And then very often, too, the lender of the money insured, not only the money which he had lent, but also the maritime interest that would be added to it if the voyage were successfully accomplished. All the writers seem to have set their faces against this. It is discussed in the works of both Emer-

gon and Pothier, and forms the subject of Article 347 in the Code de Commerce. That being so the case came before one of our courts, and it was very fully discussed, and undoubtedly it was found then to be the custom and general usage of merchants. All that Lord Mansfield said was, that he was very much inclined at first to support the policy; and in conclusion he said that the ground of the present resolution of the court was, that it was established now, as the law and practice of merchants, that respondentia and bottomry must be mentioned and specified in the policy of insurance; but at the same time he declared that the court did not mean to determine generally that no special interest in goods might be given in evidence in other cases than those of respondentia and bottomry, if the circumstances of the case should admit of it. It seems to me that Lord Mansfield intended to make that exception; and it is somewhat remarkable that some years after a case occurred of insurance on respondentia interest, in which the words were merely on "goods, specie, and effects." I allude to the case of *Gregory v. Christie* (3 Doug. 749; cited also in 1 Park on Marine Insurance, 7th edit. pp. 14 and 33). In that case it was held that the assured, having insured in general words, "goods, specie, and effects," was entitled to recover. There is no doubt, therefore, that those cases depended upon what was the practical interpretation of respondentia and bottomry; and they mean, as it seems to me, that respondentia and bottomry rested on some peculiar ground. To my mind, no special or peculiar ground attaches to the present case.

We come, then, to the consideration of the more open question here, whether it was or not material to be known, and then directly that is so, *eadit questio*, because that fact is found by the jury, and found in favour of the plaintiff.

Upon these grounds I think the plaintiff is entitled to our judgment, and that the defendant's rule must be discharged.

AMPHLETT, B.—I am of the same opinion, although I admit that in the course of the argument my mind has varied considerably, and that I have had much doubt upon the question; but from all that has appeared during the course of the case, and from the opinions of my learned brothers, I am now satisfied that my doubts were not well founded, and I therefore agree that this rule should be discharged.

But the difficulty which I felt was really upon the only question before us, namely, whether the subject matter of the insurance was sufficiently described in this policy. It appeared to me at first, and it is a common apprehension, that there is a great difference between an insurance on goods and an insurance against the risk which the first insurer has to run. Cases might be put in which the two things are not by any means identical; as, for instance, if the first policy had been for any reason void, for fraud, or anything of that sort, undoubtedly the second policy could not be recovered upon, because the matter insured was the risk which the first insurer ran. However, I think that the proper answer to that is that it is merely a limitation of the liability to the second insurer, and does not make his insurance less upon the goods themselves.

Then comes the question, and the more serious one, whether or not the custom that is said to

[Ex.] STUART AND ANOTHER v. THE BRITISH AND AFRICAN STEAM NAVIGATION COMPANY. [Ex.]

prevail that it should always be mentioned in the policy that it is a re-insurance would affect the case; and I agree with what my learned brothers have said, that a very great deal may be said in favour of that view, not upon the question whether as a matter of law the policy would be void, but whether there had been a concealment on the part of the insurer in not mentioning the fact. I say that there is a good deal to be said, because it is impossible not to see that there would be great convenience in mentioning it; and although, with reference to the second insurer the risk may be the same, the convenience of the second insurer, with regard to various things that may occur, such as adjusting and other circumstances, would be very much more consulted if he knew that he was insuring against the risk of the first insurer, and not upon the goods themselves.

It was also attempted to be argued, and with great force before the jury, that there is a notion very generally prevailing, that it would be right and proper that the fact of a second insurance should be mentioned. We have the Act of Geo. 2, by which re-insurance was prohibited generally, though certain instances in which it may be done are there specified; but it is said that where it so arises it should be mentioned in the policy. Then we find from the text books that such a law (and I think I may put it as far as that) prevails in the civilised world; and I do not except New York from the expression "civilised world;" but then we find that in America there are decisions both ways; at least in New York one way, and another way in Massachusetts. No doubt, therefore, there is a very general notion prevailing that it is right and proper that, where there is a re-insurance it should be mentioned in the policy.

But then we have that which is equivalent to the finding of the jury, because it is admitted by Mr. Benjamin, and it was not pressed to its ultimate result at the trial and the opinion of the jury taken upon it, that there is a usage and general custom in England to mention the fact of its being a re-insurance. All these were topics for the jury, and no doubt operated on their minds, and they found that there was no undue concealment. No rule was obtained upon that part of the case, and we must, therefore, I think, assume the finding of the jury to be correct.

Upon the whole, however, notwithstanding the doubts which I have entertained during the greater part of the argument, I agree with my learned brothers that this rule ought to be discharged.

Rule discharged.

Attorneys for the defendant, Gregory, Rowcliffe, Rowcliffe, and Rusele, agents for Sale and Co., Manchester.

Attorneys for the plaintiff, Norris and Allen, agents for Simpson and North, Liverpool.

Wednesday, Feb. 10, 1875.

STUART AND ANOTHER v. THE BRITISH AND AFRICAN STEAM NAVIGATION COMPANY.

Carriers by sea—Vessel with goods on board lost whilst assisting another vessel in distress—Liability of shipowner to owner of goods—Bill of lading—Clause in bill of lading giving "liberty to tow and assist vessels in all situations"—Transshipment of goods on voyage from one vessel

to another—"Goods to be transhipped and forwarded at ship's expense but shipper's risk"—Meaning of the clause—Deviation

The plaintiffs shipped goods at Liverpool on board the *Liberia*, a steam vessel, belonging to the defendant company, to be carried, for freight, payable by the plaintiffs to the defendants, to Benin, on the coast of Africa, which goods, on the arrival of the *Liberia* at Bonny, were, in the usual course of the defendants' business, and according to the terms of the bill of lading, transhipped on board the *Kwara*, a small branch steamer belonging to the defendants, to be forwarded thereby to their destination at Benin. The *Kwara*, with the plaintiff's goods on board, left Bonny, and proceeded on her voyage to Benin, calling on her way at Brass, where she had both to discharge and to take in cargo. Whilst lying in the harbour at Brass, and after having discharged and taken in cargo, and within two or three hours of being ready to proceed on her onward voyage to Benin, the *Kwara* was taken by her captain, at the request of the captain and owners of another vessel, to the mouth of the Brass river, some three miles from the harbour, for the purpose of towing off such other vessel which had got stranded on the breakers in attempting to cross the bar at the entrance of the river, and in her efforts to tow that vessel off, the *Kwara* herself, in consequence of her screw getting fouled with a rope, was wrecked, and the plaintiff's goods were lost. It did not appear that human life was in any imminent danger, or that the assistance of the *Kwara* was sought for, except to save property.

The bill of lading, given by the defendants on receiving the goods at Liverpool, contained a clause giving to their vessels "liberty to tow and assist vessels in all situations;" and also a memorandum in the margin as follows: "The within goods to be transhipped at Bonny, and forwarded to destination by branch steamer at ship's expense but shipper's risk."

In an action by the plaintiffs to recover the value of their goods they obtained a verdict, with leave to the defendants to move to enter it for themselves, and on argument it was

Held, by the Court of Exchequer (Bramwell, Pollock, and Amphlett, B.B.), making absolute the rule to enter the verdict for the defendants: First, that, under the express words of the clause in the bill of lading giving liberty "to tow and assist vessels," &c., the *Kwara* was justified and protected in going to the assistance of the other vessel in the manner and under the circumstances stated; and,

Secondly, that the words in the margin of the bill of lading "at shipper's risk," applied, as did also the words "at ship's expense," to the transshipment only of the goods from the one vessel to the other at Bonny, and not to the forwarding of them from Bonny to Benin.

THIS was an action brought by the plaintiffs against the defendants, to recover the value of certain goods shipped by the plaintiffs for Benin, by the steamships *Liberia*, *Congo*, *Senegal*, and *Kwara*, respectively, belonging to the defendants, and which goods were lost or damaged in the steamship *Kwara*, under the circumstances hereinafter stated.

The declaration contained four counts. The first count charged that the plaintiffs delivered to the

[*Ex.*] STUART AND ANOTHER v. THE BRITISH AND AFRICAN STEAM NAVIGATION COMPANY. [*Ex.*]

defendants certain goods of the plaintiffs, to be by the defendants safely and securely shipped and carried from Liverpool to Benin, certain perils and casualties only excepted, for freight therefor payable by the plaintiffs to the defendants, the said goods to be shipped at Liverpool as aforesaid on board a certain ship called the *Liberia*, to be carried thereon to Bonny and to be forwarded and sent from Bonny aforesaid to Benin aforesaid by branch steamer; and that the defendants were not prevented from so shipping, carrying, transshipping, and delivering the said goods by any of the perils or casualties aforesaid; and that all conditions, &c., to entitle the plaintiffs to have the said goods safely and securely carried and delivered by the defendants as aforesaid; yet the defendants did not safely and securely carry and deliver the said goods as aforesaid, but so negligently and improperly conducted themselves in the premises that thereby divers of the said goods became and were, during the said voyage, wholly lost to the plaintiffs; and the plaintiffs were obliged to pay salvage in respect of the remainder of the said goods, and such remainder were greatly damaged and rendered of little or no use or value to the plaintiffs. The second and third counts were similar with respect to goods shipped on board the steamships *Congo* and *Senegal* respectively.

The fourth count charged that in consideration of the plaintiffs causing to be shipped on board the ship *Kwara*, in parts beyond the seas, to wit in the port of Bonny, certain goods of the plaintiffs in good order and well conditioned for the purpose, and on the terms thereafter mentioned, the defendants, by a bill of lading made on the 16th June 1873, by the defendants, by their agent in that behalf and delivered to the plaintiffs, promised the plaintiffs that the goods of the plaintiffs in the said bill of lading mentioned, and then so shipped as aforesaid, should be delivered in like good order and condition at Benin, certain perils and casualties only excepted, to the plaintiffs, they paying freight for the same as in the said bill of lading mentioned. Averments that the delivery of the said goods was not prevented by any of the perils or casualties aforesaid, and that all conditions, &c. Breach assigned, the non-delivery of the said goods, &c., to the plaintiffs at Benin, in such good order, &c., and loss and damage to the plaintiffs, &c., as in the first count.

Plea to all the said counts.—First, denying the delivery of the goods by the plaintiffs to the defendants upon the terms, or for the purposes in the said counts respectively alleged; secondly, denying the breaches in the same counts respectively alleged; thirdly, that the defendants were precluded from carrying and delivering the goods by the excepted perils and casualties; fourthly, that the goods were delivered to the defendants, as in the said counts respectively mentioned, upon the terms of a bill of lading whereby it was provided amongst other things, that the goods should be transhipped at Bonny and forwarded to their destination by branch steamer at ship's expense, but at shipper's risk. And the defendants say that the loss and damage to the said goods, in the said counts respectively mentioned, were occasioned without the neglect or default of the defendants after the transshipment of the same at Bonny, and while the same were

being forwarded to Benin at the shipper's risk, within the true intent and meaning of the said bill of lading in that behalf.

Upon all the above pleas respectively issue was taken and joined.

At the trial before Pollock, B., and a special jury, at the Liverpool Summer Assizes, 1874, a verdict was found for the plaintiffs for the damages in the declaration; leave being given to the defendants to move to enter a verdict for them, if the court should be of opinion that the defendants are liable, the question of damages to be referred to a legal arbitrator (named), who in his discretion might state a special case as to the proper measure of damages and the principle of assessing them, at the request of either party.

The following appeared to be the admitted facts of the case as agreed between the parties to be taken as on the learned judge's notes.

The plaintiffs are African merchants carrying on their business at Liverpool and on the West Coast of Africa, at Bonny, Brass, Benin, and elsewhere on that coast, under the firm of Stuart and Douglas. The defendant company are the owners of a line of steamers trading between Liverpool and Glasgow and the West Coast of Africa, and they conduct their trade in the following manner:

All goods shipped in England are sent by the large mail steamer as far as Bonny, and there the company have floating warehouses and hulks, into which all goods for towns and ports up the shallow rivers are stored. A branch steamer belonging to the defendants plies between Bonny and the smaller ports, and by it the goods are forwarded to their ultimate port of destination. In June 1873, this branch steamer was the steam ship *Kwara*.

The goods mentioned in the first three counts of the declaration, were shipped by the plaintiffs, by the defendants' steamers from Liverpool for Benin direct, and for such shipments the plaintiffs received from the defendants bills of lading dated as follows: 5th April 1873, per *Liberia*; 17th April 1873, per *Congo*; and 6th May 1873, per *Senegal*. The plaintiffs on the 24th April 1873, made a fourth shipment of goods to Bonny by the African Steamship Company's steamer, *Calabar*, and such fourth shipment was transhipped at Bonny on board the defendants' steamer *Kwara*, to be carried from Bonny to Benin, for which shipment the plaintiffs received from the defendants a bill of lading dated the 16th June 1873. The fourth count is in respect of these last mentioned goods. The goods per *Liberia*, *Congo*, and *Senegal*, arrived safely at Bonny, and were there transhipped on board the *Kwara* on or about the 16th of June 1873, as appears from the *Kwara's* manifest, and log. No bills of lading were given by the *Kwara* for the goods so transhipped, no new bills of lading being ever given on the transshipment at Bonny on board the branch steamer of goods shipped in England on through bills of lading for Benin.

The *Kwara* left Bonny on or about the 18th June 1873, and about seven p.m. of the same day she brought up outside the bar of the Brass River. On the following morning, the 19th June, the *Kwara* crossed the bar and proceeded to discharge what cargo she had for Brass at the factories there. The cargo is discharged there with lighters belonging to the consignees of cargo. On the next day, the 20th June, the *Kwara*, which had dis-

[EX.] STUART AND ANOTHER v. THE BRITISH AND AFRICAN STEAM NAVIGATION COMPANY. [EX.]

charged her Brass cargo, and would have proceeded on her voyage to Benin in an hour or two, went to assist a steamer called the *Monrovia*, belonging to the African Steamship Company, which had got aground on the previous day in attempting to cross the bar of the Brass River, and in so doing the *Kwara* was wrecked with the plaintiffs' goods on board. The circumstances under which such assistance was rendered, and the wreck of the *Kwara* took place, are described in the following documents which form part of this case, namely, the bills of lading per *Liberia*, *Congo*, *Senegal*, and *Kwara*, and the log, protest, manifest, and letters of Capt. Tate of the *Kwara*, of the 27th June 1873, to the owners, the protest of the *Monrovia* and the examination of the captain of the *Monrovia*, are to be taken as forming part of the case, and the court are to draw all inferences of fact.

Each of the four bills of lading in this case contained the following clause: "With liberty in the event of the said steamer putting back into any port, or otherwise being prevented from any cause from proceeding in the ordinary course of her voyage, to tranship the goods by any other steamer, and with liberty to sail with or without pilots, and to tow and assist vessels in all situations." And in each of the three bills of lading by the *Liberia*, the *Congo*, and the *Senegal*, mentioned in the first three counts respectively, there was contained the following memorandum: "The within named goods to be transhipped at Bunny, and forwarded to destination by branch steamer at ship's expense but shipper's risk."

The following is a copy of so much of the letter of Capt. Tate, the master of the *Kwara*, of the 27th June 1873, from Benin to Messrs. Elder and Co., of Liverpool, detailing the circumstances under which the loss of the *Kwara* occurred, as is material to the report:—

On the morning of the 19th June, having been informed that the steamship *Monrovia* was on the western breakers, entrance to Brass River, the *Kwara* being in Brass at the time, I was requested by H. O. Carey, Esq., agent for company of African merchants, to take steamship *King Mawla* out the following morning to render assistance to the steamship *Monrovia*, if possible, which I complied with, and took the *King Mawla* out, and anchored in two and a quarter fathoms water. Went on board the *Monrovia* in company with Messrs. Carey, Minns, and Brodie, also the recognised Brass pilot Cameroons, saw Capt. Maseel, master of the *Monrovia*, and made an agreement with him, before Carey and Minns, to take the *King Mawla* back into the harbour, as that vessel had not power enough to tow him off, and to bring the steamship *Kwara* out to try and tow the *Monrovia* off the breakers, all claim for such service to be settled between the two companies at home. I, accordingly, took the *King Mawla* into the harbour, and went out with the steamship *Kwara*, anchored in two fathoms water, astern of the *Monrovia*, and got that vessel's rope on board the *Kwara*, hove up the anchor, and turned the engine astern. The *Monrovia* having a rope out astern, our propeller poked it up, and the chief engineer reported to me that the engines were immovable. I immediately lowered the quarter-boat, and went, with five Kroomen, to try and see the fan, having first let go the anchor again. The swell being too strong, I could not get near the ship's stern; the boat got a broadside to the swell, and turned over, throwing us all into the water, when the *Monrovia*'s lifeboat came and picked us up, and put us on board the *Kwara*. I then took the chain to the capstan to heave the anchor up and make sail into the harbour, but was unable to heave the chain in, the capstan gear carrying away at this time; the ship bumping on the breakers, I slipped the chain at forty-five fathoms, and made all sail for the river. The eb tide then coming on, I let go the anchor in two fathoms water, port anchor veered out to fifty fathoms,

when the chain parted; bent the keel on to the Gin-hawser, and let it go, but the hawser parted as soon as a strain came on it. Made all sail again, but found the ship driving on the west point of Brass River, and after striking heavily for some time, she struck fast.

At low water, endeavoured to clear the fan, but only partially succeeded, as a heavy surf was then running in; I then ran the cargo anchor out with the remainder of the hawser bent on to it. At high water again tried with the engines, but fan still foul, was unable to do anything, although heaving on the hawser at the same time; we then hove all cargo overboard. At low water again tried, and succeeded in clearing the fan. At the rising tide tried again with the engines, and heaving on the hawser, but the anchor came home and the engines stopped, all the sea connections being choked with sand. At dark we abandoned the ship, she being, from the first moment of going on the beach, surrounded with armed natives, who, as soon as we were out of the ship, rushed on board, and commenced plundering and breaking up the fittings. Messrs. Murphy and Whitehouse, the agents for Stuart and Douglas, were down on the beach with their Kroomen, and rescued a large quantity of the cargo, and kept the natives at bay until dark, but they now refuse to give up the cargo.

The account of the transaction, as it appeared from the log of the *Kwara*, the protest of Captain J. O. Tate, the master, and J. F. Brown, the chief officer of the *Kwara*, concerning the loss of that vessel, and the declaration of Francis Wilkinson, the chief engineer of the *Kwara*, as well as from the protest of John Coward, the master, and T. W. Norman, the chief officer of the *Monrovia*, and the examination of the said J. Cavard, taken in pursuance of a judge's order, respecting the stranding of the *Monrovia*, was substantially the same as that detailed in the before mentioned letter of Captain Tate. From all of these documents it appeared clear that the *Monrovia* was in a very dangerous position, though not in such an one that there was any immediate danger to the life of anyone on board; and that, had not the accident of the *Kwara*'s screw becoming fouled in the *Monrovia*'s ropes occurred, the *Kwara* would undoubtedly have succeeded in towing the *Monrovia* off the breakers, and would then have returned into harbour, completed the getting her cargo on board, and have proceeded on her voyage to Benin. The *Monrovia*, it appeared, was afterwards gotten off the breakers, and her damages being repaired, she returned to England.

In *Michaelsmas Term last*, *Benjamin, Q.C.*, on the part of the defendants, in pursuance of leave reserved, moved for and obtained a rule nisi to set aside the plaintiffs' verdict, and to enter the verdict for the defendants, on the ground that the admitted facts showed that the plaintiffs had no legal claim to recover any damages against the defendants, and against that rule

Herschell, Q.C. and *E. Thompson*, for the plaintiffs, now showed cause.—Three questions were raised on this rule. The first was whether, apart from the terms of the bill of lading, the defendants were justified at common law, as against the plaintiffs the owners of the goods, in deviating as they did for the purpose of assisting the ship *Monrovia*. Secondly, whether, if they were not justified at common law in so doing, they were justified under the following words of the clause in the bill of lading, "with liberty to tow and assist vessels in all situations;" and, thirdly, whether those words would apply in a case like the present where, at the time of the deviation, the goods were, in accordance with the memorandum in the margin of the bill of lading being carried "at

[EX.] STUART AND ANOTHER V. THE BRITISH AND AFRICAN STEAM NAVIGATION COMPANY. [EX.]

shipper's risk." It is contended on the part of the plaintiffs that the defendants were not authorised in what they did, either by the terms of the bill of lading, or at common law; and further, that the words, "at shippers' risk," apply only to the ordinary course of the voyage. This was not done in the course of the voyage, nor was it a deviation for the purpose of saving life. What the defendants did does not come within the terms of the contract. They were not to be at liberty to assist other ships in all possible situations, and under all possible circumstances; they would not be justified, under the terms of the bill of lading, in going out of their course to help a vessel in distress. If they met with one in the course of their voyage the case would be different. [AMPHLETT, B.—It must be a reasonable deviation. BRAMWELL, B. Suppose the *Monrovia* had been lying only a hundred yards off, do you say the *Kwara* could not have gone to her assistance?] It is a matter admitting of very much doubt whether she could have done it. It is an exception which must be construed most strictly against the shipowner as it is one in his favour. There must be some limitation put upon it, otherwise it would be competent to the shipowner to take the cargo owner's goods into extreme peril, to the latter's loss, the shipowner himself being benefitted by receiving a large sum of money for salvage, and it is obviously unfair that goods should be exposed to peril without any prospect of sharing in the salvage. There is a plain distinction between the case of a vessel on her voyage seeing another ship in distress and going to her aid, and the way in which the present act of assistance was rendered. Then, with regard to the clause as to the goods being "transhipped at Bonny and forwarded to destination by branch steamer at ship's expense, but shipper's risk." These latter words import a new bargain as to the transhipped goods, it is an entirely new and independent contract. The words mean all risk *quoad* the general voyage, and not any risk which the shipowner may choose to put upon the shipper. Where goods are carried at the shipper's risk the shipowner has no right to put any extrarisk on him. [BRAMWELL, B.—The words "At ship's expense," cannot, I think, apply to the forwarding, for that the defendant had already undertaken, but to the transshipment, and if so, do not the words "at shipper's risk" also apply only to that and not to the forwarding.] It is submitted that the words would be needless if they do not apply in the way in which it is contended on the plaintiff's behalf that they do apply. The case of *Lawrence and others v. Sydeboatham* (6 East, 45), and particularly the judgment of Lawrence, J., at p. 53, shows how strictly the courts will construe a power of deviation of this kind. See also the case of *The True Blue*, and the judgment of the judicial committee of the Privy Council, delivered by Dr. Lushington (L. Rep. 1 P. C. C. 254), where it is stated that the American courts draw a distinction between a deviation to save life and one for the ordinary salvage of goods only. [POLLOCK, B.—Human life is beyond all price; but the salvage of goods is a different matter, and the saving of property is the earning a profit to the salvors.] In the face of the American cases and in the absence of any express English authorities, we will not ask the court to hold that there is no distinction, but then the defendants are bound to

make out expressly that there was in the present case imminent danger to human life at the moment. Now here it is plain that the object of the *Kwara's* going out was not to save life, but to earn money by getting the ship and cargo off the bar, and it is submitted that as against the plaintiffs, the defendants had no right, under the bill of lading, to do what was done on that occasion.

Benjamin, Q.C. and Crompton, for the defendants, *contra*, supported their rule. [BRAMWELL, B.—We should like to hear you, Mr. Benjamin, on the point relating to this clause in the bill of lading giving liberty to the vessel "to tow and assist" vessels in distress, and, if you can give it to us, we should like to have a definition of the power, showing when and how far a vessel may go to the assistance of another?] These words "with liberty to tow and assist vessels in all situations" were put in here on purpose to render a deviation, in order to save property lawful, and to render untenable any objection such as that which has been taken by the cargo owners in the present case. The clause expressly enables the ship to do what the *Kwara* has here done, and for doing which she would, but for this clause, have been answerable. (He was here stopped.)

BRAMWELL, B.—We will not trouble you any further, Mr. Benjamin, although we should have been glad if you would have given us a rule for the application of this clause in the bills of lading, "with liberty to tow and assist vessels in all situations," telling us to what cases it would and would not extend; but you have declined to do so, and probably with good reason, thinking, no doubt, that it would not be an easy thing to do.

As to one question which has been raised here, namely, whether the ship would have been justified, supposing there had been no such clause in the bill of lading, on the ground of its being an effort to save human life, I do not propose to express any opinion, because I think the bill of lading protects the defendants. I am satisfied, upon the evidence, that this service was not performed with any view or intent to save human life, and that human life was not in danger. One need only read the captain's letter of the 27th Jan. to be satisfied of this. [His Lordship here read the letter, which is set out above *in extenso*, and then proceeded as follows:] Now, there is not a word in that letter about rescuing the passengers or crew, or as to its being an effort made for the purpose of saving human life, or anything to lead us to suppose that human life was in any danger, that is to say in any immediate danger. No doubt, if the *Monrovia* had remained where she was long enough she would have been knocked to pieces by the action of the surf and the breakers, but there is no ground for supposing that any such catastrophe was immediately imminent, or that what was done was done with the view of saving life.

But it is not necessary to determine that question, because, as I said before, I think that this clause in the bill of lading must be held to protect the defendants under the circumstances. These words were mainly relied upon by Mr. Benjamin, namely, "with liberty to sail with or without pilots, and to tow and assist vessels in all situations." But it was said on the other side, that the defendants' vessel was not at liberty to assist the *Monrovia*. It certainly is within the words; but then, as was

Ex.] STUART AND ANOTHER V. THE BRITISH AND AFRICAN STEAM NAVIGATION COMPANY. [Ex.]

admitted by Mr. Benjamin, and as Mr. Herschel contended, these words must have some limitation put upon them. It would, I imagine, be absurd to contend that, if a vessel were on a whaling expedition to the North Sea, she would be at liberty under this clause to go off to the Cape of Good Hope to assist a vessel which she heard was ashore in that part of the world. There would then no doubt be some limitation and qualification put upon the words. But Mr. Herschel endeavoured to put this qualification upon them, that it must be exclusively something which the vessel meets with in the course of her voyage. That cannot possibly be literally true, because, supposing her on her voyage to have passed another ship and to have gone some three or four miles onward from the spot where the two vessels passed each other, and then that a signal had been given that the ship which she had so passed was on fire, is it conceivable that, under such circumstances as those, she would not have been at liberty to turn back to the assistance of the burning vessel? It is not possible that such can be the proper meaning and construction of this clause.

Now the present case is really almost as strong as the case which I have put. The defendants' ship, as I understand it, is at anchor close to the wharf or landing place at Brass, she has got her steam up, though she is not quite ready to start in continuation of her voyage. This is manifest, because she was taking her cargo on board, but the whole tenor of the argument is that she had not gone out of the harbour, and if she had succeeded in getting the *Monrovia* off the bar, she would have gone back to her position alongside the wharf again. But nevertheless she was in truth on her voyage. She was at anchor no doubt, but she was on her outward voyage from the port of Bonny to Benin, though at the moment she was at anchor at Brass. She went a distance of some three miles to assist the other vessel, and might have successfully assisted her in the easiest way in the world, but for the unfortunate fouling of the rope in her screw. If she could have given one good tug at the *Monrovia*, the latter would in all probability have come off.

Then it is said that this proceeding on the part of the *Kwara* is not protected by this clause in the bill of lading. It seems to me, however, to be impossible to say that it is not. I think Mr. Benjamin might have said for himself that, though it is difficult to draw the precise line, yet that he is a long way on the right side of it.

Then the only remaining question to which we are called upon to address our attention is this: What is the meaning of this clause in the bill of lading—"The within named goods to be transhipped at Bonny and forwarded to destination by branch steamer, at ship's expense but shipper's risk?" Mr. Herschel very ingeniously suggested that these words, "but shipper's risk," would in some way or the other make the defendants better off than if they had not been there. Mr. Benjamin pointed out that the original bill of lading was a through one from Liverpool to Benin, and that no new bill of lading was given when the goods were put on board the *Kwara* at Bonny at all, but that the original bill was still the governing one. Then it is said, What meaning can be given to these words? The meaning which I give to them is this,—that the goods were to be transhipped at Bonny at the shipper's risk, but they were to be

so transhipped at the expense of the ship; and I think that the mentioning of the goods being forwarded to their destination by the branch steamer is only for the purpose of explaining why they are going to be transhipped at all. It seems to me manifest that that is so, not only from the good sense of the thing, but also from this, that it is impossible to say that they would be forwarded to their destination by the branch steamer "at the ship's expense," because they had already undertaken to carry them to that place, and therefore they could not be stipulating that the forwarding was to be "at the ship's expense;" but, inasmuch as the bill of lading mentions that they are to be transhipped, it goes on to say that the transshipment is to be at our (the ship's) expense indeed, but, in the same way as the landing them in the boats or lighters, it is to be at your (the shipper's) risk. I think that that is the meaning of those words.

In the result, it appears to me that the case is governed by the original bill of lading, that that justified the shipowner in what he did on this occasion, and that the memorandum in the margin does not in any way qualify that bill of lading. Consequently the defendants are entitled to our judgment that this rule to enter the verdict for the defendants should be made absolute.

POLLOCK, B.—I quite agree.

The first conclusion which we have to arrive at is, what is the character of the services rendered by this vessel, and those who had the management of her, to the vessel in distress? Now, we have here, by the case, power to draw inferences of fact; and the inference which I draw is that this was, although of a very important character, still but an ordinary salvage service, and not a service specially for the saving of life.

That being so, the next question that we have to determine, the case being removed from any common law right, and brought within, as it can be brought within, the terms into which the parties had entered, is, what is the fair construction to be put upon the words that the vessel is to be "at liberty to tow and to assist vessels in all situations." Now, it is no doubt, as it often is in many of these cases, extremely difficult to lay down any general definition which shall answer all circumstances that may arise. The first rule I think in these cases is this: to say that that condition must be one that comes reasonably within the first and great object of the contract. In the words sometimes used by the older writers on the subject, "you must not so construe a condition as to make it eat up the contract." Was then the going to the assistance of the *Monrovia* in this case, under the circumstances, more than one would expect to have been in the contemplation of the parties when they used these words, "to tow and assist vessels in all situations." In considering that question there are a great many points, no doubt, to be looked at. We must look at the situation, the peril of the vessel which is assisted, and also, at what other means of assistance were available; the sort of place where she may happen to be, and at the position also of the vessel which performs the salvage service. Now, with regard to the latter point, I think it would be safe to say that, if the voyage were actually ended, then this contract between the two parties would be exhausted; and the contract being at an end, the

Ex.]

THE LORD ADVOCATE v. THE CLYDE STEAM NAVIGATION COMPANY.

[H. of L.]

condition which was only a part of the contract, could not be prayed in aid by the salving vessel. But in the present case the *Kwara's* voyage was not at an end. That the vessel assisted was in great distress there can be no manner of doubt; that there were no other boats or vessels at hand, except the one *the Kina Massala*, which did go out to the assistance of the *Monrovia*, and in doing so got into trouble and ultimately upon the rocks herself, I think also there can be no doubt about. It seems to me, therefore, that in doing what she did, the *Kwara* did what was reasonably within the contemplation of the parties to this contract, and that it comes within the terms into which they had entered.

With regard to the other question, viz., whether, when this took place at that portion of the voyage, the parties were acting under the bill of lading, I have nothing to add to that which has been said by my brother Bramwell. It is a very well known clause that the transshipment of goods is to be "at shipper's risk," and it appears to me only to extend the rights and liabilities of the parties under the bill of lading to the rest of the voyage with this, that any expense that is incurred must be paid by the ship, the risks remaining the same.

On these grounds I agree with my brother Bramwell, in making the defendants' rule absolute.

AMFLETT, B.—I entirely agree with the judgment of my learned brothers; and really I should have nothing to add but for one argument, which was pressed upon us by the learned counsel for the plaintiffs, namely, that a provision of this sort was entirely for the benefit of the ship which would have made all she could get for salvage. It was said that the owner of the goods would receive none of that consideration, and that it was hardly right for the goods to be put in peril without sharing in the salvage earnings. But I really must take a rather different view of the matter. I consider that clause of this sort is for the general benefit of the whole body of merchants and others who are having their goods carried upon that dangerous coast. It is not because in the present case the goods have been lost that therefore they can be considered to receive no benefit from a clause like this. It might have been their fate to have been stranded upon this bar, and to have been assisted by the other vessel in the same way as this vessel the *Monrovia* was assisted, and subsequently saved. I think, therefore, entirely agree with all that my learned brothers Bramwell and Pollock have said, that the justice of the case, as well as the law, requires that we should give our judgment in favour of the defendant steamship company.

Rule absolute to enter the verdict for the defendants.

Attorneys for the plaintiffs, *W. W. Wynne*, agent for *Forshaw and Hauckins*, Liverpool.

Attorneys for the defendants, *Field, Roscoe, Field, Francis, and Orbell*, agents for *Bateman and Co.*, Liverpool.

HOUSE OF LORDS.

Reported by C. K. MALDEN, Esq., Barrister-at-Law.

March 9 and 11, 1875.

(Before the LORD CHANCELLOR (Cairns), Lords HATHERLEY and O'HAGAN.)

THE LORD ADVOCATE v. THE CLYDE STEAM NAVIGATION COMPANY.

ON APPEAL FROM THE SECOND DIVISION OF THE COURT OF SESSION IN SCOTLAND.

Merchant Shipping Act 1854—Measurement of ship—Tonnage—"Spar deck."

A vessel of the respondents had an upper deck above her main deck, but such upper deck was not continuous from stem to stern of the vessel, and the hatches and other fittings in it were not water-tight.

Held (affirming the judgment of the court below), that such upper deck was not a third deck or "spar deck" within the meaning of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), s. 21, sub-sect. 5; and that the space between it and the main deck was not space available for cargo, or for accommodation of passengers or crew, within sub-sect. 4 of the same section of the Act, and consequently should not be reckoned in estimating her tonnage.

This was an appeal from a judgment of the Second Division of the Court of Session, affirming a judgment of the Lord Ordinary (Lord Gifford), in favour of the respondents.

The steamship *Bear*, which gave rise to the action, was built by the respondents in 1870 for the coasting trade, and was then described by the Board of Trade and Customs authorities as a two-decked vessel. She was afterwards altered, and the appellant contended that the effect of the alterations had been to convert her into a three-decked vessel, and that she was chargeable for additional tonnage as such.

The facts appear fully in the judgment of the Lord Chancellor.

The *Attorney-General* (Sir R. Bagge, Q.C.), The *Lord Advocate* (Gordon, Q.C.), The *Solicitor-General* (Sir J. Holker, Q.C.), and *Beasley* appeared for the appellant.

Southgate, Q.C., and *E. Kay, Q.C.*, for the respondents.

The LORD CHANCELLOR (Cairns).—My Lords, the action out of which this appeal arises was instituted by the Lord Advocate of Scotland, on behalf of the Board of Trade and the Board of Customs, against the Clyde Steam Navigation Company, in order to have it declared that the register tonnage of the respondent's steamship *Bear* should be increased to 634 tons, her present register tonnage being very much less.

The ground upon which this rectification is asked for is that the *Bear* has an upper or spar deck above the tonnage or main deck, and that the space between the tonnage deck and this upper or spar deck ought to be measured in, in accordance with the rules contained in the Merchant Shipping Act 1854, and it is not denied that, if this space ought to be reckoned in, the register would require to be rectified as desired.

The 5th sub-division of sect. 21 of that Act provides that "if the ship has a third deck,

H. of L.]

THE LORD ADVOCATE v. THE CLYDE STEAM NAVIGATION COMPANY.

[H. of L.]

commonly called a spar deck, the tonnage of the space between it and the tonnage deck shall be ascertained as follows." Then follow rules for measurement. The question then is, has the *Bear* a third deck, commonly called a spar deck? The condescendence of the appellant affirms that she has.

No proof was allowed to the respondents in this case, although they desired to have a proof, but the case was by an interlocutor of 18th May 1872, remitted to Mr. Mumford, Lloyd's surveyor at Glasgow, to examine the *Bear* and to report as to the present state and position of her main deck, and of the erections, structures, and coverings thereon, as far as the same relate to the question as to the measurement for registered tonnage. Mr. Mumford made his report, dated 2nd July 1872, and that report and the model referred to in it are the only materials before your Lordships, as regards the facts of the case. It appears that the deck in question "being separated by openings completely across the vessel, and these openings being provided with planks and hatches unsuitable to any weather deck, which are not fastened down or rendered water tight," is not considered by Mr. Mumford to be a continuous deck. Further, that "the doors are not fitted so as to be water tight against any pressure;" and that "the planks, top sills of the doors, &c., covering the cuttings in the deck are not made to fit so as to be efficacious in sheltering the cargo beneath them." It is further stated that "a three-decked ship is usually loaded down, so that her main or middle deck amidships is at, or below, her water line, the usual custom being that her submerged side amidships, measured from the top of the upper deck at the side to the water line, should be 3in. to every foot of her depth of hold. This also applies in a measure to the ventilating side ports in the steerage, and their protection in case of accident. The want of strength and efficiency of the gangway doors, and the position of the steerage side scuttles in the *Bear* would therefore prevent her from being loaded down, as a three-decked ship, with well-secured ports, may with safety be laden and sent to sea. If loaded regardless of these points, the vessel would be unseaworthy."

I think it clear that the kind of upper or spar deck mentioned in the Act is a continuous deck from stem to stern, fastened down and water tight, sealing up the cylinder formed between the two decks, and making it a fit place for the stowage of cargo, like a hold. In the case of the *Bear*, judging by the evidence and the model, the upper deck plays rather the part of a covering platform for the main or tonnage deck. This covering is fixed for a certain distance from the stem towards the funnel, and from the stern towards the funnel; but there are two gaps in it made quite across the vessel, one before and one behind the funnel, of the respective widths of 13ft. 6in. and 8ft. 6in.; and, as Mr. Mumford observes, the deck is not practically a complete deck for all purposes of safety to the ship and cargo. It is in fact obvious that the *Bear* being a steamer used for coasting purposes, and chiefly for the conveyance of cattle, this which is called a deck is in reality a covering run along the ship, above and parallel to the main deck, for the purpose of affording shelter against weather, and at the same time affording a platform, along which the

crew can pass in navigating the ship. The cargo between this covering and the main deck is not cargo stowed and sealed up in a hold, but is deck cargo protected against the weather. I am, therefore, of opinion that the *Bear* has not a third deck, commonly called a spar deck, within the meaning of sub-division 5 of sect. 21, so that the tonnage of the space between it and the tonnage deck should be ascertained under that sub-division.

It was then contended that the register tonnage should be increased, under sub-division 4 of the same section. It appears to me that the condescendence of the appellant and his pleas in law are confined to the case advanced under the 5th sub-division to which I have already referred; but even if this were not so, the argument under the 4th sub-division does not appear to me to be capable of being supported. The part of the deck underneath the covering which I have described cannot in any sense be called a "permanent closed-in space on the upper deck available for cargo." It is the whole of the deck underneath the covering, and there is no inclosure or separation of one part of the deck cutting it off from the rest of the deck, nor is it a "space available for cargo" in the sense in which cargo is used, for the purpose of measurement. The cargo underneath this covering would be deck cargo merely. Neither is it "space available for the berthing or accommodation of passengers or crew," nor is it suggested that it has ever been used for that purpose.

On the whole, I am of opinion that this appeal fails, and I submit that it ought to be dismissed with costs.

LORD HATHERLEY.—My Lords, I entirely concur.

The onus of proof, which in all ordinary cases rests upon the pursuer, rests upon him in a very peculiar manner in this particular instance, because he seeks to alter a survey made upon a previous occasion by an official surveyor, which only requires to be revised in respect of certain alterations which had been made in the ship of which the particular matter in question does not form part. Therefore, to decide upon the present occasion against the respondents would be in effect not only to disregard Mr. Mumford's report, but to disregard the view entertained by the surveyor who originally surveyed the ship, and who certainly did not then think of including these erections as coming within either the 4th or 5th sub-sections of the 21st clause of the Merchant Shipping Act.

LORD O'HAGAN.—My Lords, I am of the same opinion.

I have not been at all affected by the considerations of public policy, and the possible results of our decision one way or the other, which have been pressed upon us by the Attorney-General. Such considerations may sometimes be regarded as throwing light on the terms of a statute when they are obscure, and assisting towards an understanding of the intention of its framers. But here we have no difficult question of construction; there is no controversy as to facts, and we have nothing to do but to apply to those facts the plain words of the statute, and carry them into effect, whatever may be the consequences.

The report of Mr. Mumford seems to me to conclude the case in both its branches. He is the

H. OF L.] LISHMAN AND OTHERS v. THE NORTHERN MARITIME INSURANCE COMPANY (LIMITED). [EX. CH.

sole witness; an expert named by the court, and appealed to for his judgment by both parties. The Crown, at least, cannot object to his competency and correctness, for they have insisted that by his evidence alone the matter should be determined; and, if it is to be relied on, the *Bear* is not a three-decked ship according to the contention of the appellant. In her original certificate of registry she was described as a two-decked ship, and rightly so, if Mr. Mumford is warranted in saying that her awning deck is not a continuous deck—is not that which is commonly called a spar deck—and does not, therefore, constitute a third deck within the meaning of the statute. And he makes this still more clear when he states that the *Bear* cannot, without becoming unseaworthy, be loaded as a three-decked ship can and ought to be loaded; and, if she cannot, it would seem that the measurement of her tonnage should in fairness, as well as in accordance with the terms of the statute, be proportioned to her carrying capacity, and that she should be dealt with as a two-decked vessel.

On the second point, I should have been disposed to hold the Crown precluded from making it at all by the state of the pleadings; but it was considered by the learned judges of the court below and declared to be untenable. I concur in that opinion.

I was struck by an observation of the Attorney-General with reference to the danger of allowing shipowners to escape their proper liabilities by leaving portions of their vessels in an imperfect state, so as to keep them untraced by the exact description of the statute, and yet to make them available for profit on occasion. I am not prepared to say that such a danger may not arise, and that such an evasion ought not, if possible, to be prevented. But in this case I do not find any proof of a purpose of the kind. The respondents deny it, and the sole witness, Mr. Mumford, does not allege it. Upon his testimony it seems impossible to hold that there is, in the place to which the question has reference, a space "permanently closed in" and suitable for the reception of "cargo or stores," or "the berthing or accommodation" of human beings. This is made clear by the report, which describes the place as in a condition wholly unfitting it for the reception of perishable goods, or the safe and reasonably comfortable lodging of passengers or sailors. By that report the Crown has elected to stand, excluding all access to other evidence and means of information, and according to its findings I think that the judgment of the Court of Session was perfectly correct, and ought to be affirmed.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

Solicitor for the appellants, the Solicitor to the Customs.

Solicitor for the respondents, Grahame and Wardlaw.

EXCHEQUER CHAMBER.

Reported by J. M. LEE, Esq., Barrister-at-Law.

Saturday, Feb. 6, 1875.

LISHMAN AND OTHERS v. THE NORTHERN MARITIME INSURANCE COMPANY (LIMITED).

APPEAL FROM THE COURT OF COMMON PLEAS.

Marine insurance—"Slip"—Non-disclosure of material fact known to assured after risk accepted, but before policy issued.

A slip being in practice the complete and final contract between the parties to a contract of marine insurance, although not enforceable at law or in equity, there is no obligation on the assured to communicate a material fact which comes to his knowledge after the initialling of the slip and before the issuing of the policy.

The introduction into a policy on freight of a warranty (not in the original slip) for the benefit of underwriters, to the effect that the hull of the ship is not insured beyond a certain amount, does not create a new contract or new risk different from the slip, and therefore does not affect the duty of communication of material facts.

On 11th March, the plaintiffs being shipowners, agreed with the defendants, being underwriters, for the insurance of freight, and a slip or proposal containing all the necessary terms for a complete insurance was drawn up without any question being asked as to the amount of insurance upon the hull of the vessel, and was accepted by the defendants on the same day. On 16th March the ship was lost, and on 17th March the plaintiffs became aware of that loss, and sent to the defendants for a stamped policy in pursuance of the terms of the slip, and then for the first time the defendants inquired to what amount the hull of the ship had been insured. The plaintiffs' clerk gave the required information, viz., that the ship was not insured for more than a named amount after 20th March, and a stamped policy, with the amount insured on the slip inserted in it as a warranty, was delivered to the plaintiffs. No communication was made by the plaintiffs to the defendants of the loss of the ship before or at the time of the delivery of the policy. The plaintiffs having sued upon the policy, the jury found that the risk was accepted by the defendants on 11th March, and that it was not material to make known the loss to the defendants upon 17th March, whereupon a verdict was entered for the plaintiffs.

The Court of Common Pleas discharged a rule to enter a verdict for the defendants, obtained on the ground that the judge ought to have directed the jury as matter of law that the omission to communicate the loss on 17th March was a concealment of a material fact which avoided the policy.

Held (affirming the judgment of the court below), that the judge had not misdirected the jury, and that the addition in the policy on 17th March of a term for the benefit of the underwriter, and not affecting the risk insured, did not prevent the policy from being one drawn up in respect of the risk accepted on the 11th March.

Cory v. Paton (ante, vol. i, p. 225; L. Rep. 7 Q. B. 304), followed.

THIS was an appeal from the Court of Common Pleas (Kounting, Grove, and Brett, JJ.) discharging

EX. CH.]

JESSEN V. THE EAST AND WEST INDIA DOCK COMPANY.

[C. P.]

a rule to set aside a verdict entered for the plaintiffs and enter a verdict for the defendants instead thereof. The facts are fully set out in the judgment of Keating, J., in the court below (*ante*, vol. 1, p. 554; 28 L. T. Rep. N. S. 165).

Herschel, Q.C. with him *Crompton*, for the appellants, the defendants below, again sought to distinguish

Cory v. Paton, *ante*, vol. 1, p. 225; L. Rep. 7 Q. B. 304; 26 L. T. Rep. N. S. 161; and *London v. Pacific Insurance Company*, *ante*, vol. 1, p. 141; L. Rep. 6 Q. B. 684; affirmed on appeal, *ante*, vol. 1, p. 330; L. Rep. 7 Q. B. 517; 26 L. T. Rep. N. S. 738.

The *Solicitor-General* (Sir John Holker, Q.C.) with him *Bruce* for the respondents, the plaintiffs below, was not called upon to argue.

BRAMWELL, B.—I am of opinion that the judgment of the court below ought to be affirmed.

As to the warranty, I think that there was no insurance contrary to the terms of it after 20th March. The utmost for which Mr. *Herschel* can contend is that there was only a right to an insurance optional on the part of the plaintiffs; and as the vessel was lost on 17th March, it is impossible to say that there could be any insurance then to commence at the future date of 20th March.

As to the second question, it is admitted that if there be a complete agreement for insurance in a "slip," and afterwards a policy (good but for the Stamp Acts) be executed in conformity with that slip, if everything material be communicated up to the time of giving the slip, but something material arising between the giving of the slip and the making of the policy is not communicated, in that case the non-disclosure is not fatal to the policy. Thus much being admitted, what the defendants contend for here is this: that if the underwriter when called upon to execute the policy in conformity with the slip, asks for the insertion in the policy of some additional term to which he is not entitled, and the assured thinks fit to consent, the underwriter, by virtue of such consent, gets a title to have communicated to him that which otherwise he would have no title whatever to have communicated to him. Such a contention is contrary to common sense.

It is said that the binding agreement between the parties was made, not at the time of executing the slip, but at the time of inserting the additional term into the policy. But I think that the principle of *Cory v. Paton* (*ubi sup.*) and *London v. Pacific Insurance Company* (*ubi sup.*) is really applicable to this case, and that the insurance must relate back to the real agreement, notwithstanding the subsequent modification of it, which was purely for the benefit of the defendants.

BLACKBURN, J.—I am of the same opinion.

First, I think it quite clear that the warranty was complied with.

Secondly, as to the concealment. It is a well established rule that the non-disclosure of material facts known to the assured before effecting the insurance, will avoid the policy, on the ground that the utmost good faith must be observed with regard to insurance. Now suppose that a policy were actually executed, and the parties afterwards agreed to alter the terms of it; if the alterations were such as to impose a more burdensome obligation upon the underwriter, and a fact material to the alteration were concealed by the assured, I think that the policy would be

avoided by such concealment. On the other hand, if the fact were immaterial to the alteration, and only material to the underwriter as showing him that his bargain had been a bad one in the first instance, I do not see how there could be any obligation upon the assured to disclose such a fact to the underwriter.

Now the stamp law puts it in the power of an underwriter to get out of an engagement which he is bound in conscience to fulfil, and to refuse to execute a policy in conformity with a slip. But it was held in *Cory v. Paton* (*ubi sup.*), a decision which has been followed in other cases, and which we now adhere to, that the obligation which the law attaches to the relation of insurer and insured, viz., that up to the time of the insurance material facts must be communicated, must be taken with the qualification, that where there is a previous agreement out of which the policy arises, there the obligation to communicate material facts subsists up to the time of making the agreement, and not up to the time of making the policy. Now, applying the principle of *Cory v. Paton* (*ubi sup.*), the facts of the present case make it exactly as if a stamped policy had been executed on 11th March.

I think, therefore that there was no misdirection on the part of my brother Brett in leaving it to the jury to say whether or not the fact of the loss of the ship was a fact material to the proposed alteration.

MELLOR, J.—I was a party to the decision in *Cory v. Paton* (*ubi sup.*), and I think that the reasoning upon which that decision is founded is not only correct, but derives additional strength from the present case. For a short time I thought that the present case was distinguishable, but I am now convinced that it is not.

CLEARY, B.—The only argument in favour of the defendants that appears to me at all tenable is that when the alteration was made, the parties were not on equal terms. But this difficulty is removed by the finding of the jury, who, being expressly asked whether the loss of the ship was a fact which ought to have been communicated, answered that it was not. Unless we can say that there was no evidence to support that finding, I do not see how we can set it aside.

POLLOCK and AMPLETT, BB., concurred.

Judgment affirmed.

Attorneys for the plaintiffs, *Mercer and Mercer*, for *Oliver and Botterell*, *Sunderland*.

Attorneys for the defendants, *Williamson, Hill, and Co.*, for *B. P. and H. Philipson*, *Newcastle-upon-Tyne*.

COURT OF COMMON PLEAS.

Reported by *STEWARTSON SMITH* and *J. M. LEST* Esqs.,
Barristers-at-Law.

Jan. 16 and Feb. 25, 1875.

JESSEN V. THE EAST AND WEST INDIA DOCK COMPANY.

Action by partners for breach of contract—Gain of individual partners arising from the breach—What may be taken into account in assessing damages—Part owners of ships.

In order to entitle a defendant in an action brought against him by partners for a breach of contract

C. P.]

JEBSEN & THE EAST AND WEST INDIA DOCK COMPANY.

[C. P.]

causing damage to the partnership, to take into account a benefit accruing to any of the plaintiffs from such breach, for the purpose of reducing the damages, such benefit must be a joint benefit accruing to the partnership, and it is immaterial for the assessment of damages whether or no individual plaintiffs have actually benefited in other ways from the very default of the defendants for which as a partnership they are suing. Where partnerships sue for breach of contract, the damages must be confined to those sustained by the partnership; and part owners of ships are for the purposes of such an action in the same position as partners.

The plaintiffs, as owners of an emigrant ship, were unable to carry their destined passengers through the defendants' default. Many of the emigrants so lost to the plaintiffs' ship went consequently by another ship, of which also some of the plaintiffs were part owners.

Held, that the true mode of assessing the damages to which the plaintiffs were entitled was to estimate the actual loss to them as owners of the ship delayed by the defendants' breach of contract, and wholly to disregard any gain which those of them who were part owners of the second ship had in consequence made.

DECLARATION: First count, That the plaintiffs are the owners of the steamship *Peter Jensen*, and at the time of the making of the promise hereinafter mentioned the said ship was engaged to take in emigrants at Bergen, in the kingdom of Norway, and was about to be unloaded at the port of London, and the plaintiffs were desirous that the said steamship should be unloaded with all possible dispatch, and thereupon, in consideration that the plaintiffs would send the *Peter Jensen* in to discharge at the defendants' dock, for reward to the defendants in that behalf, the defendants promised the plaintiffs that they would discharge her fast, that is to say, in two or three days, and the plaintiffs say that they did send the said steamship in to discharge in the defendants' dock, and all conditions were fulfilled and all things happened and existed, and all times elapsed necessary to entitle the plaintiffs to have the defendants perform their said promise, and to have the said vessel discharged fast in accordance with the said promise, and to sue for the breach hereinafter mentioned. Yet the said vessel was not discharged fast, that is to say, in two or three days, but great delay occurred in discharging the same, whereby the plaintiffs were put to great expense, and lost the use of the vessel for a long time, and were called upon to pay large sums in respect of the wages of the captain and crew, and in providing provisions for them, and lost the passage money due and payable by the said emigrants, and were also called upon to pay and paid several large sums in respect of the support of the emigrants, of which the defendants had notice at the time of the making of their said promise.

There were three other counts varying the form of the alleged promise by the defendants respecting the discharge of the vessel all founded on the consideration stated in the first count, and there were also two counts which recited that a considerable delay had arisen after the ship had gone into dock, and stated that thereupon in consideration that the plaintiffs would pay all charges (or 2s. per ton) on the output from the said ship beyond the discharging rate, and would take all

risk and responsibility on themselves, the defendants promised to place the said steamship alongside the quay in a proper discharging berth, and to land the whole of the cargo forthwith and without further delay; avowments of fulfilment of conditions precedent, breach and special damage as in the first count.

Pleas: First, non assumpsit; secondly, denial of the breaches; thirdly, that the defendants were prevented performing their promise by the acts and defaults of the plaintiffs; fourthly, to the fifth and sixth counts that the plaintiffs were not ready and willing to pay the charges on the output of the ship therein mentioned.

Issues thereon.

The plaintiffs in this action, twelve in number, were the owners of the ship *Peter Jensen*, 1450 tons burden, which was built for an emigrant ship to ply between Bergen and New York.

It appeared that the *Peter Jensen* and other vessels of the same character and class were built by various bodies of subscribers, and the constitution of ownership was such as to form as it were a company in respect of each ship. Then there were two lines, called respectively the Nordiske Lloyds and Nordiske American lines, and these lines are in the nature of federations of companies, each line adopting the same laws for the companies within it. The lines are thus an association of ships but not of owners; because an owner of a share in a ship of one line; might also be the owner of a share in a ship of the other line. The ship which, on 10th July, as afterwards stated, carried 202 of the emigrants who ought to have sailed in the *Peter Jensen*, was called the *Harold Harfinger*, and belonged to the Nordiske American line, while the *Peter Jensen* belonged to the Nordiske Lloyds, as did also the *St. Olaf*, which took twenty-five of the emigrants, thirteen of the intended number not going at all. The ship *Peter Jensen* was divided into thirty-two parts or 192 shares owned by the twelve plaintiffs; the *Harold Harfinger* into 120 parts or 360 shares, owned by thirty-three persons; the *St. Olaf* into 120 parts or 300 shares owned by twenty-six persons.

Five of the twelve plaintiffs were five of the thirty-three owners of the *Harold Harfinger*, and the same five had some shares in the *St. Olaf*.

In 1872 the *Peter Jensen* had carried emigrants out and was to have a return cargo to London, and in June a shipbroker called Lawson was informed that the ship was coming to the port of London, and that he would have to do what was necessary for the vessel, in getting her cargo discharged and clearing her for Bergen. He had previously had to do the same for the *St. Olaf*, a ship of the same size, and engaged in the same trade, the only difference being that the *St. Olaf* had brought a full cargo to London, and the *Peter Jensen* on this occasion had only an incomplete cargo. The *St. Olaf* had gone into the East India Docks, and was unloaded in four days. Upon notification of the expected arrival of the *Peter Jensen*, Lawson, on the 18th June, applied to the defendants, who were the Dock Company, for the same berth, and for the same dispatch as the *St. Olaf* had had. He received an answer that she could not have the same berth, but should have equal dispatch. On 21st June, the ship arrived, and went into dock. On the 24th June, Lawson heard that the dispatch was not going on satisfactorily, and went to the

C. P.]

JESSEN v. THE EAST AND WEST INDIA DOCK COMPANY.

[C. P.]

docks where he found the ship in an improper position, where rapid discharge was impossible. Thereupon he went to the dock superintendent and complained, he told him of the importance of dispatch in the case of this ship for she had to get to Bergen so as to take the next detachment of emigrants who were to be ready there on July 1st. A discussion ensued, and Lawson was asked if he would pay extra for immediate dispatch and he replied that price was immaterial, and so an agreement was come to that 2s. a ton extra should be paid, and a note was made to the effect that the 2s. should include all charges.

At that time occurred a strike among the dock labourers, and the contract for dispatch was broken, and the ship was not discharged till 4th July. She sailed at once for Bergen, and arrived there on 10th July, and found that another ship had taken on board the emigrants that had been destined for her. She eventually sailed on the 15th July for New York with eleven emigrants only, having lost 248 emigrants. It was to recover for the loss of the profit to be made by carrying these that the action was brought against the dock company.

Five questions were left to the jury.

1. Was there in your judgment such a special contract as that alleged made with the defendants before the *Peter Jensen* came into dock? If so, was it broken? Answer: Yes, in both cases.

2. Was there in your judgment such a second special contract as the plaintiffs have endeavoured to make out entered into with the defendants on the 24th June? If so, was it broken? Answer: Yes, in both cases.

3. Was there a want of reasonable dispatch in the unloading of the *Peter Jensen*, apart from any special contract? Answer: Yes.

4. Had the defendants notice of the special purposes for which the *Peter Jensen* was to be employed, at any time? Yes.

5. If so, when had they such notice? Answer: On 24th June.

Upon this a calculation of the damages claimed was made upon the following basis.

Passage money of 240 emigrants 9627 dols. 24 sch., from which was to be deducted the freight by rail in America, amounting to 2089 dols. 92 sch., the costs of the steamer in Norway conveying the people to Bergen 540 dols.; cost of food on the voyage 884 dols., and the money received from the eleven emigrants who afterwards went in the ship, 309 dols. 22sch., and to which was to be added the cost of board and lodgings of the emigrants while waiting at Bergen, 801 dols. 72 sch. The total loss claimed being, therefore, 6605 dols. 102 sch., or in English money 1444l. 15s. 6d. The verdict was accordingly entered for that sum, and leave was reserved to the defendants to move to reduce the damages.

A rule nisi was obtained, calling upon the plaintiffs to show cause why the amount of damages should not be reduced pursuant to leave reserved, or why it should not be referred to an arbitrator to determine the amount, on the principle to be laid down by the court, on the ground that the plaintiffs cannot recover more damages than the least amount which any one of the plaintiffs would be entitled to recover, and that some of the plaintiffs have suffered no loss which they would be entitled to recover.

The rule to reduce the damages by the full

amount of the verdict on the ground that the damage was too remote was refused.

Theiger Q.C. and *E. E. Webster* showed cause.—The plaintiffs are entitled to retain the verdict. It would be impossible to enter into the consideration of the interests of the various owners in the ships of these two lines, and quite impossible even to determine how far the profitable employment of any one ship was affected by the delay of another. It is like the case of a man having shares in two companies, and one company happening to benefit by some accident to the other. The possible compensation to an individual shareholder by reason of his having also shares in the company which gains a benefit, cannot be taken into account in considering the right of the other company to recover against a third party for breach of contract, or even in assessing the damages recoverable. Where are we to stop, if considerations of this kind are let in? The defendants claim to set-off several diminutions of damage in the case of some individual plaintiff against a joint loss. The defendants suggested that the damage suffered by the plaintiffs was too remote from their breach of contract to make them liable. Surely the compensation which it is suggested that some of the plaintiffs obtained is far too remote. How does this differ in principle from a case where a plaintiff is insured, and that fact does not deprive him of his right to damages for the defendant's negligence in causing the occurrence of that which he has insured against. *Bradburn v. Great Western Railway* (31 L. T. Rep. N. S. 464; L. Rep. 10 Ex. 1), is a distinguishable on principle.

W. Williams Q.C. and *C. S. C. Bowen* in support of the rule.—There has been an assumption on the other side which is not justified in fact, and that is, that the plaintiffs are a corporation for the purpose of recovering damages. But there are only two classes of persons known to the law, the individual, and the corporate body, and the plaintiffs here are neither. A partnership is, in the eye of the law, simply a number of individuals, and, therefore, the plaintiffs must here be so treated, and their individual position as damaged by the breach of this contract, not their corporate position, must be regarded. The principle is that compensation for actual loss may be given, but no more; and the defendants are entitled to put each plaintiff to the proof of this. [DENMAN, J.—Is there any authority that a member of a firm, having gained some advantage by the very breach of contract for which his firm sues, a jury may take that fact into consideration?] The case of *Agacio v. Forbes* (14 Moore 160), is rather the converse of that, and shows that a partner may sue alone upon an agreement in which the firm was beneficially interested. The notes to *Baerman v. Rademans* (2 Sm. L. Ca. p. 370), uphold the right of the defendant to look into the real title of the plaintiffs. [DENMAN, J.—Is not *Yates v. Whyte* (4 Bing. N. C. 272) against you?] That said that the defendants in an action for damage to a ship by collision, were not entitled to deduct from the damages they had to pay, a sum paid to the plaintiff by his insurers; but that is very different, for is proceeded upon the principle that the underwriters can recover from the assured after he has been satisfied; and there can be nothing of that kind here. So also *Bradburn v. Great Western Railway Company* (ubi sup.) is inapplicable, for it goes too far

C. P.]

JEBSEN V. THE EAST AND WEST INDIA DOCK COMPANY.

[C. P.]

if a principle is to be deduced from it to suit this case. It is rather from *Franklin v. South-Eastern Railway Company* (3 H. & N. 211) if actions against railway companies are at all analogous, that the true principle is to be found. That is that damages are to be given in reference to a pecuniary loss, and as Bramwell, B., says in *Bradburn v. Great-Western Railway Company* (ubi sup.), "if, therefore, the person claiming damages was put by the death of his relative into possession of a large estate, there was no loss—he was a gainer by the event." Similarly here we say if some of the plaintiffs by the delay of the one ship gained profits which they otherwise would not have gained by the consequential employment of another ship belonging to them, this fact must be taken into account, for they cannot be entitled to be paid by the defendants for their loss of profits and make them besides.

Cur. adv. vult.

Feb. 25.—The judgment of the court was read by DENMAN, J., on behalf of Lord Coleridge, as follows.—This was an action tried before me at the sittings at Guildhall after Hilary Term, 1874, to recover damages for the detention of a steamer of the plaintiffs, called the *Peter Jensen*, by the default of the defendants. The verdict was for the plaintiffs, and it is not disputed that for some amount the verdict must stand.

By the limitation placed by the court upon the rule on which we are now to give judgment, the questions became reduced to the single one whether the plaintiffs were entitled to retain a sum of 1444. 14s. 6d. which was assessed by the jury, or such portion of that sum as an arbitrator might award if the court should be of opinion that they were entitled in point of law to retain any of it. This point was elaborately argued before us last term; and we are now to give judgment upon it.

The question arose thus:—There were two lines of steamers from Norway to America called respectively the Nordake Lloyds and the Nordake American lines. The *Peter Jensen* belonged to the Nordake Lloyds. She was under contract to carry a cargo of emigrants and merchandise from Bergen to New York at the time when she was detained in the defendants' dock, and in order to fulfil her contract she ought to have been at Bergen at the end of June or the beginning of July 1872, so as to start from Bergen, as she had been advertised to do, on the 4th July. Sufficient notice of this contract had been given to the defendants to make them liable for the loss occasioned to the plaintiffs by the breach of it, if, as was the fact, the defendants' conduct caused that breach; and this loss is to be taken, for the purpose of our judgment, at 1444. 14s. 6d. It is said, however, that the plaintiffs have not sustained these damages in fact, and that therefore in law they are not entitled to retain them. The *Peter Jensen*, as has been said, belonged to the Nordake Lloyd's line. There were two other steamers, the *Harold Harfager* and the *S. Olaf*, which belonged to the Nordake American line. The 240 emigrants who were booked for America by the *Peter Jensen*, were indeed lost to her. But 202 of them went to America on the 10th July by the *Harold Harfager*; and twenty-five more of them went to America on the 10th Aug. by the *S. Olaf*. It is as to these that the substantial question arises.

The two lines of ships which have been mentioned

are associations of ships and not of owners. There is one body of directors and one set of laws for each of the lines respectively. But the owners of each ship in each line are not the same. Each ship has its own set of owners; and the same man may be and in fact is part owner in various proportions of different ships in different lines. In the instances of these particular ships, the facts were thus:—The *Peter Jensen* was divided into 192 shares, and the twelve plaintiffs owned them. The *Harold Harfager* was divided into 360 shares, which were owned by thirty-three owners; and five of these thirty-three were five of the plaintiffs. The *S. Olaf* was divided into 300 shares, which were owned by twenty-six owners, and five of these twenty-six were five of the plaintiffs, but not all the same five as were part-owners in the *Harold Harfager*.

Now, it is said, the *Harold Harfager* and the *S. Olaf* profited by the loss of the *Peter Jensen*; they carried emigrants whom they would not have carried but for the detention of the *Peter Jensen*; some of the plaintiffs, therefore, gained by the default of the defendants; and such gain to individual plaintiffs, which, though with difficulty, is yet capable of being ascertained, must therefore be taken in reduction of the damages which the whole body of plaintiffs is entitled to.

The statement of such a proposition in its bare simplicity is perhaps a sufficient answer to it. We need not insist upon the difficult and complicated inquiries which in a multitude of easily suggested cases (some were suggested in the ingenious argument before us) would render any result being arrived at by a jury practically impossible. The absence of authority for a claim by defendants like this, which yet if well founded must have arisen in many cases, affords a strong presumption against its having any legal foundation. It is true that there must be a first instance in every claim, and that ingenuity often for the first time suggests a point which has escaped observation, and which yet, when brought to the test of argument, is found to be a sound one. But this is a point which must have arisen so frequently that it is to us incredible that, if sound, it never should have been taken.

The contention of the defendants, however, is not only without authority; it is against the principle of cases decided under analogous circumstances. It should seem that, if there had been but one owner of the *Peter Jensen*, and the same person had been sole owner of the *Harold Harfager* and of the *S. Olaf*, the profits made by him as owner of the two latter could not be deducted from the damages sustained by him as owner of the former.

Yates v. Whyte (4 Bing. N.C. 272), decided that a defendant in a collision case could not deduct from the amount of damages to be paid by him a sum of money paid to the plaintiff by insurers in respect of such damage. It may be said that the authority of this case is not direct, because the insurance was a contract of indemnity, and the insurers might have recovered over from the plaintiff. The decision in the case, however, and in that of *Mason v. Sainsbury* (3 Dong. 61), itself cited with approbation in *Yates v. Whyte* (ubi sup.) both stand on grounds independent of this consideration.

But, whatever weight may be due to this consideration, the case of *Bradburn v. Great Western Railway Company* (ubi sup.), cannot be so

C. P.]

THE DUNMORE.

[ADM.]

qualified. That was an action for injuries in a railway accident: it was held that, in estimating the damages, the defendants could not take into account the amount which the plaintiff received from an accidental insurance policy. There, the contract was not one of indemnity. The judges held that the contract into which the plaintiff had entered was that, in consideration of the payment of premiums, he (the plaintiff) should, on the happening of a certain event, receive a sum of money. The event happened, and the benefit of the contract accrued to the plaintiff through the defendants' default. But the benefit could not be deducted from the damages for which the defendants were liable. This case appears to us to be perfectly well decided, and to be in point against the defendants in the case before us. Furthermore, although not in form, it is in substance an attempt to set-off against joint damage a several benefit.

We were told by Mr. Bowen, in a very able argument, that he relied upon a distinction, which no doubt exists, but which we think will not avail the defendants, between partnerships and corporations. For the purposes of actions for breach of contract, part-owners of ships who are working the ship together for profit, are in the same position as partners; and, where partnerships sue for breach of contract, the damages must be confined to those sustained by the partnership; the joint damage only can be considered. It seems to follow that any benefit arising out of the breach of contract, assuming that it can be taken at all into account in reduction of damages, must be a joint benefit, or one accruing to the partnership. In such a case as that put in argument, of a gang with whom a joint contract had been made being dismissed in breach of it, it is clear enough that the gang can sue. It was held in the case of the *Tunbridge Wells dippers* (*Weller v. Baker*, 2 Wils. 414), by Lord Chief Justice Wilmut and the Court of Common Pleas (see p. 423) that, if a stranger disturbed them in their employment, they were all jointly concerned in point of interest, and could all jointly sue in an action on the case. It follows that only something in which the benefit was joint could, if anything could, be considered in reduction of damage. If the matter now attempted to be set-off in substance were a set-off in form, there would be no room for the defendants' contention; for a joint debt cannot be set-off against a separate demand, nor a separate debt against a joint one. The benefit here, as it is a gain from three parties, is not a set-off; but the same rules of sense and convenience apply as if it were.

On no ground, therefore, do we think the defendants entitled to succeed; and the rule must be discharged.

Rule discharged.

Attorneys for plaintiffs, *Lowless and Co.*

Attorneys for defendants, *Freshfields and Williams.*

COURT OF ADMIRALTY.

Reported by J. F. ASHLEIGH, Esq., Barrister-at-Law.

Thursday, Feb. 4, 1875.

THE DUNMORE.

Master's wages — Disobedience to instructions — Error of judgment — Forfeiture — Deduction.

Where a master receives instructions to take the balance of freight due at the end of a voyage in cash, or by bank bill upon London, and, without sufficient inquiry, but without mala fides and rather through error of judgment, he takes a bill which he believes to be (but which is not) a bank bill, and which is afterwards dishonoured, causing loss to his owners, this negligence or disobedience, not being wilful, does not work a forfeiture of his wages, nor can the owners claim to deduct the amount of their loss from his wages.

THIS was an appeal from a decree of the City of London Court (Admiralty Jurisdiction) in a cause of wages instituted by John Harwood, master mariner, against Messrs. Adamson and Ronaldson, shipowners in the City of London, the owners of the ship *Dunmore*.

The plaintiff was engaged on the 19th March 1872 by the defendants to act, at "fifteen pounds per month," as master of the *Dunmore*, then lying in the river Tyne, under charter to carry coals from the Tyne to Buenos Ayres. By this charter-party, dated the 18th March 1872, the ship was to load a full cargo, and to proceed therewith to Buenos Ayres and "deliver the same, always afloat into craft alongside steamer or depot ship there, as may be directed by the consignee, being paid freight at the rate of 35s. per ton of 20 cwt.; . . . the freight to be paid, one third on sailing, less 5 per cent. for all charges, and balance on delivery of the cargo in cash at current exchange, or by good and approved bill on London at sixty days' sight, at captain's option. The captain has to receive 5*l.* gratuity. . . . The ship to be addressed at the port of discharge inwards only, to the freighters' agent free of commission. . . . The owners of the ship to have an absolute lien on the cargo for all freight, dead freight, and demurrage." This charter-party was entered into between the defendants and Gustav Hermann, of Hamburg.

The ship duly loaded her cargo in the Tyne, the charterer being the shipper; and the master, on the 4th May 1872, signed a bill of lading for 654 tons 11cwt. of coal, "shipped in good order and condition by Gustav Hermann, Hamburg," and "to be delivered in the like good order and condition, at the port of Buenos Ayres, unto Messrs. Lamh Brothers, or to their assigns, they paying freight for the said coals, and all other conditions, as per charter-party." The bill of lading was indorsed with a receipt by the master for the sum of 58*l.* 16*s.* 5*d.*, the amount of freight agreed by the charter-party to be prepaid at Newcastle.

On the 2nd May 1872 the defendants wrote to the plaintiff at Newcastle, as follows:

Dear Sir,—We have no letter from you this morning, but we hope you will get away to-morrow. The ship is consigned, as you will see by the charter, to charterer's agent at Buenos Ayres, inwards only. We do not know their names yet, but shall have them in a day or two, and we will have letters awaiting you at their office. As there is no chance of your loading out again at Buenos Ayres, we do not appoint any agents for the vessel there. All that will have to be done is to collect the balance of inward freight and disburse the ship, remitting us what

[ADM.]

THE DUNMORE.

[ADM.]

money then remains. The ship is free of commission to charterers agents, and you will see it is at your option to take the balance of freight in cash at current exchange, or by approved bill on London. You must do which you deem best; but if you take a bill, it must be a bank bill, it being a rule with us that all remittances are to be made by such drafts. Always send remittances yourself; first of the draft by one mail, and second by mail following. Our idea of further employment, &c. (The rest of the letter is immaterial to the present case.)

The ship duly sailed with her cargo, and arrived in Buenos Ayres all safe on or about the 15th July 1872. The master at once applied to Messrs. Lamb Brothers, the consignees named in the bill of lading, for instructions as to delivery of the cargo; and he was referred by them to a Mr. Haase, the manager of the River Plate General Trading Company in Buenos Ayres, to whom Messrs. Lamb said the cargo belonged. The master applied to Mr. Haase, and was by him informed that his papers relating to the cargo (including the bill of lading) had not arrived from England, but that he would clear the ship at the Custom House. Mr. Haase accordingly cleared the ship, and the master commenced discharging cargo. Mr. Haase advanced money to the master to the amount of 140*l* for disbursements, but would not pay the whole amount of freight until the cargo was wholly discharged. When it had all been delivered, the balance due for freight was 550*l*., including 5*l*. gratuity due to the master. The master applied to Mr. Haase for the money in cash, but Haase offered bills drawn by himself upon The River Plate Trading Company (Limited), No. 1, Leadenhall-street, London. The master told Haase that he wanted a bank bill, and Haase said that "The bill is on my bank in London." The master went to the British consul to inquire about the credit of the River Plate Trading Company, and was informed by the consul that "they were a new firm, and he knew nothing against them, but they were honourable people." The master thereupon took the bill offered for the balance of freight, and remitted it to his owners, believing it to be a bank bill, and calling it "a bank draft" in his letter to them. He then, in accordance with his instructions, sailed for the Mauritius, where he arrived on the 12th Nov. 1872. Whilst there he received letters from his owners, inclosing a printed form of instructions, which they were in the habit of issuing to all their masters, and in which it was said, "Make all remittances by bank bills, and where practicable send remittances yourself, rather than leave agents to do so. The only exception to our request always to remit by bank bills is in the case of the port of New York. From there we take the drafts of first-class houses on their branches here." He left the Mauritius with his ship, and arrived in Calcutta on the 12th Jan. 1873.

The bill was received by the defendants on the 30th Sept. 1872, and was immediately presented to the River Plate Trading Company for acceptance, but they refused to accept, saying that Haase had no authority to draw. Proceedings were taken against them, but without effect, and the bill was then sent out again to Buenos Ayres for presentation to Haase, but at the time of the commencement of this cause nothing had been recovered on it.

On the 25th Oct. the defendants wrote to the plaintiff at Calcutta, acknowledging the receipt of his letter inclosing the draft, and saying:

In your letter you call it a bank draft, but it is no such

thing. It is on a trading company, who refuse to honour it, and, as far as we can see at present, we will lose the whole of the money. By your charter-party you were to get bills of freight in cash, or by an approved bill, at your option. Your duty then was clearly to have got the hard cash, gone to the best bank in Buenos Ayres, and have bought a bill there. That would really have been a bank bill, in accordance with our printed instructions, so plainly set forth; and how in the face of the same you send us such a draft, we are quite at a loss to conceive.

On the 18th Dec. the defendants again wrote to the plaintiff a letter, which was sent by a Captain Mitchell. The plaintiff was therein informed that he must hand over his command to Capt. Mitchell, and proceed at once to London in order that the plaintiff might see the defendants' solicitor, and give the latter a "detailed account of the whole of the circumstances connected with the 550*l*. draft" which the plaintiff took and advised to the defendants "as a bank bill." The plaintiff was asked to keep down his travelling expenses, as all the extra expense of bringing him home was "clearly traceable to his not having attended to the defendants' instructions." The master received this letter two or three days after his arrival at Calcutta, the former letter having been there on his arrival. The plaintiff at once left for London, where he arrived in the first week in March, and at once put himself in communication with the defendants for the purpose of making up his accounts and assisting them in recovering on the 550*l*. draft. The plaintiff applied for his wages, and the defendants gave him 10*l*. on account.

On the 27th March 1873, he delivered them an account showing wages to be due to him amounting to 110*l*. 15*s*. 3*d*. The defendants refused to pay this amount, because they said that the plaintiff was indebted to them for the 550*l*. in consequence of his negligence in the matter.

On the 7th April the plaintiff had an interview with the defendants' manager, when he again applied for a settlement of his account, and for a testimonial they had promised him, and for his discharge. The defendants' manager said that the plaintiff could not have a settlement of his account unless he signed a letter then submitted to him, and that he would not get his money until the money on the bill had been paid. The letter submitted to the plaintiff was as follows:

London, 34, Leadenhall-street, E.C.,
7th April 1873.

Messrs. Adamson and Donaldson.

Gentlemen,—With reference to the balance of my account as master of the ship *Dunmore*, which I have rendered to you; as also to the supplemental statement made out by you, and showing 72*l*. 6*s*. 9*d*., as due to me, I hereby agree to the correctness of the same, and furthermore I abide unconditionally by your requirement, that I shall await your payor me the same until you receive 20*s*. in the pound on the 550*l*. draft drawn by Mr. Haase, which has been dishonoured, and which I sent to you, believing the same to be a bank bill; and if you do not get 20*s*. in the pound, then I shall have no claim whatever upon you in respect of the said balance of 72*l*. 6*s*. 9*d*.

This letter the master took till the next day to consider about, and then went to the defendants' office, and the defendant Donaldson signed the testimonial in the plaintiff's presence, and offered it to him if he would sign the letter. The plaintiff declined to sign the letter, and was consequently unable to obtain either the testimonial, his wages, or his discharge. The testimonial was as follows:

We hereby certify that Capt. John Harwood has had the command of our ship *Dunmore* for twelve months, ending March last. We have found him strictly honest

ADM.]

THE DUNMORE.

[ADM.]

and sober, and fully believes he would do his utmost to give satisfaction to his employers. Capt. Harwood was relieved of the command of our ship in consequence of his having made as a remittance quite contrary to our instructions, but we fully believe he did so from want of knowledge and good judgment, and that the like would not happen again; and we sincerely trust his future prospects may not be prejudiced by his having lost command of the *Dunmore*.

ADAMSON AND RONALDSON.

The plaintiff then went for another voyage in other employ, and on his return in Sept. 1874 instituted the present suit.

The cause came on for hearing in the City of London Court (before R. A. Fisher, Esq.), on the 25th Sept. 1874, and on the following day a decree was given for the plaintiff, the court holding that "It appeared from the charter-party and bill of lading that the captain had an option in collecting the freight. Although the subsequent letter of the defendants limited the consideration, yet it was so large that, unless *mala fides* was shown on the part of the captain—and this the defendants had not shown—the captain was justified in the course he adopted. In the case of *The Atlantic* (Lush. 566; 7 L. T. Rep. N. S. 647; 1 Mar. Law Cas. O. S. 274). Dr. Lushington held that dilatory conduct did not forfeit wages, unless *mala fides* was proved. The printed instructions showed that the defendants meant that when the captain received cash for freight he should remit it by bank bill, and not by buying a bill. An approved bill was a bill to which no reasonable objection could be taken: (Smith's Mercantile Law, 511.) No error of judgment works a forfeiture of a master's wages so long as he remains in command of the ship: (*The Camilla*, Swabey, 312.) The question of wages would be referred to the registrar to ascertain the amount due up to the 7th April; the amount claimed in the plaint not to be increased, and the master not to be allowed the £l. gratuity included in the 550l. bill. The proposed testimonial of the defendants showed that they at the time viewed the conduct of the plaintiff as an error in judgment."

From this decree the present appeal was brought by the defendants.

Butt, Q.C. and *Webster* (J. Cohen, Q.C., with them), for the appellants (defendants below).—The plaintiff has been guilty of a wilful disobedience to the orders of the owners, which has caused loss to his owners, and has in consequence forfeited his wages. The amount of damage caused to owners by an officer's or seaman's negligence may always be deducted from his wages:

The New Phoenix, 2 Hag. 420;

The Booback, ante, p. 367; 31 L. T. Rep. N. S. 274.

[Sir R. PHILLIMORE.—Does such conduct as this master is accused of work a total forfeiture of wages? In *The Thomas Worthington* (3 W. Rob. 128, 132), speaking of the forfeiture of wages for misconduct, Dr. Lushington says: "The principle applies not merely to contracts between masters and owners, and between owners and mariners, but it pervades all other contracts of service and hiring; and the only difference between this court and other courts of law in adjudicating upon such contracts is, that in this court, under ordinary circumstances, where any loss has been sustained through the negligence or misconduct of the mariner, the amount of the loss is alone deducted from the wages of such mariner, whereas in other courts no wages would be recoverable at all.

Cases, indeed, may occur, even in this court, where the misconduct may be of so gross a description that, independent of any actual loss sustained by the owners, the entire forfeiture of wages would ensue; as, for instance, if a master had attempted to commit barratry; or if, throughout a voyage, he had shown gross incapacity, or had been constantly drunk. In either of these cases would this court be justified in pronouncing for any part of his wages under the contract? Unquestionably not, and if any such case came before me I should not hesitate for a single moment in rejecting his claim *in toto*."] We do not put the case as one of gross misconduct, but as one of disobedience to orders leading to loss. By the old law, freight was the mother of wages, and, although the law is now altered, still how can a master recover his wages when he by his own negligence destroys the very fund out of which his wages would most naturally be drawn? But, even if the court should hold that there was no wilful disobedience, the defendants are still entitled to set-off or make a counter claim in respect of their loss, under the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), sect. 191. At common law a set-off must be a liquidated sum, but it has always been the practice of this court and in the Admiralty Registry to allow deductions from wages in respect of negligence resulting in loss; *a fortiori*, we are entitled to deduct losses arising from direct disobedience to orders. [Sir R. PHILLIMORE.—You must carry your argument to the extent that an honest mistake entitles to a forfeiture of wages.] It is not necessary to contend that, because there is here a disobedience, whether wilful or not. [Sir R. PHILLIMORE.—Disobedience to orders must be either wilful, or done through ignorance and hence a mistake. If it is wilful, it works a total forfeiture of wages; there can be no partial forfeiture in such a case. But if, on the other hand, the disobedience was a mere mistake, made without *mala fides* and through ignorance, can that be said to work even a partial forfeiture?] There was negligence in not obeying the written instructions, in not ascertaining the solvency of the consignees, and in taking the bill when he could easily have ascertained that it was not a bank bill. This entitles the defendants to claim to set off their loss against his wages. [Sir R. PHILLIMORE.—If I were satisfied that the master believed that this bill was a bank bill, could you contend that his wages were forfeited?] Certainly. If a master neglected to reef his sails in a gale of wind, he would forfeit his wages *pro tanto*. He contracts to have not only knowledge as a sailor but also as a competent manager of his owner's affairs abroad, and he ought to have competent knowledge as to the safest mode of making remittances. [Sir R. PHILLIMORE.—There is a wide difference between a knowledge of seamanship and of mercantile affairs.] In the case of a mate or a seaman that might be so contended, but a master's usual business is to look after freight, disbursements, and remittances, and he contracts to have the knowledge requisite to conduct the ship's business for the benefit of his owners.

Francis Turner, for the respondent (plaintiff below).—By the charter-party the balance of freight is to be paid by approved bill; in the instructions the master is only to take a bank bill; considering this variance, could the master have reasonably refused an approved bill and demanded

ADM.]

THE THAMES.

[ADM.]

a bank bill or cash? An "approved bill" means a bill to which no reasonable objection can be taken (*Hodgson v. Davies*, 2 Camp. 530), and the master in the present case made inquiries before taking the bill whether any reasonable objection could be taken to it; and, moreover, he *bona fide* believed that the bill was a "bank bill" drawn upon the drawer's bank in London. The person to whom the goods were delivered was named to the master by the consignees named in the bill of lading, and he had every reason to believe in the *bona fides* of the transaction. There was no wilful disobedience or misconduct; at most there was an error of judgment. But error of judgment, occasional misconduct, or even drunkenness, will not work a forfeiture of wages:

The Camilla, Swabey, 312;
The Atlantic, Lush. 506.

But even supposing there was wilful disobedience, as contended, there was a clear condonation of it by the conduct of the defendants after they received the draft; they never discharged the plaintiff until the following April. Moreover, they are actually proceeding upon this bill at the present time; if they should recover either upon the bill or upon the charter-party, upon which they can sue if they like, the plaintiff would be clearly entitled to his wages, as there would then be no loss to the defendants. Can he be said to have forfeited his wages in respect of a loss which is not yet clearly established? If they recovered, would his right of action revive? He is at any rate entitled to his wages so long as he remained in command of the ship, because his service was an actual service rendered, and the wages accrued due at the end of each month of his service:

Butten v. Thomson, L. Rep. 4 C. P. 350; 3 Mar. Law Cas. O. S. 231.

Butt, Q.C., in reply.

Sir R. PHILLIMORE.—I think I should do very wrong if I were to disturb the sentence of the court below in this case, I should be running counter to the principles which underlie the various precedents cited.

I am of opinion, moreover, that this is not a case of wilful disobedience on the part of the master to the orders of his owners. He received instructions, according to the charter-party, that the cargo was to be delivered for cash, "freight to be paid one-third on sailing, &c., and balance on delivery of the cargo in cash at current exchange, or by approved bill on London." Then, after that, he received a letter of instructions, in which it is stated: "The ship is free of commission to charterers' account. It is at your option to take the balance of freight in cash at current exchange, or by approved bill on London. You must do what you deem best; but if you take a bill it must be a bank bill, it being a rule with us that all remittances are to be made by draft." Now in this case the master was admitted to be an honest, respectable, and reputable officer in every respect; and we have it admitted by counsel for the appellants that the master acted as he did without any *mala fides*. He goes to a person named to him by the consignee at Buenos Ayres. He first obtains a certain sum of money, and then he takes a bill drawn on the River Plate General Trading Company (Limited), No. 1, Leadenhall-street, London; and the mistake he has made is in considering that the company which was at No. 1, Leadenhall-street was a bank. That is one mistake that he

made; he also made another mistake in not making sufficient inquiries before he took the bill from Haase. It appears that he went to the British Consul, who advised him that from such information as he (the British Consul) possessed, the company were respectable people, and that he knew nothing against them, from which the master inferred that the bill would probably be honoured in due time. He was no doubt incautious, but under these circumstances the master took the bill, which was subsequently dishonoured.

Now I do not understand by the evidence in the case that the proceedings are abandoned in respect of the bill, and it may be that some one may after all be made responsible upon it. But be that as it may, I am clearly of opinion that I ought to act within the principles uniformly applied in such cases where it is sought to establish a forfeiture of wages by means of a set-off against the master. I am clearly of opinion that I should be running counter to all these cases if I were to hold that this man, who was acting *bona fide*, was not entitled to his wages, the utmost charge against him being that he was not so intelligent as he might have been. If I were to do that I should be running counter to the principle on which all such cases in this court are decided, and, therefore, I dismiss this appeal with costs.

Appeal dismissed.

Solicitor for the appellants, Rowland Miller.
Solicitor for the respondent, Edward Louth.

Friday, Jan. 29, 1875.

THE THAMES.

Collision—Ship forced into collision by wrongful act of third party—Liability.

Where a steamship, in order to avoid collision with another ship, is obliged by the wrongful act of that other ship to take measures which bring her into collision with a third ship, without any negligence on her own part, the Court of Admiralty will not hold her responsible for the damage to the injured vessel.

Semble, that the owners of the injured vessel should proceed against the original wrongdoer.

This was a consolidated cause of damage, instituted on behalf of Messrs. John and Edward Aylesford, in the county of Kent, shipowners, the owners of the sailing barge *Volunteer*, and on behalf of the master and crew thereof, and also on behalf of the cargo lately laden on board the said vessel, against the crew steamship or vessel *Thames*, and against the owners of the said crew steamship or vessel *Thames*, the defendants in this cause, intervening.

The plaintiffs' petition was as follows:

1. Shortly after noon on the 15th Oct. 1874, the sailing barge *Volunteer*, of 37 tons register, manned by two hands, and bound from the Medway to Vauxhall with a cargo of bricks, was at the entrance of Halfway Reach, in the River Thames.

2. The wind at such a time was about south, and blowing a fresh breeze; the weather was fine but cloudy, and the tide was nearly half-flood, and of the force of about four knots per hour. The *Volunteer* was under mainsail, topsail, foresail, small jib, and mizen, and was sailing at the rate of about six knots an hour, heading about north. Another sailing barge, called the *Alfreda*, was also sailing up, and was on the port side of the *Volunteer*, and distant about one length from her; and another sailing barge, called the *Two Sisters*, was also sailing up,

[ADM.]

THE THAMES.

[ADM.]

and was ahead of the *Volunteer*, and distant about four or five lengths from her.

3. At such time the above-named screw steamer *Thames*, which was coming down the said river under steam, ran against the *Two Sisters*, and caused immediate danger of collision with the *Alfreda*. The helm of the *Alfreda* was thereupon put astern, and the helm of the *Volunteer* was thereupon ported, but the *Thames* struck the *Alfreda*, causing her to sink, and came on with her stern struck the *Volunteer* on her port quarter, and caused her to sink with her cargo.

4. The said collision with the *Volunteer* was occasioned by the negligent and improper navigation of the *Thames*.

5. The said collision was not in any way occasioned by any neglect on the part of those on board the *Volunteer*.

The defendants' answer was as follows:

1. In the morning of the 15th Oct. 1874, the screw steamship *Thames*, of tons register, and having a crew of hands, left Rattlebridge Pier, in the River Thames, bound for Swansea.

2. About noon of the same day the *Thames*, in the course of her said voyage, was approaching Jenningtree Point, in the River Thames, and proceeding along the south or starboard shore. The weather was fine, with a moderate breeze from about south-west by south. The tide was early flood. The *Thames* was proceeding under easy steam only, and making about four knots an hour. A vigilant look-out was being kept on board her.

3. In these circumstances those on board the *Thames* observed several barges at anchor on the south or starboard side of the river; three sailing barges, to wit, the *Two Sisters*, the *Alfreda*, and the *Volunteer*, coming up the river, with the wind fresh, bearing about three points on the port bow of the *Thames*. Those on board the *Thames* were prepared to pass the said sailing barges on their port hand, but the headmost of the said sailing barges, the *Two Sisters*, suddenly starboarded her helm and threw herself across the course of the *Thames*. The helm of the *Thames* was thereupon, and in order to avoid a collision with the *Two Sisters*, starboarded, and her engines were stopped and reversed full speed, and those on board the other sailing barges, the *Alfreda* and the *Volunteer*, were hailed to starboard her helms. The *Two Sisters* struck the *Emusa*, the headmost of the barges at anchor, was taken aback, made sternboard, and came into slight collision with the *Thames* on her starboard side forward. The *Alfreda* and the *Volunteer* ported their helms instead of starboarded them, and though the helm of the *Thames* was thereupon put hard astern to ease the blow, she came into collision, first with the *Alfreda* and then with the *Volunteer*, striking the latter on her port quarter with the stem, and the *Volunteer* shortly afterwards sank.

4. Save as hereinbefore appears, the several allegations contained in the petition are untrue.

5. The collision aforesaid, and the damage consequent thereon, are primarily attributable to the improper navigation of the *Two Sisters*.

6. If and so far as the collision and damage aforesaid are not attributable to the improper navigation of the *Two Sisters*, they are attributable to the improper navigation of the *Alfreda* or the *Volunteer*, or both of them.

7. No blame, in respect of the collision and damage aforesaid, is attributable to the *Thames*, or to any of those on board her, who did their utmost to prevent the said collision and damage.

The plaintiffs replied, traversing the allegations of the answer, and alleging that "the alteration, if any, in the course of the *Two Sisters* was made in order to avoid immediate danger of collision caused by the negligent navigation of the *Thames*."

Evidence was called on both sides, the effect of which is sufficiently stated in the judgment.

Milward, Q.C. (E. C. Clarkson with him), for the plaintiffs.—Even admitting that the *Two Sisters* did wrong, what justification is there for the *Thames* running into the *Volunteer*? [Sir R. PHILLIMORE.—Is that the question? Did not the *Two Sisters* do an act which forced the *Thames* to take the course she did?] Even if the *Thames* was so forced, that would afford no justification for the injuries inflicted upon the barge. [Sir R. PHILLIMORE.]

VOL. II., N. S.

—The *Two Sisters* would be considered as a wrongdoer, and as having, by her wrongful act, brought about the collision. If she was to blame, ought not the proceedings to have been taken against her? I submit not, so far as the plaintiff was concerned, because they would have no remedy against the *Two Sisters*; her wrong was done to the *Thames*. The plaintiffs are entitled to recover against the *res* doing the injury, leaving the defendants to their remedy over against the *Two Sisters*. So far as the plaintiffs are concerned, they are not in any way to blame, and they have suffered injury at the hands of the defendants' ship; the plaintiffs ought not to be forced to inquire into the cause of the defendants' ship going out of her course and violating the rules of navigation. But I further submit that the *Two Sisters* was not to blame, and that the *Thames* was negligent in not straightening down the river after she starboarded for the *Two Sisters*.

The Admiralty Advocate (Dr. Deane, Q.C., W. G. F. Phillimore with him), for the defendants.—The defendants are not bound to justify their act; the onus lies upon the plaintiffs to show that the defendants are wrongdoers. They have only succeeded in establishing that the *Two Sisters* was a wrongdoer. The *Thames* must have starboarded, or have run over the *Two Sisters*. The *Thames* was bound to avoid collision with the *Two Sisters*, if possible, and if, in so doing, she unavoidably ran into other vessels, she is not responsible. A vessel having got into danger through no fault of her own, and endeavouring to extricate herself from it, is not to blame if she comes into collision with another vessel in her endeavours to avoid the danger.

The *Thornesley*, 7 Jur. 639.

The *Venus*, Fritchard's Digest, vol. 1, p. 129.

The action ought to have been brought against the primary wrongdoer.

Milward, Q.C., in reply.

Sir R. PHILLIMORE:—This is a case of collision between a sailing barge called the *Volunteer* and a screw steamer called the *Thames*. It happened about noon upon the 15th Oct. of last year, therefore in broad daylight. The place of collision appears to be, as far as can be accurately described, a little off what is called the Jenningtree Point, Halfway Reach. The direction of the wind was to the south. The flood was running about four knots, which, with reference to the argument made as to the speed of the steamer, is not unimportant. The steamer was going down the Thames, the *Volunteer* was going up the river under full sail.

The first question I have put to the Brethren of the Trinity House, which appeared to me very important to determine in this case, was, whether in their judgment the steamer was to blame for the manner in which she was going down the Thames, in reference to the distance from the shore and the course she was pursuing. They are clearly of opinion, and I agree with them, that she was right in coming down the Thames in that way, without meaning to go inside the barges that were at anchor.

The next point in the case to consider is this: She being in her right course which she was pursuing, saw before her, soon after rounding the point, or about rounding the point, three barges, the *Two Sisters*, the *Alfreda*, and the *Volunteer*. The *Two Sisters* was the foremost barge, and the *Alfreda* and *Volunteer* were, in my judgment,

2 L

practically to be considered for the purpose of this judgment as almost one barge. The distance between the two was not above half a cable, though it is not very accurately stated, and it is rather difficult to be precise on a question of distance or time in a case of this description. Now, the statement upon the part of the steamer is, that she was steadily pursuing her course when the foremost of these barges, namely, the *Two Sisters*, starboarded her helm, crossed her bows, and ran into another barge that was at anchor called the *Emma*; the steamer was therefore, she says, compelled by this improper conduct on the part of the *Two Sisters* to starboard, in order to avoid running over her. The effect of this was that she struck her lightly, but ran on the next barge, the *Alfreda*, and did her serious mischief, cutting her stern off, and then into the *Volunteer*, which she sank.

Now the question, in my judgment of the gravest importance to a right decision of this case is, whether the *Two Sisters* was to blame for the first collision, or whether the *Thames* was to blame. We have no evidence from the *Two Sisters* at all. We have evidence as to what she did from other vessels, but no evidence from the barge, the *Two Sisters*, herself; and if I had any doubt upon the matter, after the evidence proved, I should consider that it was my duty, looking to the pleadings in the case, and the facts of the case generally, to hold that it was incumbent upon the plaintiff in this case to have produced evidence from on board the *Two Sisters* if they seriously thought they could contend with success that the *Thames* was to blame, and not the *Two Sisters* for the first collision. They have not done so. But I am satisfied upon the evidence, and so are the Elder Brethren, that the *Two Sisters* was alone to blame for this first collision.

The next question to be considered is what was the state and condition in which the *Two Sisters* placed the steamer by her own improper manoeuvre? And it has been argued, as a very important part of the case, that even admitting the *Two Sisters* to be to blame, it was still the duty of the *Thames* to have straightened and gone under her helm, and that then the course pursued by the *Alfreda* and the *Volunteer* of porting their helms would have been perfectly right. There is no doubt that the *Alfreda* and the *Volunteer*, apart from the consideration of the previous collision with the *Two Sisters*, did right in porting their helms; but that is not the question; it is whether the *Thames* did wrong, or whether the plaintiffs have made out the case that the *Thames* was the wrongdoer, as they are bound to do. This is a matter very much for the Elder Brethren of the Trinity House to decide, taking into consideration the short distance between the barges, the time and space, the state of the tide, that the *Volunteer* was on the starboard bow of the *Thames*, and the state of the wind. They are clearly of opinion that there was no possibility for the *Thames* to have recovered herself in the short period of time that intervened after the collision with the *Two Sisters*.

Therefore I am brought to the conclusion that the collision which afterwards happened with the *Volunteer*, namely, by the bow of the *Thames* going into the port quarter of the *Volunteer* was not a consequence of bad navigation on the part of the *Thames*, or of any misconduct on her part; it was the necessary consequence produced by the wrong

manoeuvre of the *Two Sisters* in the manner I have described.

I therefore pronounce that the plaintiffs have not made out that the *Thames* was the wrongdoer in this case, and I dismiss her from all further observance of justice, and condemn the parties proceeding in costs.

Solicitors for the plaintiffs, Ingledew, Ince, and Greening.

Solicitors for the defendants, Loicless and Co.

Jan. 22, 23, and 30, and Feb. 4 and 18, 1875.

THE EMILIE MARIE.

Breach of contract of carriage—Short delivery of cargo—The Mersey Docks Acts Consolidation Act 1858, sects. 35 and 36—Master porters—Liability.

The Mersey Docks Acts Consolidation Act 1858, sect. 36, making the master porters, appointed under that Act to discharge cargoes in the Mersey Docks, responsible for any loss, damage, or injury sustained by the cargoes discharged by them during the receiving, weighing, and loading off by the master porters or their servants, does not in any way discharge the shipowner from his liability existing before he delivers to the master porter, and his responsibility for short delivery remains unaffected by the Act.

An assignee of a bill of lading may have a better right against the shipowner to recover for breach of the contract of carriage than the assignor.

An assignee of a bill of lading, who has given valuable consideration without notice of any arrangement between the shipper and the various consignees giving priority to the holders of the other bills of lading in the case of short shipment of cargo shipped in bulk, may claim from the shipowner full delivery of the cargo specified in his bill of lading, even though the arrangement has been made without the privity of the shipowner, and the master has indorsed the bill of lading with the words "weight unknown."

A letter written by an assignor of a bill of lading to his assignee, informing the latter that the bankruptcy of the shipper and consignee (who had indorsed to the assignor) may possibly interfere with the proceeds of the shipment, so far as the assignor is concerned, and that he thinks it best to prevent the possibility of a hitch to send the bill of lading for the assignee to deal with, the latter having advanced money thereon, is not such a notice as will oblige the assignee to make inquiries as to the quantity of and the various rights to the cargo, so as to bind the assignee with constructive notice of any arrangement between the shipper and various consignees, giving priority to the holders of other bills of lading in the case of short shipment.

The rights of an innocent holder of a bill of lading are not affected by the fact that the master signed as agent for the charterers, unless the holder has notice of the charter-party, or that the master signed in that capacity.

A bill of lading assigned in part payment of a debt already due from the assignor to the assignee, is assigned for valuable consideration.

Seemingly, the High Court of Admiralty has jurisdiction to proceed in rem against a ship for breach of contract, within the meaning of the Admiralty Court Act 1861 (24 Vict. c. 10), sect. 6, although

[ADM.]

THE EMILIE MARIE.

[ADM.]

that breach is committed by one of the part owners of the ship only (the master), and for which the other part owners would not be responsible.

There was a cause of breach of contract for short delivery of cargo, instituted under the 6th section of the Admiralty Court Act 1861, by James Hall, Robert Hartley Bower, James Robinson Pease, and George Augustus Duncombe, bankers, of Beverley, Yorkshire (Hall, Bower, and Co.), against the above-named vessel, and Emilien Aubin and others, her owners intertenuing.

The plaintiff's petition, so far as material, was as follows:

1. On or about the 27th Aug. 1874, forty tons of palm kernels were shipped on board the *Emilie Marie* at Lagos, on the coast of Africa, to be carried to Liverpool.

2. The master of the *Emilie Marie* signed a bill of lading for the said palm kernels, whereby he undertook to deliver the same at Liverpool to the order of D. Chinery.

3. The plaintiffs, at the time of the short delivery hereinafter mentioned, and thenceforward to the commencement of this suit, were the owners of the said palm kernels, and the holders for value of the said bill of lading.

4. The *Emilie Marie* having arrived at Liverpool, the plaintiffs caused the said bill of lading to be presented to the master, but the only cargo delivered out to the plaintiffs was about three tons of palm kernels and sweepings; and, except as aforesaid, the plaintiffs have been unable to obtain delivery of the palm kernels to which they are entitled under the said bill of lading.

5. The said deficiency was caused by the negligence, and misconduct, and breach of contract, and breach of duty on the part of the owners or of their servants or agents.

6. The value of the portion of the said cargo which is deficient is 600*l.*, or thereabouts.

7. No owner or part owner of the said vessel is domiciled in England or Wales.

The defendants' answer, so far as is material, was as follows:

1. In or about the month of Aug. 1874, a quantity of palm kernels, in bulk, was shipped on board the above-named vessel, *Emilie Marie*, at Lagos, by or on behalf of the African Barter Company (Limited.) Three bills of lading respectively in quadruplicate, copies whereof are hereto annexed, marked respectively A, B, and C, were presented by the said shippers to the master of the said vessel, in respect of such shipment for his signature, the copy marked C being a copy of the bill of lading mentioned in the petition. The said master, not knowing the weight of the said shipment, wrote on each of the said bills of lading, before signing the same, the words "weight unknown," and signed and delivered the same at the dates respectively appearing thereon. The quantity of palm kernels so shipped was much less than 140 tons, the aggregate quantity represented by the said bills of lading to have been shipped on board the said vessel.

2. The master of the said vessel signed the said bill of lading, mentioned in the petition, without there being a *vy* palm kernels on board the said vessel, save a very small quantity, namely, about three tons, to meet the same, and the said master had not any authority to sign or deliver the said bill of lading.

3. Save as herein appears, the defendants deny the truth of the allegations contained in articles 1 and 2 of the said petition.

4. The said vessel subsequently left Lagos with the said palm kernels, and with other palm kernels and other goods on board her, and arrived therewith at Liverpool, and entered and used for the discharge of her cargo the George's Dock, being a usual and proper place of discharge, and being a dock belonging to or under the management of "The Board," as defined by sect. 3 of The Mersey Docks Act Consolidation Act 1856, and being an open dock, as defined by the said section.

5. The said vessel having on board her goods belonging to more than one owner or consignee, all the goods on board her had, under and by virtue of the provisions of the said Act, and of The Mersey Docks and Harbour Board Act 1860, and The Mersey Docks (Corporation Purchase) Act 1861, and the bye-laws made under the said

Acts, to be received, weighed, and loaded off by one set of porters only, in the employment and under the directions and orders of a duly qualified master porter, appointed to that office by "The Board," defined as aforesaid; and all the said goods, including all the said kernels shipped by or on behalf of the African Barter Company, were accordingly, under and in compliance with the provisions of the said Acts and bye-laws, discharged and delivered from the said vessel by the said master to, and received by, a master porter, duly qualified and appointed, and entitled to act in receiving, weighing, and loading off the said goods, including as aforesaid, and whose duty it was, under and by virtue of the said Acts and bye-laws, to receive, discharge, and weigh off the said goods, and to deliver the same to the respective consignees and owners thereof; and the master and owners of the said vessel duly did all things which they were bound to do in order to enable the plaintiffs to have delivered to them, by the said master porter, all the palm kernels which they were entitled to receive under and by virtue of the said bills of lading, mentioned in the said petition, and by reason of the premises the defendants are not liable in respect of the non-delivery and deficiency complained of by the plaintiffs.

6. The defendants admit that only about three tons of palm kernels were delivered to the plaintiffs.

7. Save as herein appears, the defendants deny the truth of articles 3 and 4 of the said petition.

8. At the time of the said shipment by the African Barter Company, and before the signing of the said bills of lading, it was, for valuable consideration, agreed by and between the said company and Messrs. Charles Leigh Clare and Company and Samuel Rigby Staithforth respectively, who are the consignees respectively named in the said bills of lading—copies whereof are annexed, marked respectively A and B—that the said Messrs. Charles Leigh Clare and Company and Samuel Rigby Staithforth were respectively to have delivered to them, out of the said shipment, made by or on behalf of the said company, the full quantity of kernels, mentioned in their said bills of lading, before any portion of the said kernels should be delivered to the said D. Chinery, managing director of the said company, or to his assigns, on the said bills of lading mentioned in the petition.

9. The quantity of palm kernels shipped by or on behalf of the said company as aforesaid, was sufficient only to meet the quantities respectively mentioned in the said bills of lading, of which the copies are annexed, marked A and B respectively, and to leave about three tons of kernels and sweepings. The said master porter accordingly delivered, to the holders of the last-mentioned bills of lading, the full quantities of kernels therein respectively mentioned, and the said three tons of kernels and sweepings, being those mentioned in article 4 of the said petition, were, by the said master porter, delivered to the plaintiffs.

10. The plaintiffs had notice of the agreement, mentioned in article 8 of this answer, before any assignment was made to them of the said bill of lading referred to in the said petition. No consideration was paid by the plaintiffs for the assignment of the said bill of lading.

11. The defendants further say that at the time of the shipment of the said palm kernels, comprised in the said bills of lading the said vessel had been chartered by her master to Messrs. John Longton and Company by a charter-party, bearing date the 10th Oct. 1873, and had, by the said John Longton and Company, been sub-chartered to Samuel Rigby Staithforth, of Lagos, merchant. The shippers of the said palm kernels, comprised in the said bills of lading, had, before and at the time of the said shipment, notice of the said charter-party and sub-charter-party. The master of the said vessel, on signing the said bills of lading, was acting as agent for the said charterers or sub-charterers, and not as agent for the owners of the said vessel. The defendants crave leave to refer to the said charter-party and sub-charter-party.

12. The defendants deny the truth of the allegations contained in the fifth and sixth articles of the said petition.

(A).

Shipped, in good order and well conditioned, by African Barter Company, Ltd., in and upon the good ship called the *Emilie Marie*, whereof E. Aubin is master for this present voyage, and now riding at anchor off the port of

[Ann.]

THE EMILIE MARIE.

[Ann.]

Lagos, and bound for Liverpool, sixty tons palm kernels, in bulk, being marked and numbered as in the margin,
 60 tons } and are to be delivered in the like
 Palm kernels. } good order and well-conditioned, at
 Weight unknown. } the aforesaid port of Liverpool (the
 act of God, the Queen's enemies, fire, and all and every
 other dangers and accidents of the seas, rivers, and navigation
 of whatever nature and kind soever excepted), unto
 Messrs. Charles Leigh Clare and Co., or to their assigns.
 Freight for the said goods to be paid in Liverpool, 40s.
 per ton net weight, primage, and average accustomed.
 In witness whereof, the master or purser of the said
 ship hath affirmed to four bills of lading, all of this tenor
 and date, the one of which bills being accomplished, the
 others to stand void.

Dated in Lagos, 19th Aug. 1874.

E. AUBIN.

(B).

Shipped, in good order and well conditioned, by African
 Barter Company, Ltd., in and upon the good ship called the
Emilie Marie, whereof E. Aubin is master for this present
 voyage, and now riding at anchor in the port of
 Lagos, and bound for Liverpool, forty tons palm kernels,
 in bulk, being marked and numbered as in the margin,
 40 tons } and are to be delivered in the like
 Palm kernels. } good order and well-conditioned, at
 Weight unknown. } the aforesaid port of Liverpool (the
 act of God, the Queen's enemies, fire, and all and every
 dangers and accidents of the seas, rivers, and navigation
 of whatever nature and kind soever excepted), unto Sam.
 R. Stainforth, or order. Freight for the said goods to be
 paid in L'pool, at 40s. per ton net weight, primage, and
 average accustomed.

In witness whereof the master or purser of the said
 ship hath affirmed to four bills of lading, all of this tenor
 and date, the one of which bills being accomplished, the
 others to stand void.

Dated in Lagos, 19th Aug. 1874.

EMILIE AUBIN.

(C).

Shipped, in good order and well conditioned, by John
 Finlay, in and upon the good ship or vessel called the
Emilie Marie, whereof E. Aubin is master for this present
 voyage, and now lying in the port of Lagos, and bound
 for Liverpool, forty tons palm kernels, in bulk,
 being marked and numbered as per margin, and are to be
 40 tons } delivered in the like good order and
 Palm kernels. } condition, at the aforesaid port of
 in bulk. } Liverpool (all and every the dangers
 Weight unknown. } and accidents of the seas, and navigation
 of whatever nature and kind excepted), unto D.
 Chimery, managing director African Barter Company
 (Limited), or to his assigns, he or they paying freight
 for the said goods, at the rate of 40s. per ton net weight,
 with per cent. primage and average accustomed.

In witness whereof, the master of the said ship or
 vessel hath affirmed to four bills of lading, all of this
 tenor and date, one of which being accomplished, the
 rest to stand void.

Dated in Lagos, this 27th Aug. 1874.

EMILIE AUBIN.

The plaintiffs replied, denying the allegations of
 the answer, and concluded.

Jan. 22, 28, 30, and Feb. 4.—The cause came on
 for hearing before the judge.

On behalf of the plaintiffs, the original bills of
 lading were put in; the bills of lading set out
 in the pleadings were exact copies of the original
 bills, except that there were indorsed upon the
 bill of lading C the words, "Deliver the within to
 Parry, Lovell, and Co., or order, D. Chimery," and
 also an indorsement by Parry, Lovell, and Co. to
 the plaintiffs. These bills of lading, with the
 admissions in the defendants' answer, formed the
 plaintiff's case.

Bull, Q.C., on the part of the defendants, sub-
 mitted that as the bill of lading contained the
 words, "weight unknown," the plaintiffs made
 out no case without proof of the actual amount
 shipped. There was nothing to show that forty
 tons were shipped at Lagos to the consignee
 named in bill of lading C, without positive proof

that that amount was put on board. The bill of
 lading in itself is not sufficient evidence of the
 quantity shipped, where it contains a qualification,
 as in the present case: (*Jessel v. Bath*, L. Rep. 2
 Ex. 275.)

Mitford, Q.C. for the plaintiffs.—The bill of
 lading is *prima facie* proof of the quantity shipped
 as against the shipowners.

McLean v. Fleming, 23 L. T. Rep. N. S. 317; L. Rep.
 2 Sc. App. 129; 1 Asp. Mar. Law Cas. 160.

Sir R. PHILLIMORE.—I cannot stop the case at
 the present stage. There is evidence to show that
 the master accepted what purported to be forty
 tons, and it lies upon the defendants to show that
 such an amount was not received by the master.
 If any question arises upon this point, I will re-
 serve it till after the defendants' case has been
 heard.

Witnesses were thereupon called for the de-
 fendants, who established the following facts: The
 master of the *Emilie Marie*, whose name was
 Emilie Aubin, was also a part owner. The master
 had at Liverpool, on the 10th Oct. 1873, entered
 into a charter-party with Messrs. J. Longton and
 Co., merchants, by which the ship was to take a
 cargo on board at Liverpool, then proceed to a port
 between Cameroon and Lagos, both places in-
 cluded, and there take on board from the char-
 terers' agents a full and complete cargo of palm
 kernels or other produce of the country, and being
 so loaded, to proceed therewith to a port in the
 United Kingdom, and there deliver the cargo
 agreeably to bills of lading (the usual perils ex-
 cepted), on being paid freight at the lump sum of
 34,000 francs; the master to be at liberty to sign
 bills of lading as tendered, without prejudice
 to the charter-party, and having a lien on the
 cargo for all freight, dead weight, and demurrage,
 due under the charter-party.

The ship duly took on board a cargo at Liver-
 pool, and carried the same to Brisa River, and
 there delivered it, and then proceeded to Lagos to
 obtain cargo. Previous to the arrival of the ship
 at Lagos, one John Finlay had been agent for the
 African Barter Company, named in bill of lading C,
 but when the ship got out there Finlay had left
 for England, and one Lewis was then agent for
 the company. The African Barter Company was
 at this time indebted to a Mr. Stainforth and to
 Messrs. Leigh Clare and Co., merchants at Lagos
 in separate sums of money, and these creditors
 hold bills of the company, and were pressing Lewis
 for payment, and in fact had obtained judgments
 in the court at Lagos against the African Barter
 Company for the amounts of the bills. In order
 to satisfy these judgments it was arranged
 between Lewis and Stainforth and the agent of
 Leigh Clare and Co. that produce should be
 shipped to England by Lewis, and that Stainforth
 and Leigh Clare and Co. should each receive a bill
 of lading representing a sufficient quantity of the
 produce shipped to satisfy their respective claims,
 by sale thereof in England. Thereupon Stain-
 forth obtained from the charterers' agent at
 Lagos a sub-charter of the *Emilie Marie*, which was
 made at Lagos at the end of July 1874, and by which
 John Longton and Co. as chartered owners of the
 ship, agreed with Stainforth that the ship should
 load from Stainforth's factors a full and complete
 cargo of palm oil or other produce, and being

[ADM.]

THE EMILIE MARIE.

[ADM.]

loaded should proceed to Liverpool and deliver the same, on being paid freight at the rate of 30s. per ton of 20 cwt. delivered for palm kernels, and 35s. for like quantity of palm oil (the usual perils excepted), the freight to be paid on the correct delivery of the cargo in cash, on unloading, and true delivery of the cargo at Liverpool; the captain to sign bills of lading at any rate of freight, without prejudice to this charter. The master was no party to this sub-charter, and, although he had heard of its existence, had never seen it. The master had no experience of palm kernels as cargo.

In pursuance of this agreement, Lewis began to load the after hold of the ship with palm kernels, in bulk, about the beginning of August.

On the 19th Aug. 1874, Lewis presented to the master for signature the two bills of lading, A and B, for sixty tons and forty tons respectively. The master objected, that he did not know the quantity that had been shipped, and the words "weight unknown," were thereupon written across the bills of lading by Lewis, and the bills of lading were then signed by the master. Lewis at the same time, in the presence of Stainforth and Leigh Clare and Co.'s agent, informed the master that the sixty and forty tons would have to be delivered first, free from depreciation, before the rest of the cargo to be put in the after hold, and that, only if any was left, was delivery to be made to other consignees. At this time there was only about sixty or seventy tons of palm kernels in the after hold, but Lewis continued to load palm kernels until the after hold was full. As it had been estimated that the after hold would contain about 140 tons, Lewis, on the 27th Aug., when the hold was full, presented (in addition to the bills of lading already signed) a bill of lading (C) for forty tons more, to the master for signature. By this bill of lading J. Finlay was the consignee, and "D. Chinery, Managing Director African Barter Company (Limited)," was the consignee, and there was also an indorsement, "Weight unknown." The ship sailed from Lagos, duly arrived in Liverpool, and discharged her cargo; the quantity discharged from the after hold was 103 tons and no more, and of this sixty tons was delivered to Messrs. Leigh Clare and Co., under bill of lading A, and forty tons to Stainforth, under bill of lading B. The remaining three tons consisted of sweepings, and these were delivered to the plaintiffs. It was distinctly shown that the master delivered at Liverpool all that he had shipped at Lagos in the after hold.

On the ship's arrival in Liverpool, Mr. Maddril, a master porter duly appointed under the Mersey Dock Acts Consolidation Act, received the cargo on the quay, and his servants weighed it and loaded it off, and delivered it to the consignees or indorsees named in the bills of lading. It was stated that Mr. Maddril was instructed by the ship's brokers to deliver the sixty and forty tons, under bills of lading A and B, to Stainforth and Leigh Clare and Co., in priority to other persons claiming cargo out of the afterhold under other bills of lading. No such order was given to the master, nor was there any notice of any right to priority on any of the ship's papers, but these two bills being presented first the master porter delivered accordingly. The afterhold was full on arrival at Liverpool, and no more could have been put into it.

Under the Mersey Docks Acts Consolidation Act

1848, the Mersey Docks and Harbour Board have power (sect. 32) to appoint masters, porters, and

Sect. 35:

The cargo of every vessel from any foreign or colonial port, entering and using any open dock, shall be received, weighed, and loaded off by one set of porters only, who shall be in the employ and under the directions and orders of one of the master porters appointed by the board.

Sect. 36:

Every master porter, immediately after his appointment and before he shall be capable of acting as such, shall execute to the board a bond, with two sufficient sureties, to be approved of by the board, in the penal sum of 200*l.*, to be conditioned for paying or satisfying the owners of goods received, weighed, or loaded off by such master porter, or by the porters in his employ or under his direction, the amount of any loss, damage, or injury which such goods may sustain during such receiving, weighing, or loading off; and the owner of any goods sustaining any such loss, damage, or injury as aforesaid, may sue in his own name such master porter and his sureties, or any or either of them, upon such bond, and shall recover in such action damages in the same manner as he might have done in case the said bond had been executed to him and not to the board.

By the bye-laws made under the above Act (Bye-laws 120, 121), further provision is made as to the responsibility of the master porters in receiving, weighing, and loading off the discharged cargoes.

Parry, Lovell, and Co. had for some time before this transaction been connected with the African Barter Company in business. About the time of the arrival of the *Emilie Marie* at Liverpool, the African Barter Company went into liquidation. Parry, Lovell, and Co. were then indebted to the plaintiffs in a sum of money considerably exceeding the value of the goods purporting to be covered by the bill of lading. The plaintiffs' bank was in the habit of making advances to Parry, Lovell, and Co., upon security, and it was in respect of these advances that Parry, Lovell, and Co. were indebted to the plaintiffs. No specific advances had been made against the cargo of the *Emilie Marie*. Parry, Lovell, and Co. wrote to the plaintiffs as follows:

122, Cannon-street, London, E.C.,

31st Oct. 1874.

Messrs. Power, Hall and Company,
East India Dock, Liverpool.

Re African Barter Company.

Having in view the appointment of a liquidator next week, which might possibly interfere with the proceeds of the shipment by the *Emilie Marie* as far as we are concerned, we thought best, to prevent the possibility of a hitch, to send you the inclosed bills of lading for you to deal with, you having advanced us money on account thereof. There can be no possibility of a question being raised as to your right to receive proceeds; please, therefore, send the inclosed bills of lading to the brokers in Liverpool by Monday's post, and we send you herewith a copy of our usual note of instruction for your guidance in writing them. The value of this parcel will be about 500*l.*, after paying freight and charges.

The bills of lading of the other portion of the cargo are in the hands of the brokers who are discharging the vessel, there having been some advances made thereon, and we are now negotiating, with a view of paying off these advances, in order to secure the balance of proceeds.

We saw Mr. Silvester yesterday, to whom we gave some telegrams which will explain the delay in our promised remittance.

We are, dear sirs, yours faithfully,
PARRY, LOVELL, AND

Milward, Q.C. (W. C. Gully with him), for the plaintiffs.—The plaintiffs derive their title as indorsees from Parry, Lovell, and Co., who are in-

[ADM.]

THE EMILIE MARIE.

[ADM.]

doreses of Chinery, described in the bill of lading as "Managing Director of the African Barter Company (Limited)." The plaintiffs are indorsees for value, without notice of any special arrangement which could defeat their claim, and are *prima facie* entitled to recover, if the defendants show no good defence. One defence is, that the plaintiffs had notice of the arrangement, that they gave no consideration for the bill of lading. This lies upon the defendants to show, and they have not shown it; moreover, they are bound to show that Parry, Lovell, and Co. had notice of the arrangement, and gave no consideration, otherwise the plaintiffs take from innocent holders and have a good title. A second defence is, that the plaintiffs must look to the master porter, and that he is liable for any deficiency under the Mersey Docks Acts Consolidation Act. A third defence is, that the shippers from whom the plaintiffs derive their title had notice of the charter-party and sub-charter-party, and that as the sub-charter was not entered into by the shipowners or the master, but by the charterers by the shipowners' backs, any liability arising under the sub-charter-party falls upon the charterers and not upon the shipowners, and that the master signed the bills of lading as agent of the charterers, and not of the shipowners. But by both charter-parties the master is to sign bills of lading without prejudice to the charter-party, and therefore as agent for the shipowner.

First, as to the notice of any arrangement for priority: There is nothing on the face of any of the documents to show that any such arrangement had been made, and there is no proof that knowledge of it had come either to the plaintiffs or Parry, Lovell, and Co. The bill of lading is in the ordinary form, and even if any ordinary words, such as "or to his assigns," had been omitted, there would have been not even constructive notice: (*Henderson and another v. The Comptoir d'Escompte de Paris*, ante, p. 98; 29 L. T. Rep. N. S. 192); and I submit that nothing short of actual notice of such an arrangement could affect the plaintiffs in such a case as the present. There was ample consideration for this bill of lading in the fact that Parry, Lovell, and Co. were indebted to the plaintiffs and gave them the bill of lading as security for their overdrawn account. Such a deposit gives the plaintiffs a lien upon the bill of lading: (*Brandao v. Barnett*, 1 M. & G. 908; 12 Cl. & Fin. 767) and, consequently, a right to sue.

Secondly, as to the master's power to bind the owners by signing bills of lading. The master was part owner, and, consequently, so far as his own share in the ship is concerned, he bound the ship, and the plaintiffs are entitled to recover to that extent; but I submit that they are entitled against all the owners. Under the charter-party of the 10th Oct. 1873, the master was to sign bills of lading as tendered, without prejudice to the charter-party. Hence the master had not only the general authority of a master to sign bills of lading, but also a special authority under the charter-party. He was empowered to sign and to bind the ship. Even if the master was made acquainted with the fact that Lewis had promised that bills of lading A and B should have priority, he was no party to the bargain, and he cannot set up that bargain in derogation of his own contract in writing in bill of lading C, by which he undertakes to deliver forty tons of palm kernels to the plaintiffs. Much

less can he set up the bargain against the plaintiffs, who had no knowledge of it and cannot therefore be affected by it.

Then as to the defence set up in paragraph 5 of the answer. The plaintiffs seek to throw off their obligation by recourse to the Act, although they never delivered more than 103 tons out of the after hold to the master porter. There was no notice upon the ship's manifest that there was to be priority of delivery. [Sir B. PHILLIMORE.—If goods are to be delivered to several consignees, they are delivered under the provisions of the Mersey Docks Act; but I do not see how that makes any difference in the obligation upon the shipowner to perform his contract. The master porter is only part of the machinery for delivery. This part of the question had better be argued by the defendants, as I do not at present see how it affects the plaintiffs.]

Bull, Q.C. and *E. C. Clarkson*, for the defendants. —The African Barter Company were the actual shippers of the whole 103 tons. In bills of lading A and B they are named as the shippers; in bill of lading C, John Finlay is named, but it has been shown that Finlay was agent of the African Barter Company, and was succeeded by Lewis. Finlay had gone to England before the shipment, and Lewis made the arrangement with the creditors of the African Barter Company. In effect the African Barter Company, Lewis, Finlay, and Chinery, are all one for the purpose of this case, and the consignment by Finlay to Chinery in bill of lading C was a consignment from the African Barter Company to the African Barter Company. The plaintiffs derive their title through Chinery, who indorses the bill of lading as managing director of the African Barter Company, to Parry, Lovell, and Co. The African Barter Company could not set up anything against the arrangement with Stainforth and Leigh Clare and Co. The plaintiffs can only sue as assignees, and therefore the question arises whether they are *bona fide* assignees for value. There is no evidence that Parry, Lovell, and Co. gave anything for the bill of lading, and the ones of proof is on this point upon the plaintiffs. Parry, Lovell, and Co., having been connected in business with the African Barter Company, the presumption is that they were fully acquainted with the whole transaction, and if so, all parties concerned were affected with knowledge of the arrangement up to the time the bill of lading C got into the hands of the plaintiffs. Then as showing whether the plaintiffs are *bona fide* holders for value, it becomes important to inquire whether they had notice, actual or constructive, of the agreement between the shippers and Stainforth and Leigh Clare and Co. As to actual notice, there is no evidence; but we submit that they had constructive notice, that is to say, such facts came to their knowledge as ought to have put them on inquiry. The letter of the 31st Oct. 1874, from Parry, Lovell, and Co. to the plaintiffs, shows that the bill of lading was sent to the plaintiffs in order to get it into the hands of persons who would appear *bona fide* holders; because Parry, Lovell, and Co. feared that they themselves could not enforce the bill of lading against the African Barter Company or the shipowners. Parry, Lovell, and Co. were rather interested in the African Barter Company themselves, or they were afraid they could not get the goods from the liquidators. If Parry, Lovell, and Co. were indorsees for value,

[ADM.]

THE EMILIE MARIE.

[ADM.]

and without notice of the arrangement, why should they not have claimed? The word "hitch" in the letter shows something wrong, so far as Parry, Lovell, and Co. are concerned. Moreover, although it has been proved that nothing was advanced against the *Emilie Marie* consignment, the letter expressly says that the bill of lading is sent to cover such an advance already made. That letter ought to have shown to the plaintiffs that Parry, Lovell, and Co., were not *bond fide* holders, and that it was desired to make the plaintiffs appear so; such conduct should have put the plaintiffs upon inquiry. A *bond fide* holder must come into court with his hands clean. He must not only have no actual notice, but no constructive notice, that is to say, nothing which puts him on inquiry. The duty as to inquiry is clearly laid down in the equity cases relating to the purchase of real property, but it is equally applicable here. In White and Tudor's Leading Cases in Equity, 2nd edit., vol. 2, p. 38, it is said, "No equitable doctrine is better established than that so clearly and forcibly laid down by Lord Hardwicke in the principal case (*Le Neve v. Le Neve*), viz., that the person who purchases an estate (although for valuable consideration) after notice of a prior equitable right, makes himself a *mala fide* purchaser, and will not be enabled, by getting in the legal estate, to defeat such prior equitable interest, but will be held a trustee for the benefit of the person whose right he sought to defeat." Again, at p. 38, "Constructive notice is defined to be in its nature no more than evidence of notice, the presumption of which is so violent that the court will not allow of its being controverted." The authors proceed to quote a passage from a judgment of Wigram, V.C., in *Jones v. Smith* (1 Hare, 55), in which it is said that there are two classes of constructive notice—the one where the party has had actual notice that the property he purchases is in some way incumbered or affected, the other cases in which the court has been satisfied that the party charged had designedly abstained from inquiry for the purpose of avoiding notice. Here the plaintiffs both had actual notice that the property was affected, and they abstained from inquiry after their suspicions were, or ought to have been, aroused. When bankers have the offer of a security such as this, they ought to make some inquiry. The defendants had no means of knowing of this letter, and could not, therefore, set up fraud specifically in their answer; but still, if the plaintiffs had notice of the real state of things, their acts amount to legal fraud, and this is sufficiently raised by paragraph 10 of the answer.

Even if the plaintiffs hold this bill of lading as security for advances, they have only a lien upon it, and that does not give them a right of action against the shipowners. They derive their right, if any, from the indorsement of the bill of lading by Parry, Lovell, and Co. The consideration for this indorsement is alleged to be the lien upon the bill of lading for advances made; but at the time the advances were made the bill of lading was not in their possession, or indorsed to them, and consequently the consideration was a thing they had no right to and did not possess, and was valueless.

This action is brought under the Admiralty Court Act 1861, s. 6, by which this court has "jurisdiction over any claim by the owner or consignee, or assignee, of any bill of lading of any goods, &c., or his right to sue at all in any breach of duty or breach of contract," &c. An

assignee of a bill of lading has no right to sue for breach of contract, except such right as he derives from the Bills of Lading Act (18 & 19 Vict. c. 111). Such right as he acquires by that Act is a bare right to sue, and he can acquire no greater rights than those possessed by the original shipper or owner of the goods. This is clearly shown by the preamble of the Act, which says: "Whereas, by the custom of merchants, a bill of lading of goods, being transferable by indorsement, the property in the goods may thereby pass to the indorsee; but nevertheless all rights in respect of the contract contained in the bill of lading continue in the original shipper or owner, and it is expedient that such rights should pass with the property: And whereas it frequently happens that the goods in respect of which bills of lading purport to be signed have not been laden on board, and it is proper that such bills of lading in the hands of a *bond fide* holder for value should not be questioned by the master or other person signing the same, on the ground of the goods not having been laden as aforesaid: Be it therefore enacted," &c. The wording of that preamble shows that it was not intended to pass to an indorsee any greater right than those possessed by the original shipper or owner. In Smith's Leading Cases, 4th edit., vol. 1, p. 651 (Notes to *Liebharron v. Mason*), it is said, speaking of the Bills of Lading Act: "That statute, however, has altered the law in this respect (the right to sue). By the first section, rights of action and liabilities upon the bill of lading are to vest in and bind the consignee or indorsee to whom the property in the goods shall pass. By the second section it is provided that the Act is not to affect the right of stoppage in transitu or claims for freight against the shipper or owner of the goods, or the consignee or indorsee as owner, or by reason of his receipt of the goods. It should seem that the statute has not altered the rule that the indorsement of a bill of lading gives no better right to the indorsee than the indorser himself had, and that in this respect a bill of lading still differs from a bill of exchange in the same way as it did before the statute: (see *Gurney v. Behrend*, 3 E. & B. 622.)" Independently of the statute, the plaintiff, even if owner of the goods, could only have brought trover, and could then only have recovered what the shippers transferred to them, viz., three tons. The statute gives no greater right than that of the shipper, who was himself a party to the arrangement which gave priority to the other consignees.

Henderson v. The Comptoir d'Escompte de Paris (ubi sup.) does not affect this case, as it only decided that the omission of the words "order or assigns" from a bill of lading was not enough to put the transferee upon inquiry. In *Rodger v. The Comptoir d'Escompte de Paris* (L. Rep. 2 P. C. 393, 405), a *bond fide* holder is described as a person who can show that he got the bill of lading without notice of anything unfair or dishonest in the transaction.

Then, as to the master being part owner. Even if he is personally liable, the other owners are not liable. This is a proceeding *in rem*. The plaintiffs have no right to arrest the property of a number of owners for the breach of contract on the part of one of them. There is no maritime lien, and, consequently, no right to detain the ship. The only case in which the ship ought to be detained is where all its owners are liable.

Again, the owners are not liable because the master signed the bill of lading as agent of the charterers. By the original charter-party the ship is chartered at a lump freight. Stainforth sub-chartered the ship to carry out the proposed arrangement, and Lewis had notice of the sub-charter-party which was entered into between the charterers and sub-charterers. The rule of law is, that if charterer of a ship puts her up for cargo, and persons ship goods on board without notice that the charterer is not owner, then the shipowner is bound to the shipper; but if the shipper has notice, the master signs as agent for the charterers, and does not bind the owners of the ship:

Marquand v. Benner, 25 L. J. 313, Q. B.;
Schuster v. McKellar, 26 L. J. 281, 288, Q. B.;
The St. Cloud, 18 L. T. Rep. N. S. 24; *Bro. & Lash*,
4; 1 Mar. Law Cas. O. S. 308;
Sensemann v. Scurr, L. Rep. 2 Q. B. 86; 2 Mar. Law
Cas. O. S. 446.

If the master had not happened to be owner, no action could lie. The master himself may be estopped from denying that the quantity stated in the bill of lading was shipped; but that does not prevent his owners from denying it and saying that he improperly signed bills of lading for more than was shipped. A master signing for more than is actually shipped does not bind his ship-owners: (*Grant v. Norway*, 10 C. B. 665.) It must be admitted that the Bills of Lading Act, sect. 3, renders the master personally liable for goods not laden, if he signs bills of lading for them. He is estopped from denying the shipment, but can the plaintiffs in this action, which is a proceeding against the ship, recover against one defendant when the others are not liable, more especially when no distinction is shown as to the defendants in the petition? There has been a delivery of something under the bill of lading, and, therefore, it is an important question whether the master is or is not liable under the Bills of Lading Act, sect. 3. His liability does not make the liability of his co-owners, and this is not a proceeding in personam against the master. The third section of the Act only applies to the person actually signing the bill of lading:

Meyer v. Dresser, 10 L. T. Rep. N. S. 612; 16 C. D.,
N. S., 646; 2 Mar. Law Cas. O. S. 27;
Jessel v. Bath, L. Rep. 2 Ex. 267.

On the question of whether a shipowner's liability is discharged by delivery to a master porter at Liverpool—the shipowner has admittedly delivered all the cargo he had on board into the hands of the master porter, and this constitutes, under the *Mersey Docks and Consolidation Act*, a complete delivery in law. Once in the hands of the master porter, any duty to deliver a particular quantity, or to decide the quantity discharged, rateably falls upon the master porter by that Act, and under sect. 36, the master porter is responsible for "the amount of any loss, damage, or injury which such goods may sustain at the hands of the master porter. The shipowner has nothing to do with the delivery in open dock, and if he is to be made responsible after his cargo have passed into the hands of the master porter and delivery on his part is complete, the Act would be meaningless.

Milward, Q.C. in reply.—The *Mersey Docks and Consolidation Act*, sect. 35, only applies to cases where the consignees suffer loss in the "receiving, weighing, and loading off" of the cargo. The master porter is only responsible for damage

done by himself or his servants, not for loss of or injury to goods which he never received. He has nothing to do with the delivery, only with distribution. [Sir R. PHILLIMORE.—The defendants' argument would imply that a master porter would be responsible for all damage, whether caused before or after the ship came into port. You need not trouble yourself upon that point.]

If the private arrangement was to be binding against consignees or assignees, it ought to have appeared on the face of the bills of lading. The defendants state that Parry, Lovell, and Co. gave no consideration for the bill of lading, but this point is not raised upon the pleadings, and, consequently, the plaintiffs were not challenged to show this consideration, and the point cannot be raised, and it must be assumed that Parry, Lovell, and Co. were innocent holders for good consideration. If that be so, the bill of lading, into whose hands it afterwards gets, is binding upon the shipowner. This will be seen by analogy drawn from cases decided on bills of exchange:

Byles on Bills, 11th edit., p. 117.

In *Rodger v. The Comptoir d'Escompte de Paris* (ubi sup.), Sir Joseph Neipper, in giving judgment, says: "In order to decide between the rival claimants, two questions have to be answered. . . . Secondly, was the transfer of the bills of lading made to the respondents for valuable consideration, and without notice of such circumstances as rendered them not fairly and honestly assignable, and so as to transfer to the respondents a property in the goods freed and discharged from the proprietary lien of the unpaid vendors. . . . The second is the real question in the case. The respondents contend that they gave value for the bills of lading; that they had no notice of any special terms of agreement between the vendors and vendees, of which they say they were not informed, and as to which they say they were not bound to make inquiry. . . . The general rule, so clearly stated and explained by Lord St. Leonards in the case of *Mangles v. Dixon* (3 H. of L. Cas. 702), is, that the assignee of any security stands in the same position as the assignor as to the equities arising upon it. This, as a general rule, was not disputed, but it was contended that the case of a bill of lading is exceptional, and must be dealt with on special grounds. Doubtless, the holder of an indorsed bill of lading may in the course of commercial dealing transfer a greater right than he himself has; the exception is founded upon the negotiable quality of the document. It is confined to the case where the person who transfers the right is himself in actual and authorised possession of the document, and the transferee gives value on the faith of it, without having notice of any circumstance which would render the transaction neither fair nor honest. In such a case, if the vendor is unpaid, one of two innocent parties must suffer by the act of a third; and it is reasonable that he who, by misplaced confidence, has enabled such third person to occasion the loss should sustain it: (*Lickbarrow v. Mason*, 2 T. R. 70.)" Then the letter from Parry, Lovell, and Co. to the plaintiffs shows that they were under advances from the plaintiffs at the time, and that there was valuable consideration for the bill, but it is no notice of any private arrangement; it simply shows that Parry, Lovell, and Co. are afraid that there might be a difficulty in their enforcing the bill of lading on their own behalf, but that the plaintiffs would

ADM.]

THE EMILIE MARIE.

[ADM.]

have no such difficulty. There is nothing to show that the "hitch" mentioned was anything more than a dispute, and was of such a nature as to render defective Parry, Lovell, and Co.'s title to the goods represented by the bill of lading.

The default in delivery was the default of the shipowner, who was bound to have so loaded his goods that he could deliver to each consignee the amount shipped under each bill of lading; if shipping in bulk prevented the different portions from being duly allotted, that was the negligence of the shipowner. At the worst, the plaintiffs were entitled, the quantity shipped in the afterhold should be apportioned among the three holders of the bills of lading A, B, and C. Nothing appeared on the ship's papers to show priority, and all were equally entitled to delivery. Bill of lading C transferred forty tons to the plaintiffs as much as A and B transferred sixty and forty respectively to the other consignees. Even if bills of lading only transfer what was actually shipped, all the consignees were equally entitled to their proportion of the 103 tons. But it is said that on the presentation of bill of lading C, there were only three tons left on board to satisfy it after the others had been discharged, and that these three tons are all that the plaintiffs are entitled to. But the Bills of Lading Act assumes that the property named in the bill of lading passes to the ultimate holder, and he becomes clothed with the rights of the original owner as if the contract had been made with him; and, further, it is well established that a transferee for value without notice has a better title than even the original owner: (*Lickbarrow v. Mason*, 1 Sm. L. C., 602); and, consequently, the plaintiffs have acquired an absolute right to have delivered to them the amount of the goods named in the bill of lading, which amount the defendants cannot deny as against the plaintiffs, however much they might dispute it against former holders.

Curr. adv. vult.

Feb. 18, 1875.—SIR R. PHILLIMORE: This is a suit by Hall, Bower, and Co., against the ship *Emilie Marie* and the foreign owners, for short delivery of a cargo of certain palm kernels, valued at 500*l.* Hall, Bower, and Co. are the indorsees of a bill of lading from Parry, Lovell, and Co., who are indorsers of D. Chinery, the managing director of the African Barter Company (Limited).

It appears that the master of the vessel gave three bills of lading to three different parties for portions of the same cargo of palm kernels. These bills are marked A, B, and C in the pleadings. The bill upon which the plaintiffs rest their claim is as follows: [His Lordship then read bill of lading C, set out in the pleadings.] Then there is the indorsement: "Deliver the within to Messrs. Parry, Lovell, and Co., or order—D. Chinery;" indorsed also "Parry, Lovell, and Co." *Prima facie* the plaintiffs are entitled to their forty tons of palm kernels. The other bills of lading, A and B, are as follows: [His Lordship read these bills of lading, as set forth in the pleadings.] The whole shipment, therefore, it appears, ought to have amounted to 140 tons of kernels, whereas, when the cargo came to be delivered there were only 103 tons. The holders of the bill of lading A received their sixty tons, the holders of the bill of lading B received their forty tons, and the holders of the bill of lading C were tendered about three tons of kernels

and sweepings, which they refused to accept, and hence the institution of this suit.

Various answers have been pleaded in defence. Some are of what may be called a technical, and some of a substantial character. I will first deal with those of the former category.

First, it is contended as follows in the 5th article of the answer: "The said vessel," &c. [His Lordship here read the 5th paragraph of the answer, as above set out.] Upon examination of the statutes referred to and the bye-laws passed by virtue of them, I am clearly of opinion that these statutes in no way alter the legal liability existing previously to the delivery at Liverpool, to the master porter, of the cargo. Those statutes and bye-laws relate to the possibility of injury in the receiving, weighing, and loading of the goods," for damage to which, while in his possession, the master porter may be liable. And I may observe here, that the order of the shipbroker to the master was to deliver 140 tons, without any reference to priority or to any supposed bargain.

Secondly, the question was raised as to the effect of the Bills of Lading Act (18 & 19 Viet. c. 111). It was contended that this statute gives no greater right to the assignees than the assignors possessed, and, therefore, assuming that the assignors, for reasons presently to be stated, could not have put in force the bill of lading, the incapacity attaches to the assignee. This argument has some plausibility, but I think no soundness. The question arises in sect. 1 as to who is meant by the term "himself." I think the ultimate and not the intervening owner, and that in this case it is as if the kernels had been consigned to Hall, Bower, and Co. direct, and not to Chinery.

Thirdly, it is contended that the vessel had been sub-chartered in this case to Stainforth, that the master signed the bill of lading as agent for the sub-charterers, and not of the owner. If this were so, it would be enough to say that at least notice of the sub-charter, or that the master was signing as agent for the sub-charterers, ought to appear on the bill of lading. It does not appear, and I am further of opinion that the master did not sign in that capacity.

Fourthly, it is contended that though the captain, being a part owner in this vessel, may be liable, there are other owners, and that no liability attaches to the whole ship, which it is said the court has no right to arrest. I am of a different opinion. I think the court has jurisdiction over this ship, though the part owners may be subject to an action in another court.

Now I come to the argument, of a less technical and more substantial character, addressed to the court on behalf of the defendants. It is, in fact, contended that the plaintiffs are guilty of a fraud in the matter of the bill of lading C, an allegation which I think should have been distinctly pleaded if intended to be relied upon. It is said, however, that the charge necessarily results from what is pleaded. The 10th article is as follows: "The plaintiffs had notice of the agreement mentioned in article 8 of this answer before any assignment was made to them of the said bill of lading referred to in the said petition. No consideration was paid by the plaintiffs for the assignment of the said bill of lading." If these two averments are substantiated by evidence, the plaintiffs, it is contended, are putting forward a claim bottomed on fraud. I will consider them in their order.

[ARM.]

THE EMILIE MARIE.

[ADM.]

But, first, it will be convenient to state concisely the law applicable to both these allegations. It is perspicuously stated, in the case of *Rodger v. The Comptoir d'Escompte de Paris* (L. Rep. 2 P. C. 405), before the Privy Council: "Doubtless," their Lordships say, "the holder of an indorsed bill of lading may, in the course of commercial dealing, transfer a right greater than he himself has; the exception is founded on the negotiable quality of the document. It is confined to the case where the person who transfers the right is himself in actual and authorised possession of the document, and the transferee gives value on the faith of it, without having notice of any circumstances which would render the transaction neither fair nor honest."

Now, it is said that the plaintiffs had notice sufficient to invalidate their claim; what it was is set out in the 8th article (to which the 10th refers) of the answer: "At the time of the said shipment by the African Barter Company, and before the signing of the said bills of lading, it was for valuable consideration, agreed by and between the said company and Messrs. Charles Leigh Clare and Co. and Samuel Rigby Stainforth respectively, who are the consignees respectively named in the said bills of lading, copies whereof are annexed, marked respectively A and B, that the said Charles Leigh Clare and Co. and Samuel Rigby Stainforth were respectively to have delivered to them out of the said shipment, made by or on behalf of the said company, the full quantity of kernels mentioned in their said bills of lading before any portion of the said kernels should be delivered to the said D. Chinery, managing director of the said company, or to his assigns, on the said bills of lading mentioned in the petition." The two bills of lading A and B, referred to in this article, have been already recited. The shippers in these are the African Barter Company, Leigh Clare and Co., consignees of A, and Stainforth, consignee of B, had claims secured by judgments upon their allotments of the cargo. The shipper in bill of lading C is Finlay, the consignee being Chinery, described as managing director of the African Barter Company. It is said that Finlay and Chinery are practically the same, and that the African Barter Company was known to be on the verge of bankruptcy. But, if this be so, it would not affect Parry, Lovell, and Co., to whom Chinery indorsed the bill of lading C.

Then it is said that they had notice of a private arrangement, whereby it was settled that A and B should be satisfied before C, because Chinery must be taken to have been cognizant of this agreement. I am not satisfied that Parry, Lovell, and Co. were not innocent holders of the bill C; and I must observe that it is not pleaded that they took bill C with notice or without consideration; but, even if they were not innocent holders, what is alleged against Hall, Bower, and Co. P. Why, that a letter from Parry, Lovell, and Co. to them gave them notice which, as honest assignees of bill C, ought to have awakened their suspicion, and have admonished them to make inquiries, the result of which would have apprised them that bill C was to be postponed to A and B, and that there were not kernels enough to satisfy the three. The letter, so far as it was relied on to prove this charge, is as follows: [His Lordship then read the letter of the 31st Oct. 1874, from Parry, Lovell, and Co. to the plaintiffs, before set out.] After a careful consideration of this letter, I cannot come to the conclusion that it warrants

the argument that Hall, Bower, and Co. were bound to have made further inquiries before they took the bill of lading.

The general principle of the law as to constructive notice to allet in the case about to be cited seems to be well laid down in the judgment of Wigram, V.C., in *Jones v. Smith* (11 Hare, 55): "It is scarcely possible," observes his Honour, "to declare *a priori* what shall be deemed constructive notice; because, unquestionably, that which would not affect one man may be abundantly sufficient to affect another. But I believe I may, with sufficient accuracy for my present purpose, and without danger, assert that the cases in which constructive notice has been established resolve themselves into two classes: first, cases in which the party charged has had actual notice that the property in dispute was in fact charged, encumbered, or in some way affected, and the court has thereupon bound him with constructive notice of facts and instruments to a knowledge of which he would have been led by an inquiry after the charges, incumbrance, or other circumstance affecting the property of which he had actual notice; and, secondly, cases in which the court has been satisfied, from the evidence before it, that the party charged has designedly abstained from inquiry for the very purpose of avoiding notice. The proposition of law upon which the former class of cases rests is, net that the party charged had notice of an instrument, which in truth related to the subject in dispute, without knowing that such was the case, but that he had actual notice that it did so relate. The proposition of law upon which the second class of cases proceeds is, not that the party charged had incautiously neglected to make inquiries, but that he had designedly abstained from such inquiries for the purpose of avoiding knowledge—a purpose which, if proved, would clearly show he had a suspicion of the truth, and a fraudulent determination net to learn it. If, in short, there is net actual notice that the property is in some way affected, and ne fraudulent turning away from that knowledge of facts which the *res gestæ* would suggest to a prudent mind—if mere want of caution, as distinguished from fraudulent and wilful blindness, is all that can be imputed to the purchaser—there the doctrine of constructive notice will net apply; there the purchaser will in equity be considered, as in fact he is, a *bona fide* purchaser without notice." These remarks in favour of the innocence of the purchaser are certainly net weakened when applied to the holder of a bill of lading. It may be that the letter conveys an intimation that the African Barter Company is on the eve of bankruptcy, and that the writer desires to prevent the bill of lading from forming part of the bankruptcy estate. It may be before another tribunal, and for a different purpose, the writer may be liable for this statement. I offer no opinion on these points. The question before me is, whether the letter ought to have suggested to Hall, Bower and Co. that which is now relied upon, namely, that the bill of lading C was only to be satisfied if the satisfaction of bills A and B left a sufficient quantity of kernels for the purpose. I think it contained ne such suggestion.

With respect to the objection as to want of consideration given by Hall, Bower, and Co., I am of opinion that the bill of lading was assigned to and taken by them in part payment of a debt due to

[ADM.]

THE EARL SPENCER.

[ADM.]

them from the assignee, which is a sufficient valuable consideration.

Upon the whole, I am of opinion that the prayer of the plaintiffs ought to be granted. I pronounce for the damage, which must be referred in the usual manner to the registrar and merchants, and I condemn the defendant in costs.

Solicitors: Plaintiffs, Snowball, Copeman, and Smith; Defendants, Duncan, Hill, and Dickinson.

Feb. 11 and 18, 1875.

THE EARL SPENCER.

Collision—Speed—Ship overtaken—No duty to show light or signal.

A steamship entering a harbour at full speed on a night when ships not showing lights can be seen only at a distance of one or two cables' length will be held to blame if she injures another ship. There is no duty imposed upon any ship to exhibit a light or signal astern to another ship approaching the former from such a direction that the regulation lights of the leading ship are not visible to those on board the following ship, even when the leading ship is in the fair way of a harbour on a night when vessels not showing lights cannot be seen at a greater distance than one or two cables' length.

This was a cause of collision instituted on behalf of the owners, master, and crew of the schooner *Merlin*, and on behalf of the owners of the cargo lately laden on board thereof, against the steamship *Earl Spencer*, and against the London and North-Western Railway Company, the owners of the said steamship, intervening. The petition, so far as is material, was as follows:

1. At about or shortly before 5 a.m. on the 17th Oct. 1874, the schooner *Merlin*, of 65 tons register, manned by a crew of four hands all told, whilst in prosecution of a voyage from Carmarthen to Liverpool with a cargo of tin plate, was in Holyhead Bay inside of the Breakwater.
2. The wind at such time was about south-north-west, a moderate gale; the weather was rainy, and the tide about one hour and a half ebb, and the *Merlin* had her proper regulation lights duly exhibited and burning brightly. She was on the starboard tack, heading about south-east by south; her speed was about one and a half knots to two knots per hour, and she was under double-reefed mainsail, reefed topsail, standing jib and forestay, and her crew were engaged in setting her double-reefed foresail.
3. At such time the above-named steamship *Earl Spencer*, with her three lights open, was seen at the distance of about a cable's length astern of the *Merlin*, and coming towards her under steam. The *Earl Spencer*, although loudly hailed from the *Merlin*, ran against and with her stem struck the *Merlin* a violent blow on her port quarter, doing her a great deal of damage. The crew of the *Merlin* got on board the *Earl Spencer* in order to save their lives, and the *Earl Spencer*, after an unsuccessful attempt to take the *Merlin* in tow, proceeded into Holyhead harbour, and the *Merlin* and her cargo and everything on board her were totally lost.
4. Those on board the *Earl Spencer* neglected to keep a proper look-out.
5. The *Earl Spencer* improperly neglected to keep out of the way of the *Merlin*.
6. The *Earl Spencer* was going too fast considering the state of the weather, and did not duly observe and comply with the provisions of Article 16 of the Regulations for preventing Collisions at Sea.
7. The said collision and the consequent loss of the *Merlin* and her cargo, and everything on board her, were occasioned by the negligent and improper navigation of the *Earl Spencer*.
8. The said collision was not occasioned by any negligence on the part of the master or crew of the *Merlin*.

The defendants filed an answer, which, so far as material, was as follows:

1. The *Earl Spencer* is a paddle steamship of 350 horse-power, and of 431 tons register, belonging to the port of London, is manned by a crew of twenty-eight hands all told, and is employed in carrying cargo and passengers between Holyhead and Greenore in Ireland.
2. The *Earl Spencer* left Greenore bound for Holyhead on the evening of the 16th Oct. 1874, having on board a cargo of general goods, cattle, and thirty-eight passengers.
3. The *Earl Spencer* proceeded on her said voyage in safety until about 125 a.m. on the 17th Oct. 1874, when the tide being ebb, the weather dark and rainy, and a gale blowing from the south-south-west, the *Earl Spencer* was rounding the breakwater of and entering Holyhead outer harbour, heading about south-half-east, with her regulation lights burning brightly, and a good look-out being kept on board of her. At such time, and after rounding the breakwater, those on board the *Earl Spencer* suddenly sighted a vessel, which turned out to be the *Merlin*, with no lights visible, bearing about half a point on the starboard bow of the *Earl Spencer*, and close ahead of the latter vessel, and inside the breakwater. The master of the *Earl Spencer*, thinking that the *Merlin* was a vessel at anchor, starboarded the helm of the *Earl Spencer* to go to the eastward and outside of her and of the other shipping, there being several vessels at anchor to the westward of the *Merlin*, but discovering immediately afterwards that the *Merlin* was under weigh, the master of the *Earl Spencer* ordered the engines of that vessel to be stopped and reversed full speed, which order was immediately obeyed, but as the time which had elapsed from the sighting of the *Merlin* was so short, and as the *Merlin* was steering a course which crossed the course of the *Earl Spencer*, that latter vessel was unable to avoid the *Merlin*, but her bow came in contact with the stern and port quarter of the *Merlin*. The master of the *Earl Spencer* attempted to tow the *Merlin* in safety, but after an unsuccessful attempt to do so was compelled, through fear of risking the lives and property under his care, to abandon her after taking on board her crew.
4. Save as herein appears the defendants deny the several allegations of the plaintiffs' petition.
5. Those on board the *Merlin* improperly omitted under the circumstances of the case to hail the *Earl Spencer*, or to show a light, or to take any proper measures in due time to warn those on board the *Earl Spencer* of the proximity and position of the *Merlin*, although from the relative position of the two ships the regulation lights of the *Merlin* were not visible to those on board the *Earl Spencer*.
6. Those on board the *Merlin* neglected to observe and comply with the provisions of Articles 19 and 20 of the Regulations for Preventing Collisions at Sea.
7. The said collision was occasioned or contributed to by some or one of the acts or defaults set forth in the 5th and 6th Articles of this answer, or otherwise by the negligence of those on board the *Merlin*.
8. The said collision was not occasioned by any negligence of those on board the *Earl Spencer*, but was, so far as they were concerned, an inevitable accident.

The pleadings were thereupon concluded.

Feb. 11.—The cause came on for hearing before the Judge, assisted by Trinity Masters. The facts of the case were not in dispute. The plaintiffs called only one witness, the master of the *Merlin*, who stated that the *Merlin* was beating into Holyhead harbour for refuge, as it was blowing a gale of wind, and the weather was dark and rainy. He was at the helm, and the rest of the crew were engaged in hoisting the foresail. As he was coming in he made out the hulls of two vessels at the distance of about a cable's length and a half off; They had their riding lights up. No one on board the *Merlin* sighted the *Earl Spencer* till she was about a cable's length off astern of them, and then the master of the *Merlin* saw the *Earl Spencer's* three lights, and made out that vessel coming up right astern of them, and the *Earl Spencer* was

[ADM.]

THE EARL SPENCER.

[ADM.]

loudly hailed, but came on and struck the *Merlin* on the stern a little on the port side. The *Merlin* was heading S.E. by S., and the *Earl Spencer*, S. $\frac{1}{2}$ E. In cross-examination the master of the *Merlin* admitted that he could have seen the lights of the *Earl Spencer* three or four miles off if he had looked for them, and that if he had seen them sooner he should have shown the *Earl Spencer* a light over the stern of the *Merlin*; that it was his practice to show a light over his vessel's stern on such occasions; and that the *Earl Spencer* was coming up in such a direction that those on board of her could not see the *Merlin's* regulation lights.

The defendants' witnesses stated that the *Earl Spencer* was going into Holyhead harbour at a speed of eleven knots, and that such a speed is necessary to keep enough steerage way on to enable the steamer to get into the place where she lands her passengers and cargo. If she slackened speed she would be thrown off her course by the tide and wind. The night was so dark, that although a good look out (the first mate and three men) was kept on the fore-castle the *Merlin* was not sighted until within a cable's length. The *Merlin* was in the usual track of steamers going into the harbour, and had no lights visible, but the master of the *Earl Spencer* thought she was a vessel at anchor, it being a common thing for small vessels to lie at anchor without lights inside the breakwater. As there were other vessels at anchor to starboard of the *Merlin*, the master of the *Earl Spencer* starboarded his helm to go outside of her, but immediately afterwards discovered she was under weigh, and stopped and reversed his engines, but was unable to avoid the collision.

The court called upon (on the question of speed)

Butt, Q.C. and *James P. Ainsworth* for the defendants.—The speed of the *Earl Spencer* was justifiable. If such speed was necessary to reach her discharging berth, she cannot be held wrong in keeping up that speed even when entering harbour. Having only just entered the harbour, it would not have been safe to slacken speed. There is no rule or regulation requiring a vessel to go at less than full speed except in foggy weather, and whether a steam ship be entering harbour or in the open sea, she is equally entitled to keep up her speed if she can see nothing in her way. Even if she had slackened speed on entering the harbour, she could not have avoided the collision; she made out the *Merlin* too late to be able to avoid that vessel even if she had been going at half speed.

When the night is so dark that the look out on board a steamship cannot make out a vessel ahead till within the length of a cable or two, and until it is too late to avoid a collision, it is the duty of those on board the vessel ahead, if she is in such a position that her regulation lights are not visible to the overtaking vessel, to exhibit a light to that vessel or to give her some signal by which she may recognise that she is likely to run into risk of collision. The master of the *Merlin* should have shown a light or signal over the stern of the *Merlin* in time to have enabled the *Earl Spencer* to keep out of the way of the *Merlin*. This duty on the part of the leading vessel arises under the general maritime law enforced by Article 20 of the regulations for preventing collisions, which says "Nothing in these rules shall exonerate any ship, or the owner, or master, or crew thereof, from the

consequences of any neglect to carry lights or signals, or of any neglect to keep a proper look-out or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case." Under the general maritime law before the passing of these regulations, although there was no rule requiring fixed lights to be carried, there was an obligation upon every vessel at night to show a light to another vessel approaching from any direction if the vessels were navigating in frequented waters; and consequently a vessel would be bound to show a light over her stern to another approaching. The regulations only provide for certain fixed lights to be carried from sunrise to sunset (Arts. 3 & 5), which are visible only from ahead and not from astern. Art. 20 expressly reserves the obligation to carry such lights or signals, in addition to those fixed lights, as may be required by the ordinary practice of seamen, and that the exhibition of a light or signal over the stern of the *Merlin* would have been an ordinary seamanlike precaution is admitted by the master of the *Merlin*. The regulations leave untouched the obligation of the maritime law as to showing lights or signals in the directions in which the fixed lights are not visible. Such occasional lights or signals should be ready for occasional exhibition whenever there appears to be danger of collision. [Sir R. PHILLIMORE.—I shall ask the Elder Brethren whether in this case it would have been in accordance with the ordinary practice of seamen to have exhibited a light.] The practice of seamen is no doubt a question for the Elder Brethren but the obligation under the maritime law, is a question for the court. In *The Chanonry* (1 Asp. Mar. Law Cas. 569; 28 L. T. Rep. N.S. 284), this court intimated that under special circumstances the exhibition of a light astern to an overtaking vessel would be obligatory, and in this case there were clearly special circumstances; because the *Merlin* was beating into a harbour into which these steamers went regularly and was in the usual track of these steamers. She was an obstruction to the fairway, and as such was bound to give notice of her position; failure to give such notice disentitles her from recovering in this action, as tant for that failure no collision could have occurred.

Milward, Q.C. and *Clarkson*, for the plaintiffs.—*The Chanonry* (*ubi sup.*) is in our favor, because it was there decided that the leading vessel was under no obligation to show lights, although she was navigating one of the passages of the Bristol Channel, and a strong opinion was expressed that such unusual lights would be misleading. The regulations clearly contemplated the case of overtaking ships. They specially provide for the arc of the horizon over which the lights are to be seen, and that the side lights shall not be seen abait the beam, and this provision indicates that vessels are not to show lights astern. Moreover, article 2 of the regulations provides that "the lights mentioned in the following articles, numbered 3, 4, 5, 6, 7, 8, and 9, and no others, shall be carried in all weathers from sunset to sunrise," and it will be noticed that in those articles no mention is made of showing a light astern, and that article 20 is not included among the articles named therein. [Sir R. PHILLIMORE.—But articles 3 and 5 which govern this ship apply to the permanent carrying of lights according to Mr. Butt's contention.] The only provision in the rules for the occasional exhibitio

ADM.]

Ex parte LAMSTON; Re LINDSAY.

[CHAN.]

of lights relates to the case of small vessels (articles 6 and 9), and this only in case it is impossible to fix the lights; when the lights can be fixed no others should be exhibited. What light or signal is a vessel to show to one overtaking her? In *The C. S. Butler* (L. Rep. 4 Adm. & Ecc. 238; 31 L. T. Rep. N. S. 549; 2 Asp. Mar. Law Cas. 405), a steamer was held to blame for damaging a dumb barge navigating the Thames at night, and it was held that there was no obligation on the barge to show a light, because the rules provided no special light for a dumb barge. If we are bound to show a white light, how is it to be distinguished from an anchor light. We submit that the Legislature expressly omitted any mention of lights astern in order to prevent confusion. The only question is whether the steamer was prudently navigated.

Butt, Q.C., in reply.—Both in *The Chanoury* (*ubi sup.*), and *The C. S. Butler* (*ubi sup.*), the lights were such that vessels could be seen without lights at a considerable distance, whereas here they were only visible when close to. The exhibition of a light under such circumstances was a matter of ordinary precaution.

Sir R. PHILLIMORE.—The court entertains no doubt whatever with respect to a portion of this case, namely, that the steamer is to blame for the very reprehensible speed at which, in the circumstances of this case, she thought proper to enter Holyhead Harbour. But on the other point the court will take a little time to consider, and will deliver a reasoned judgment.

Cur. adv. vult.

Feb. 18.—Sir R. PHILLIMORE.—The question reserved in this case is whether the *Mertin* be not to blame as well as the *Earl Spencer*—already pronounced to be to blame—because she, the *Mertin*, did not exhibit a light over her stern. I must consider this question with reference to the particular case and the general law.

First, as to the particular case. The Elder Brethren were careful to draw my attention to the fact that the crew of this little schooner were only four in number. That the master was engaged in steering and the three others in making sail, and in their opinion there was not time or opportunity to have exhibited a light over the stern. In this opinion I agree, but I am afraid I must consider, secondly, what the general law is.

That law is to be found now exclusively in the Regulations for preventing Collisions at Sea. The regulations carefully prescribe the occasions upon which lights are to be carried, and the character and position of those lights.

It is not denied that no express provision is to be found for the exhibition of a light to an overtaking vessel. The second article of the regulations rules that lights mentioned in certain following articles, and no others, shall be carried in all weathers, from sunset to sunrise; and it is clear that the case of an overtaking vessel was in the contemplation of the framers of the regulations, for Article 17 says, "Every vessel overtaking any other vessel shall keep out of the way of the said last-mentioned vessel;" and if it be ever the duty of the vessel overtaken to exhibit a stern light here was surely the place where it would have been mentioned.

It is no secret that great nautical authorities are divided in their opinion on the subject of the advantage or disadvantage of exhibiting a stern light. It may be proper that a regulation

to the effect should be made. I do not offer an opinion upon the point.

The regulations, having an international character, would of course require great consideration, caution, and communication with other states who are parties to the existing regulations, but until a new regulation be made it seems to me that to require a vessel about to be overtaken to exhibit a stern light would lead to confusion and danger. The necessity for exhibiting such a light would vary with the circumstances of each case; at least, I presume it would not be contended that the overtaking vessel would always be entitled to expect the exhibition of a light from the vessel ahead. The consequence would probably be that uncertainty would be introduced to the general matter of lights, and certainly in this respect has been the great object of the regulations.

I am of opinion that the exhibition of a stern light is not obligatory on the vessel ahead. This opinion must be taken as corrective of any dicta uttered by me in the case of *The Chanoury* (*ubi sup.*).

I pronounce the *Earl Spencer* alone to blame.

Solicitors for the plaintiff, Ingleton, Ince, and Greening.

Solicitor for the defendants, R. F. Roberts.

COURT OF APPEAL IN CHANCERY.

Reported by E. STEWART ROSS and H. PRAT, Esqrs.,
Barristers-at-Law.

April 22 and 29, 1875.

(Before the LORDS JUSTICES.)

Ex parte LAMSTON; Re LINDSAY.

Bill of exchange—Doctrine of Ex parte Waring—Ship-building contract—Bills drawn against work done—Vendor's lien for unpaid purchase-money—Double insolvency—Rights of bill holders.

*A. contracted to build an iron steamship for B. for 7800*l.* The money was to be paid by instalments at specified periods, as the building of the ship progressed, partly in cash and partly in bills, and from the time of paying the first instalment the ship was to be the property of B., to the extent of his payments, subject to A.'s lien for any unpaid instalments. B. gave his acceptances from time to time to the amount of 2700*l.* to A., who discounted them with his bankers in the ordinary course.*

Before the ship was completed, A. and B. both became insolvent, and the bills were consequently dishonoured at maturity. B.'s creditors resolved to accept a composition, and their resolution was duly registered. B. subsequently abandoned the contract, and the trustee under A.'s bankruptcy finished the ship. The bankers, the holders of the bills, which were expressed to be drawn "for value received in iron screw steamer now building," claimed to stand in B.'s place, and to be entitled to a lien upon the ship for the money they had advanced on the bills:

Held (affirming the decision of the Chief Judge in Bankruptcy), that the doctrine of Ex parte Waring (19 Ves. 345) did not apply, and that the bill holders were not entitled to the lien claimed by them.

Thus was an appeal from a decision of the Chief Judge in Bankruptcy, reversing a decision of the

[CHAN.]

Ex parte LAMHTON; Re LINDSAY.

[CHAN.]

judge of the County Court of Newcastle-upon-Tyne.

Edward Lindsay, the bankrupt, was an iron shipbuilder at St. Lawrence, near Newcastle-upon-Tyne. On the 20th Oct. 1873, he entered into a contract with Messrs. Marshall, Osborne, and Co., engineers and boiler builders, at South Shields, to build them an iron screw steamer, the material clauses of which were the following:—

The facts were as follows:—

That if at any time the said Edward Lindsay shall neglect or make default in any of the conditions of this contract, or in the event of the death, bankruptcy, or insolvency of the said Edward Lindsay, or if not completed by the time specified, it shall be lawful then and therefor for Marshall, Osborne, and Co. to cause any person or persons, nominated for that purpose by them, to enter upon and take possession of the vessel, and of all materials, matters or things prepared or provided, or in the course of preparation for the vessel, and to cause the vessel to be completed by any person whom Marshall, Osborne, and Co. may see fit to employ in such completion, and at such place or places as Marshall, Osborne, and Co. shall choose to take the vessel to for that purpose; or in like manner to contract with some such person or persons for the completion of the work agreed to be done by the said Edward Lindsay, and to employ such materials of and belonging to the said Edward Lindsay as shall then be upon his premises, and which shall be considered fit and applicable for the purpose. And it shall be lawful for the said Marshall, Osborne, and Co. to pay to such person or persons such sum or sums as they shall think fit or agree upon in that behalf, and to deduct such sum or sums of money as they may so pay from and out of the payments agreed by them to be paid to the said Edward Lindsay.

That the said vessel, and the materials prepared and provided, or in course of preparation, shall, from the time of giving or paying the first instalment by the said Marshall, Osborne, and Co. to the said Edward Lindsay, belong and be deemed in every respect, for every and all purposes, to be the property of the said Marshall, Osborne and Co. to the extent of their advances (whether in the builder's yard, or in the river, or in the graving dock after launching), and that for the better identification of the vessel, and for the protection of the said Marshall, Osborne, and Co., the said Edward Lindsay shall, immediately the keel of the vessel is laid, mark thereon the initials of the said Marshall, Osborne, and Co., as owners, and the name of the said vessel, and as soon as practicable mark the name of the said vessel, and the initials of the said Marshall, Osborne, and Co. as owners thereof, in legible characters, subject, nevertheless, to the builder's lien for any unpaid instalments.

That the price of the said vessel shall be £700*l.* sterling.

That the said vessel shall be launched on or before the 1st Aug. 1874, and delivered to the purchasers complete in hull, with everything named in the specification, by the 1st Sept. 1874.

That the said Edward Lindsay shall be paid for the said vessel as follows:—

When keel is laid 100*l.* cash, and 500*l.* by 6 months' bill.

When framed, 1000*l.* by 6 months' bill.

When plated, 200*l.* cash, and 2000*l.* by 4 months' bill.

When launched, 200*l.* cash, and 2000*l.* by 4 months' bill.

When finished, the balance by 6 months' bill.

All bills given during construction to be retired by Marshall, Osborne, and Co., at completion and transfer.

Edward Lindsay immediately proceeded to build the ship. The mode of payment stipulated for by the contract was not strictly adhered to, but prior to the 9th July 1874, Marshall, Osborne, and Co. had paid to Lindsay about 100*l.* in cash, and had accepted to his drafts five bills of exchange to the aggregate amount of 2700*l.* The first bill was stated to be given "for value received at keel being laid for steamer," and the remainder purported to be "for value received in iron screw

steamer now building." Edward Lindsay discounted all these bills with his bankers, Messrs. Lamhton and Co., of Newcastle-upon-Tyne, without any suspicion on their part that the bills would not be met at maturity, or that either Lindsay, or Marshall, Osborne, and Co. were in difficulties.

On the 28th July 1874, Daniel Thomas Osborne died before any of the acceptances given by his firm had become payable, and on the 31st, the surviving partner, Robert John Osborne, finding the affairs of the firm greatly involved, filed his petition for liquidation, and at the first meeting the creditors passed resolutions accepting a composition of five shillings in the pound. These resolutions were subsequently confirmed, and registered on the 18th Sept.

On the 10th Oct., Robert John Marshall gave notice in writing of his intention to abandon the contract with Lindsay for the building of the steamer.

On the 18th Aug. 1874, E. Lindsay filed a petition for liquidation, but the proceedings fell through.

On the 7th Sept. E. Lindsay was adjudicated bankrupt, upon the petition of R. S. Proctor, a creditor for 500*l.*, filed on the 20th Aug., and Joseph Greener was appointed receiver and manager of his estate. This adjudication was annulled on appeal, and the matter remitted to the County Court to inquire into the alleged act of bankruptcy: (see *Ex parte Lindsay*, 31 L. T. Rep. N. S. 415; L. Rep. 19 Eq. 62.) The petition for adjudication was subsequently dismissed by consent.

On the 11th Dec. E. Lindsay was again adjudicated bankrupt, and Mr. Greener was appointed the trustee thereunder. At this time the ship was still in the building yard of E. Lindsay, in an unfinished state, and the trustee proceeded to complete it, and advanced the necessary funds for that purpose.

All the bills were dishonoured at maturity, and Messrs. Lamhton and Co. claimed, under the bankruptcy of Lindsay, to stand in the place of Marshall, Osborne, and Co., and to have a lien upon the ship for the amount which they had advanced to Lindsay upon the acceptances in their hands.

On the 23rd Jan. 1875, the County Court Judge, upon the application of Messrs. Lamhton and Co., made an order, declaring that the steamer was, at the date of the bankruptcy of Edward Lindsay, a security to the firm of Marshall, Osborne and Co., for indemnifying them against the payment of the bills of exchange given by them to E. Lindsay, and then in the possession of Messrs. Lamhton and Co., as the holders thereof for value, and that Messrs. Lamhton and Co. were entitled to the benefit of such security in respect of the said bills.

Against this order Joseph Green appealed. *Little, Q.C., Winslow, Q.C., and F. H. Colt*, appeared for the appellant.—The question was, whether the rule in *Ex parte Waring* (19 Ves. 345) applied to the present case. They submitted that it did not, because in the present case there never were two insolventcies existing at one and the same time. Under the contract the ship could not be a security to anyone who was not willing to pay the 7000*l.*, the amount of the purchase money, and thus gain possession of the ship. Possession

[CHAN.]

Ex parte LAMITON; Re LINDSAY.

[CHAN.]

was to be given, but only concurrently with the obligation to retire the outstanding bills of exchange. Everything was conditional upon the payment and retiring of the bills at maturity. They cited

Barrow v. Cotes, 3 Camp. 92;

Bishop v. Shillito, cited in *Hornblower v. Froud*, 2 B. & Ald. 329;

Ex parte Birmingham Gas Light and Coke Company, re Adams, 24 L. T. Rep. N. S. 43; L. Rep. 11 Eq. 204.

De Gee, Q.C. and *Doria*, appeared for the bank, who claimed to be entitled to whatever lien E. Lindsay possessed. He had a right to retain the ship until all the bills were paid, and the bank was also entitled to have the ship as security for the outstanding bills in their hands, without being compelled to complete the purchase. That was the common case of *Ex parte Waring*, and there was no necessity that there should be a double insolvency. The bank was entitled to the equities both of E. Lindsay and Marshall, Osborne, and Co., and to prove against both estates, and to take the composition under the one and the instalments under the other. They cited

Forbes v. Hargreaves, 22 L. T. Rep. 137; 3 De G. M. & G. 430;

Ex parte Parr, Buck. 191;

Ex parte Perfect, 1 Mont. 25;

Ex parte Prescott, 1 M. & A. 316;

Bank of Ireland v. Perry, 25 L. T. Rep. N. S. 843; L. Rep. 7 Ex 14;

Ex parte Smart, 28 L. T. Rep. N. S. 146; L. Rep. 8 Ch. App. 220;

Re Barrow's Banking Company, 31 L. T. Rep. N. S. 865; L. Rep. 19 Eq. 1.

The Chief Judge.—After the very long argument that I have heard, it is satisfactory that one can bring the case back to a very simple shape. It appears that Lindsay agreed to build a ship for Messrs. Marshall, Osborne, and Co., for 7600*l.* If he held the ship they are to pay him 7600*l.*, and if they do not pay him 7600*l.* the ship must remain his. That 7600*l.* has not been paid. Then, upon what ground could anyone claim to have any interest in the ship? It is one entire contract, and the substance of it is that which I have stated. The ship is, of course, proceeded with progressively; there is a stipulation for payment by way of advances as the ship proceeds. There is a stipulation that, to the extent of these advances, the purchasers shall have a lien on the ship. But all that is overridden by the general universal stipulation that, until you pay Lindsay 7600*l.*, that ship is not Messrs. Marshall, Osborne, and Co.'s, nor any interest in the ship. They can claim nothing. Now, it seems to me that that disposes of the question altogether, because, unless that state of facts can be shaken, the case of *Ex parte Waring* cannot be resorted to, and no other principle of law need be resorted to. Lindsay is to build the ship, and, as in the course of building, expenses are incurred from day to day, as the ship proceeds advances are to be made. The agreement is so plain and so clear that it is impossible to have any doubt whatever on the subject. The 4th clause, namely, that upon which the learned judge of the court below relies most, is that which has furnished, to a great degree, the arguments I have listened to on the part of the respondent. It is this, that the vessel shall, from the time of giving or paying the first instalment by Messrs. Marshall, Osborne, and Co. to Lindsay, belong and be deemed in every respect, and for

every and all purposes, to be the property of the said Messrs. Marshall, Osborne, and Co., to the extent of their advances. The meaning of that one knows well enough is to prevent any outside claim from being made upon the ship. Then, for the better identification of the said vessel, it is agreed that certain marks shall be put upon this vessel as soon as the keel is laid; but all this shall be subject, nevertheless, to the builder's lien for any unpaid instalment. There is a stipulation for the period within which the ship shall be completed, and there is expressed in the agreement the periods at which bills are to be given as the ship proceeds; and there is, moreover, this express agreement, that all the bills given during the construction of the vessel are to be returned by Messrs. Marshall, Osborne, and Co. at the completion of the transfer, so that, although bills for 6000*l.*, or any other sums, were to be given before the completion, yet when the vessel was completed, and when its delivery was asked for by the purchasers, the whole sum must have been paid to Lindsay. That is the very essence of the contract. And then what takes place is this: 100*l.* are paid, and at certain periods bills of exchange are given for other sums. These bills of exchange are discounted by the bankers in the most ordinary course of trade; there was no suggestion, no stipulation that these bills were given on the security of the ship, although the bills do, on the face of them, mention the ship then building, but without the remotest intention on the part of anybody, discounter, drawer, acceptor, or anybody, that there should be any connection between the moneys advanced on the security of the bills and the ship in course of building. It has been suggested, on the authority of *Ex parte Waring*, that the holders of these bills were entitled to a lien on the ship. What part of the ship, I ask? Because it goes only to the extent of the advances. That is clear in the stipulation. What part of the ship, then, are they entitled to? The ship is to be one entire substantive thing, and to be the builder's, notwithstanding what I have read that it should belong to the purchaser to the extent of the advances. It is the property of the builder until he is paid. The bankers say, that inasmuch as there has been a double insolvency and a double right of proof, they are entitled to apply the principle of *Ex parte Waring* to this case. In my opinion nothing can be more foreign to the principle of *Ex parte Waring* than the case now before me. The case of *Ex parte Waring* proceeds, not upon any favour to the bill-holders, but upon the equitable rights subsisting between the parties to the bills. The holders are disregarded for all purposes of legal claims, but in order, as Lord Eldon said—and that is the very marrow and point of his decision—to work out the equity between the persons liable in a matter in which they are both interested, but in which neither of them can claim the property, it must be realised for the benefit of the holders, to whom both are under an obligation to pay a share. There the equity is clear, and if there be any balance it is to be proved for in the ordinary way by the bill-holders. What has that to do with this case? What equity subsists here? There are no equities, no legal rights that the purchaser of the ship can claim until he has paid 7600*l.* What can be do, although there is this stipulation in the 4th clause of the agreement? Can he sell any part of

[CHAN.]

Ex parte LAMBTON; Re LINDSAY.

[CHAN.]

the ship thus said to belong to him? Could he interfere with what any assignee or contractor might do for the completion of the ship? The object and intention of that clause is perfectly obvious. Everybody knows it is to prevent the operation of the order and disposition clause, and consequently it is not infrequent that such a stipulation is made. It can, however, have no force with respect to the completion of the ship. With respect to the double insolvency, I quite agree that it is possible, as has been suggested to me, that assignees or other persons might lay their heads together and practise a fraud on persons holding bills. I have not the least reason to say that any such thing has been done here, and I find nothing whatever resembling it. What is the state of circumstances? Mr. Marshall became insolvent. He is unable to pay his debts, and summons his creditors together, and they agree to take 5s. in the pound; the billholders are bound by that agreement to the extent of Marshall's debts and his liability upon the bills. What is Mr. Marshall's position? Here is a ship in course of building, of which a small part, less than one half of the agreement price, has been paid off, and the bills which had been given have been discounted. All that he could by any possibility do was to pay the difference and insist upon the ship being completed for him. Marshall had not the means of completing the ship by paying the difference between the sums advanced by him, which certain right belonged to him, and the value of the ship. To relieve himself of the burden of this contract, he gives notice to the builders that he abandons the contract. He was free by means of the composition resolution, and he declines to have any responsibility whatever. Suppose it had been otherwise, and that his right and his interest in the contract, which vested in him by the composition, had been sold in any way, and he had bargained with anybody to sell his interest, would anybody say that the bankers, who had stipulated for nothing, and who knew of nothing, for so I must take it, had a lien? Marshall might have entered into such a contract. Nobody can dispute that he did enter into an arrangement or engagement, whatever it might be called. That is perfectly clear on the facts. In my opinion, the case of *Ex parte Waring* contains law which has been very often misunderstood, but the principle of which has never been questioned. It has no sort of application to this case. If it had it would be directly in favour of the respondent, because the equitable and legal right arising out of the contract could not be arranged upon any other terms than the parties resolve. I decline to bind myself by any opinion now as to what device may be resorted to and with what success on the subject of *Ex parte Waring*; but in this case I find it clear and distinct that after Marshall's insolvency, and when he abandons the contract, the trustee of the bankruptcy of Lindsay, acting in discharge of the simple duty which was incumbent upon him, and, perhaps, more than his duty, has furnished money to complete the ship, and the ship being completed, it is a part of Lindsay's estate not to be affected by any transaction arising out of the bills, and not to be affected by the principle of *Ex parte Waring* in the slightest degree; but that by reason of the original contract, if it had stood alone, and by reason farther of the conduct of Marshall, who was able to deal with and dispose of

his own property, and in that view of the bankrupt's estate and that alone, the trustee is entitled to the proceeds of this ship, and that there is no ground whatever for the claim, which the banker's make, because they are the holders of the bills. The order of the court below must be discharged.

Lambton and Co., the bill holders, now appealed from this decision.

De Gex, Q.C. and Davis, for the appellants.—The Chief Judge's decision proceeded upon the ground that Marshall, Osborne and Co. had no property in the ship till they paid the whole of the purchase money. But the contract expressly provides that "the said vessel, &c., shall from the time of giving or paying the first instalment by the said Marshall, Osborne, and Co. to the said Edward Lindsay, belong and be deemed in every respect, for every and all purposes, to be the property of the said Marshall, Osborne, and Co., to the extent of their advance." Therefore it is impossible to say that the property in the ship did not pass. In the old case of *Wood v. Russell* (5 B. & Ald. 942-6), where there was a very similar shipbuilding contract to that in the present case, Abbott, C.J. (Lord Tenterden) said: "This ship is built upon a special contract, and it is part of the terms of the contract that given portions of the price shall be paid according to the progress of the work; part when the keel is laid, part when they are at the light plank. The payment of these instalments appears to us to appropriate specifically to the defendant the very ship so in progress, and to vest in the defendant a property in that ship." But the present case is stronger than that by reason of the express provision contained in the contract that from the time of paying the first instalment the ship shall be the property of Marshall, Osborne, and Co. In *Wood v. Bell* (5 E. & B. 772), it was held that a provision in a ship-building contract making the payment of the instalments partially dependent upon the progress of the ship, was an indication of intention to vest the property as it was building. The bills which we hold having been expressly given "for value received in iron screw steamer now building," we are entitled to whatever lien Lindsay possessed. He had a right to retain the ship until all the bills were paid, and we are also entitled to have the ship as security for the outstanding bills in our hands, without being compelled to complete the purchase. As we are entitled to the equities of both Lindsay and Marshall, Osborne, and Co., and to prove against both estates, the doctrine of *Ex parte Waring* (19 Ves. 345) applies to this case, and gives us a right to a lien on the ship. They cited—

Pooley v. Hargreaves, 22 L. T. Rep. 137; 3 De G. M. & G. 430;

Bank of Ireland v. Perry, 25 L. T. Rep. N. S. 845; L. Rep. 7 Ex. 14;

Bishop v. Shillito, 2 B. & Ald. 329 n;

Barrow v. Coles, 3 Camp. 92.

Little, Q.C., Winslow, Q.C. and F. H. Colt, for the respondent, the trustee in the bankruptcy of Lindsay.—Marshall, Osborne, and Co. acquired no property in the ship. In *Mucklow v. Mangles* (1 Taunt. 318) it was held that if a person contracts with another for a chattel which is not in existence at the time of the contract, though he pays him the whole value in advance, and the other proceeds to execute the order, the buyer

[CHAN.]

Ex parte LANBTON; Re LINDSAY.

[CHAN.]

acquires no property in the chattel till it is finished and delivered to him. [*De Ges*, Q.C.—That case is distinguishable from the present, on the grounds stated by Lord Tenterden in *Woods v. Russell* (5 B. & Ald. 947), "because the bargain there for building the barge does not appear to have stipulated for the advances which were made and those advances do not appear to have been regulated by the progress of the work."] Even if any property passed in the ship, it was subject to the vendor's lien, and no one can claim a ship under the purchasers' till the whole of the purchase money has been paid. Possession of the ship was to be given to the purchasers, but only concurrently with the obligation to retire the outstanding bills. Everything was conditional upon the payment and retiring of the bills at maturity. The doctrine of *Ex parte Waring* has no application to this case, and the appellants have no lien upon this ship. They cited

Ex parte Chalmers, re Edwards, 28 L. T. Rep. N. S. 325; L. Rep. 8 Ch. 269;

Faulkner v. Halliday, 30 L. T. Rep. N. S. 741; L. Rep. 9 Ch. 361.

De Ges Q.C., in reply, cited

Clarke v. Spence, 4 Ad. & Ell. 448;

City Bank v. Luckie, 23 L. T. Rep. N. S. 376; L. Rep. 5 Ch. 773.

Lord Justice JAMES said.—I am of opinion that this case is really a *reductio ad absurdum* of the case of *Ex parte Waring*.

The bill holders in this case never, either by contract or by the conduct of anybody, acquired or had any charge whatever, direct or indirect, upon this thing, which was to have been a ship, and which has now become a ship. They were bill holders, having a right against the acceptor, and having a right against the drawer. Those bills came into existence, no doubt, with a contract for building the ship, and in a certain state of circumstances, if there had been two insolvent estates under the administration of the Court of Chancery, or the Court of Bankruptcy, or one estate being administered under the Court of Bankruptcy and one estate under the Court of Chancery, under some circumstances like those it might have been the duty of the trustees of the one estate as against the trustees of the other estate, or it might have been the duty of both sets of trustees to have insisted upon the ship being sold, or that which was to be a ship being sold for the purpose of taking up the bills. I say there might have been circumstances which one might well conceive in which such a right would have been acquired, but I cannot conceive that, in such a state of circumstances as that, merely in order to get rid of what is said to be a dead lock, accidentally and casually a benefit should arise collaterally to the persons who were holding the bills because some one had a right to take them, and that because of that the bill holders, who never had a right by contract or otherwise with regard to the ship, could interfere with the right of the two parties, the vendor and the purchaser, or the assignees of the vendor or the assignees of the purchaser, to make such arrangements as they otherwise could not honestly and properly make with regard to that thing which is the subject of an executory contract. I cannot conceive that the holders of the bills would have a right to interfere in such a case as that.

Mr. Marshall had a full right, if he thought that that was for the benefit of himself or his

creditors, to rescind or abandon the contract, and to say I cannot complete, and the other party had a right to say, "That being the state of things, we will accept your abandonment of the contract, and we will complete it for ourselves and take whatever remedies we may have." It seems to be an absolute right on the part of Messrs. Marshall, Osborne and Co., as well as upon the part of the other side, which they might have exercised at that time, on the one side to make the abandonment, and on the other to accept it. I say there never was a moment of time at which Messrs. Marshall, Osborne and Co., or their assignees, had a right to say, "Sell that unfinished chattel and apply the proceeds to the payment of the bills, because they happen to be in your hands, or in the hands of bankers to whom both you and myself are liable. You and I are liable to the same bankers, and therefore sell that ship." There was no such right, and therefore Messrs. Marshall, Osborne, and Co., by becoming insolvent, would not alter the rights of the other parties. The right of the other parties was to say: We will keep that ship until you have paid the purchase money, and the bankers had no right to interfere with the contract which existed between Messrs. Marshall, Osborne, and Co., and the vendor, or to enlarge the rights of Messrs. Marshall, Osborne, and Co., and to diminish the rights of the vendor.

The Chief Judge was of opinion that the right was to have the ship upon payment. It appears to me that it is altogether unnecessary to decide any point as to the exact nature of the property which was transferred from time to time, or the exact nature of the charge or lien which from that time existed with regard to it. The substance of it was that the makers or the builders of the ship were not to part with their whole interest, legal and equitable, except in exchange for full payment of the purchase money, less the last instalment, and therefore everyone had a right to say: "You shall not take that ship unless you pay the full purchase money."

I am of opinion, therefore, that the Chief Judge was perfectly right in the opinion at which he arrived.

Lord Justice MELLISH.—I am of the same opinion.

I confess that when this appeal was first opened I was a little alarmed at what appeared to be an expression of opinion on the part of the Chief Judge in Bankruptcy that no property had passed in this ship, because for years, since what was said by Lord Tenterden, in the case of *Woods v. Russell* (5 B. & Ald. 942), I have always understood the law to be that where a contract is made for the building of a ship, and the price is to be paid by instalments in proportion to the amount of work done upon the ship, that there is an inference that the property passes; because, if any doubt were thrown upon that rule, it would, in my opinion, very seriously affect the rights of purchasers of ships in the event of the insolvency of the vendor who orders ships to be built. But now that this case comes to be understood, it really seems to me that it signifies very little whether the property had actually passed or not.

It appears to me that it is perfectly plain, upon the construction of the contract, that either the property had passed to the purchaser subject to the vendor's lien for all the sums due and owing

[CHAN.]

Re ARTHUR AVERAGE ASSOCIATION; *Ex parte* CORT AND HAWKESLEY.

[ROLLS.]

except the last bill, or else the property remained in the vendor subject to a charge in favour of the purchaser for any sums that he might pay, and as an indemnity for him as against the acceptance of bills, although I rather think myself, having regard to the express mention of the vendor's lien in the contract, that the true construction of the contract is that the property passed subject to the vendor's lien, not only for the giving of the bills, but until the bills were paid.

I apprehend, however, that notwithstanding that the property may have passed, the purchaser of a ship is not entitled to the possession of the ship except upon his being willing to pay the full amount, and if the purchaser becomes insolvent during the time that the ship is building, his merely becoming insolvent will not of itself dissolve the contract. But in the case of a composition, which this is, where the property of the purchaser never becomes vested in any trustee, it is still for him to determine, or if he becomes a bankrupt, it is for his trustee to determine, whether it is for the benefit of his estate to have the contract completed, for it does not follow that because he is insolvent it may not possibly be for the benefit of the estate to complete the contract. The ship might be very nearly completed, ships might have risen in value, and a ship, for which the purchaser might have to pay £10,000, might be worth when completed £15,000. In that state of things, notwithstanding that the purchaser was insolvent he would have no difficulty in borrowing money upon the ship with which to pay the full price, and in that case I apprehend that the vendor would be obliged to complete the contract notwithstanding the insolvency of the purchaser. On the other hand, when the purchaser becomes insolvent, the contract might be a very onerous one, and if the building of the ship were to go on and it was to be completed, the costs to the estate would only be increased, and therefore it is that he may give notice at once if he pleases to the vendor that he abandons the contract, and in that case the vendor might take the property back to himself and prove for his damages.

The effect of giving notice is that it fixes the damages as those caused at the time when the notice is given.

It appears to me that it is unnecessary to determine whether a trustee might do that if the purchaser had become bankrupt. Here in point of fact, as to Messrs. Marshall, Osborne, and Co., there was a composition which left the property in the ship in them, and I do not understand what possible right the bill-holders had to say that Messrs. Marshall, Osborne, and Co. were not entitled to abandon their contract with the vendors if that was most beneficial to them.

Then it is said that if here they gave notice to abandon it there was a bankruptcy, and there is no evidence that Lindsay's trustees accepted it. I should think I may assume that a person would accept an offer which was for his benefit. There is, however, abundant evidence to my mind that these parties had accepted the offer after Lindsay's bankruptcy was annulled, for Lindsay went on completing the ship, and when he was made bankrupt upon a subsequent occasion, then his trustee went on and completed the ship. For what purpose did the trustee go

on and complete the ship? Was it for the benefit of Messrs. Marshall, Osborne, and Co., who had become insolvent, and who had given notice that they did not claim the ship, but had abandoned it? An unfinished ship is worth nothing, and it was necessary to complete it in order to get something for it. I cannot conceive what possible right the bill holders had to prevent their pursuing their contract for their benefit.

There are various ways in which it may be said that the case of *Ex parte* Waring cannot apply to this case. One conclusive reason is that at the time when this application was made, Messrs. Marshall, Osborne, and Co. had ceased to have any interest whatever in this ship, and the ship was exclusively the property of Lindsay's estate. *Ex parte* Waring could not apply because that case only applies either where the property of the acceptor has been pledged with the drawer or the property of the drawer has been pledged with the acceptor, or where the property is exclusively the property of one of the parties.

I think, therefore, that the decision of the Chief Judge was perfectly right, and that this appeal must be dismissed, and dismissed with costs.

Appeal accordingly dismissed with costs.

Solicitor for the appellant, G. B. Wheeler, agent for S. H. Sewell, Newcastle-upon-Tyne.

Solicitor for the respondent, S. W. Hoyle, agent for Hoyle, Shipley, and Hoyle, Newcastle-upon-Tyne.

ROLLS COURT.

Reported by G. WELBY KINGS and S. H. S. LOFTHOUS, Esqrs., Barristers-at-Law.

April 22, 23, and 29, 1875.

Re ARTHUR AVERAGE ASSOCIATION; *Ex parte* CORT AND HAWKESLEY.

Mutual marine insurance association—Unincorporated and unregistered body—Winding-up—Association for acquisition of gain—Names of underwriters specified in policy—30 Vict. c. 23, s. 7—Companies Act 1862, ss. 4, 199.

By the rules of a mutual insurance association it was provided that the members should severally, and respectively, and not jointly or in partnership nor the one for the other, but each only in his own name, insure each other's ships for one year from noon of any day named as the commencement of risk, subject to the conditions endorsed on the form of policy and to the rules and regulations which should be binding on all the members of the association. The managers of the association were to be James Jackson and William Sheppard, and either of them might sign their firm name of Jackson and Sheppard to all policies of insurance in the name of the association as managers thereof, and the signature thus given by either of them should be binding and conclusive on all the members of the association, and should have on each and all of the members the same effect as if each and every member had personally signed such policy. The annual rates on the sums insured were payable in advance by quarterly proportions by members' acceptance of the managers' draft at three months' date; or if paid in cash discount of 5l. per cent. per annum was to be allowed, which was to be placed to the credit of each respective member; and if such amount exceeded the claims for losses or damage

[ROLLS.]

Re ARTHUR AVERAGE ASSOCIATION; Ex parte CORY AND HAWKESLEY.

[ROLLS.]

maintained by the members, such excess was to stand to the credit of each mutual member proportionately as he might have contributed, and if such contributions were not sufficient to meet the claims of members for loss or damage sustained within any respective year, then such credited amounts should be applied to meet such deficiency, and if there should still be a deficiency, such sum as might be required to meet the same should be drawn for on each respective member in such proportion as they bore to each other. The rules also provided that the managers should have authority to issue policies to members for periods less than a year or for special risks either in time or voyage policies, in consideration of special rates of premium, to which the reserve fund should in no way apply, and that the rules might be repealed, altered, or amended by a majority of the members at a general meeting.

Special rate policies were issued to non-members both before and after an invalid alteration of the rules, by which it was attempted to give the managers authority to issue special rate policies to non-members.

The policies issued by the association were signed "Jackson and Sheppard, joint managers per procuration of the several members of the Arthur Average Association for insuring each other's ships, every member bearing his equal proportion according to the sums mutually insured therein, excepting members paying special rates."

In Feb. 1870 the association was ordered to be wound-up, and on the 25th May 1871 Cory and Hawkesley were settled on the list of contributories. By the chief clerk's certificate, dated 20th Dec. 1873, certain sums were found to be due to holders of special policies who were non-members. On a call being made on Cory and Hawkesley, they took out summonses to have the debts admitted by the certificate of certain non-members expunged.

Held that the signatures to the policies was not a specification of the names of the insurers as required by the 7th section of 30 Vict. c. 23, and that the policies were therefore invalid.

Held also that the issuing of special rate policies to non-members was ultra vires, and that, notwithstanding the delay in applying to vary the chief clerk's certificate, the amounts found due to non-members must be expunged.

Seemingly, that an unincorporated and unregistered mutual insurance association, formed since the passing of the Companies Act 1862, being an association for the acquisition of gain, cannot be wound-up under the 199th section of the Companies Act 1862.

THE ARTHUR AVERAGE ASSOCIATION for British, Foreign, and Colonial built ships was a mutual shipping insurance association formed in 1867, and was not incorporated under any Act of Parliament, and was not registered under the Companies Act 1862.

The rules of the association, which were annexed to the policies issued by the association to members, were, so far as is material, as follows:

1. The members of this association severally and respectively, and not jointly nor in partnership, nor the one for the other, but each only in his own name, do hereby agree to insure each other's ships for one year from noon of any day named as the commencement of risk against all losses, perils, and damages described in the form of policy hereto annexed, and subject to the conditions endorsed on said form of policy, and to those rules and regulations which shall be binding and conclusive on all

the members of the association. The managers of this association shall be James Jackson and William Sheppard, and either of them may sign their firm name of Jackson and Sheppard to all policies of insurance in the name of this association as managers thereof, and the signatories thus given by either of the said managers shall be binding and conclusive on all the members of this association, and shall have on each and all of the said members the same legal effect as if each and every member had personally signed each policy. The said managers shall decide in what section any ship shall be included, the premium to be paid for the same, the allowance for laid-up premium, and the value of the ship shall be entered on the policy.

2. Ships classed in French Veritas, American Lloyd's, or any other authorised society's books for the classification of ships, may be admitted by computation according to corresponding class in British Lloyd's, and shall be divided into sections marked A, B, C, and so on successively, and paying different annual rates as agreed on at the time of entering the association or at the commencement of any subsequent year on the sum insured, to be payable in advance by quarterly proportions by members' acceptance of managers' draft at three months' date; if paid in cash, discount of five cent. per annum will be allowed, which shall be placed to the credit of each respective member, and should such amount exceed the amount of claims for losses or damages sustained by the members during each year respectively, such excess shall stand to the credit of each mutual member proportionately as he may have contributed, and should it be that such contributions are not sufficient to meet the claims of members for loss or damage sustained within any respective year, then such credited amounts shall be applied to meet such deficiency, and should there still be a deficiency such sum as may be required to meet the same shall be drawn for on each respective mutual member in such proportion as they bear to each other.

3. The said managers shall also have authority to issue policies to members, for periods less than a year, or for special risks either in time or voyage policies in consideration of special rates of premium, to be fixed by said managers as in last clause of the first rule, to which the reserve fund should, in no way apply, also to allow brokerage and discount to insurance brokers.

The rules further provided that the affairs of the association should be managed by a committee, which should have power of calling general and special general meetings of the members, which should have authority to make, repeal, alter, or amend the rules or regulations for the government of the association, and the decision of the majority of such meeting should be binding and conclusive on all the members.

Special rate policies were issued to non-members both before and after an alteration of the rules made on the 29th March 1869, by which it was attempted to authorise the managers to issue policies to non-members for special risks or on voyage policies; but such alteration was made without the sanction of the members at a general meeting as provided for by the rules.

The policies issued were signed "Jackson and Sheppard, joint managers per procuration of the several members of the Arthur Average Association for insuring each other's ships, every member bearing his equal proportion according to the sums mutually insured therein, excepting members paying special rates."

On the 12th Feb. 1870, an order was made for winding-up the association. Messrs. Cory and Hawkesley were settled on the list of contributories on the 25th May 1871. By the chief clerk's certificate, dated the 20th Dec. 1873, the sum of 17,532l. 11s. 8d. was found to be due to holders of special policies, many of whom were non-members. Amongst such non-members holding special policies were Messrs. Hargrave, Ferguson, and Jackson to whom policies had been issued both before and after the alteration of the rules.

[ROLLS.]

Re ARTHUR AVERAGE ASSOCIATION; *Ex parte* CORY AND HAWKESLEY.

[ROLLS.]

In June 1874 a summons was taken out by the official liquidator for a call upon Messrs. Cory and Hawkesley, and thereupon they took out a summons asking that, notwithstanding the time limited by General Order XXXV. B. 52, had expired, the certificate might be varied by expunging the debt of Messrs. Hargrave, Ferguson, and Jackson.

Fry, Q.C., North, and Hilbery, for the applicants.

—The association, not having been registered under the Companies Act 1862, was an illegal association, and could not authorise Messrs. Jackson and Sheppard to act on its behalf, nor ought it to have been wound-up under the 199th section of the Companies' Act 1862. The association had no power to issue policies to Messrs. Hargrave and Co., who were not members, and did not become so by having special rate policies granted to them. Again, this being a marine policy, the 7th section of 30 Vict. c. 23 requires that the names of the assurers should be specified in the policy. They referred to

Turnbull v. Woolfe, 9 Jar. N. S. 37;

Bromley v. Williams, 32 Beav. 177;

Watson v. Brown, 11 C. B., N. S. 750;

Re London Marine Insurance Association, L. Rep. 4

Ch. 611; 21 L. T. Rep. N. S. 97;

Re Mexican and South American Company, L. Rep. 2

Ch. 387; 16 L. T. Rep. N. S. 194.

Chitty, Q.C. and Robinson, for Messrs. Hargrave and Co., contended that the courts had always construed the Act of Parliament liberally in favour of insurers, and that Jackson and Sheppard signed for the members of the association as they were authorised to do by the rules. They referred to

Dovell v. Moss, 4 Camp. 180

Reid v. Allen, 4 Ex. Rep. 326.

Southgate, Q.C., Waller, Q.C., and E. C. Willis, for the official liquidator.

Sir GEORGE JESSEL.—The question which I have to decide is complicated with another: that is, whether this association, as it is called, should have been wound-up at all, or if wound-up at all, whether it should not have been wound-up in a different way. As I understand the decision in *Re London Marine Insurance Association* (which followed other cases), where the objection is simply to strike out a debt or to oppose a call order, what I may call a subsidiary application in the winding-up, it is not open to the applicant to say that the winding-up order ought not to have been made. Therefore, an objection which amounts to this, that there was no jurisdiction to make a winding-up order, or that the winding-up order ought not to have been made on any other ground, is not admissible.

Now the first objection which has been taken to the debt which has been proved (debte they are, but for this purpose we may treat one alone), which is a claim under a policy for insuring a ship entered into with the managers of the Arthur Average Association, the first objection was that the Arthur Average Association was an illegal body by reason of its not having been registered under the Companies Act of 1862, although formed after the passing of that Act, and it was said that, being an illegal body, it could not authorise an agent to contract on its behalf. In other words, an illegal body could not enter into a valid contract of agency, and any person dealing with the alleged agent, and having notice of the nature of the body, which of course all these applicants had, could not avail himself of such a contract of agency with the view of charging the alleged principals.

Now that involved another proposition, that this was an association coming within the 4th clause of the Companies Act 1862, and, although for a reason which I have already alluded to, and which I think applied to this case, I do not think I am absolutely compelled to decide this question, yet, it being a question of very considerable importance, on which I have heard a great deal of argument, and as to which I have formed an opinion, I think it right to express that opinion with a view, if this case goes further, to its being before the Court of Appeal, or if it does not go further, that it may be before other judges when similar questions come to be discussed.

The 4th section of the Act is this: "No company, association, or partnership consisting of more than ten persons shall be formed after the commencement of this Act for the purpose of carrying on the business of banking unless it is registered as a company under this Act, or is formed in pursuance of some other Act of Parliament or of Letters Patent; and no company, association, or partnership consisting of more than twenty persons shall be formed after the commencement of this Act for the purpose of carrying on any other business that has for its object the acquisition of gain by the company, association, or partnership, or by the individual members thereof, unless it is registered as a company under this Act." The only other section which I am aware of which throws any light on the meaning of that section is the 21st section, which is in these terms: "No company formed for the purpose of promoting art, science, religion, charity, or any other like object, and not involving the acquisition of gain by the company, or by the individual members thereof, shall, without the sanction of the Board of Trade, hold more than two acres of land; but the Board of Trade may by licence under the hand of one of their principal secretaries or assistant secretaries empower any such company to hold lands in such a quantity and subject to such conditions as they think fit."

It is to be observed that the objects there mentioned are all objects which, according to the definition which the Court of Chancery gives to the words 'charitable objects,' are charitable objects. They are all objects which, if described in a testator's will as the objects of bounty, could be well supported as a charity, and, therefore, "the like objects" are obviously objects of the same kind. It was quite right to put in the words "not involving the acquisition of gain by the company," because no doubt under the cloak of religion or charity you might establish a company which really had the private gain of the individuals in view; therefore, that restriction was very properly inserted. But the words, I think, throw some light upon what was meant by "gain;" all those words denote objects which *prima facie* would lead to expenditure as distinguished from profit. In other words, a company or an association formed for any of those objects would rather be a company or association formed to regulate the spending of the members' money than the acquisition of money by any of the members. The position of a company for giving away or spending, is distinguished from a company for getting or acquiring anything. Therefore, we see that the Legislature contemplated, as we all know that there are, both companies and associations formed for charitable objects or similar objects which include the spending or giving away

[ROLLS.]

Re ARTHUR AVERAGE ASSOCIATION; Ex parte CORY AND HAWKESLEY.

[ROLLS.]

money by the members of those companies or associations.

The words used are "acquisition of gain." If you inquire the meaning of the word "gain" it means acquisition; it has no other meaning that I am aware of—gain is something obtained or acquired. It is not limited to pecuniary gain, in fact, we should have to put the word "pecuniary" to show it, and in no sense, of the word that I know of does it mean commercial profits, except that of course in one sense commercial profits are gain. It is not "gains," but "gain" in the singular. Commercial profits no doubt if acquired are gain, but I cannot find any word limiting it simply to a commercial profit. I take the words as referring to a company which is formed to acquire something, or in which the individual members are to acquire something, as distinguished from a company formed for spending something and in which the individual members are simply to give something away, or to spend something, and not to gain anything.

If that then is the fair meaning of the word, what is the constitution of the association which I have to deal with? It is said that a contract for mutual indemnity is not within the meaning of that clause. What is meant by a contract for mutual indemnity? I can understand this (we can take it between two people as well as between two hundred)—A. and B. enter into a mutual contract that if either of them incurs a loss of a certain kind the other shall make it good. That is a contract, I suppose, of mutual indemnity; but these contracts are very different things—they are that which I have mentioned. This is simply an association of people, by the rules of which it is agreed that everybody who wants to insure a ship against loss shall pay a certain sum of money by way of premium, which sum of money is not equal. It depends on the nature of the ship insured; that is, on the nature of the loss to be guarded against. The sums of money are to go into a common fund, and the common fund so raised is to be applied in payment of the losses as far as it will go, and if deficient, the losses are to be made good by the members, not in proportion to the sums subscribed, as I understand it, but in proportion to the sums assured, which of course is a very different thing. The premiums vary in amount according to the nature of the risk, and are very different proportions. It is quite clear that, in addition to these policies, there may be policies for periods less than a year and policies for special risk, in respect of which, as I read the rules, the members are not liable to contribute anything beyond their premiums.

The result then is this: the association insures the ships with a view certainly of getting enough money in the shape of premiums, at least to pay the losses, to pay the expenses, and to have something over in the shape of a reserve fund. Why is not that an association formed for the purpose of profit, even using the word "profit" instead of "gain"? Between the association and its members it carries on business with a view of getting more than it will have to pay; it must acquire the difference; it contemplates the acquiring it. It is formed for the purpose of acquiring first of all the sums required for the expense of carrying it on, and secondly the sums to form a reserve fund at the end of the year. It is quite true that the reserve fund may be ultimately divided, but it is not divided and given back to the people who have paid too much, but to

another class, because, as I understand it, it is a limited reserve fund, although it stands to the credit of each member proportionately as he may have contributed; it is a reserve fund, which does not arise from the policies of less than a year or from special risk policies; to them the reserve fund shall in no way apply. So that I understand that members, or those who pay premiums for time voyages or special risks, do not get any share of the reserve fund. That is how I read Rule No. 3. The result, therefore, is that there is, as between the association and its members, a gain—the association acquires something.

But then I think that individual members obtain gain. If an individual member loses his ship he gets his ship paid for, and he gets a proportion of the reserve fund, not merely the share that he has contributed to it, but also the share of the other members, who have got time policies or policies on special risks, because of course the theory on which the rules of the association are formed is that everyone pays more than is absolutely necessary, otherwise you could not pay the expenses or carry on the assurances. The whole theory of insurance is that every premium meets something more than the risk; that is the whole theory of successful insurance. That being so, it appears to me that the members acquire something. But I am not prepared to say that, even independently of that consideration, an association by which people are indemnified from losses in carrying on any trade is not an association for gain. Some of these associations are for insuring freight. The freight is composed partly of the expenditure of the ship owner, and partly of the profit of carrying on his trade. If he insures his freight, he insures his actual profit of carrying on his trade; that is, he secures himself his profit. Is not that a gain?

It seems to me that this Act broadly means this: all commercial undertakings shall be registered. That is the meaning of it as I understand it. It distinguishes in so many words, and intends to distinguish, between commercial undertakings on the one hand, in which insurance companies certainly are included, for there are special provisions relating to them, and what one may call literary or charitable associations on the other hand, in which persons associate, not with a view of obtaining a personal advantage, but for the purpose of promoting literature, science, art, charity, or something of that kind; that I think is the broad distinction, and if that broad distinction is kept in view, I think there will be no difficulty in putting a fair and reasonable and also a literal and grammatical construction on the passage. In my opinion, whether the persons who were entitled to take out time policies and special risk policies were or were not to be members of the association, the association in question was one formed for the purpose of gain within the meaning of the 4th section, and would have required registration.

But it is then asserted that it ought not to have been wound-up at all under the 199th section. That is my present impression. There are provisions for registering an association for the purpose of its being wound-up, but it does not appear to me that the unregistered association pointed out in the 199th section was intended to be an illegal association formed after the passing of the Act. I think it must have meant that the unregistered association contemplated was a legal association,

[ROLLS.]

Re ARTHUR AVERAGE ASSOCIATION; Ex parte CORY AND HAWKESLEY.

[ROLLS.]

which might have been unregistered because it was formed before the passing of the Act, or because it was excepted, for it is not every association which requires registration. It was within the exception if it were an association formed after the passing of this Act, which did not require registration. The Act of Parliament is clear that there are exceptions. I think, therefore, the plain meaning of it is that the court ought not to wind-up an illegal association. But that argument proves too much, for it is an argument which makes the association illegal in any event, end therefore, if well founded, would destroy the validity of the winding-up order, and consequently is not admissible for the benefit of the applicants on the present occasion.

The next objection is that this is a marine policy, and that, being a marine policy, the Act of Parliament avoids it unless the names of the assureds are specified. Now this association was one of very peculiar character. The members of the association, not jointly, or in partnership, or the one for the other, but "each only in his own name, do hereby agree to insure each other's ships for one year from noon of any day named as the commencement of the risk." The members of the association insure each in his own name, neither in partnership, nor one for the other, and only for one year from noon of any day named as the commencement of the risk, and they insure each other's ships.

Then the third rule says: "The sub-manager shall also have authority to issue policies to members for periods less than a year or for special risks either in time or voyage policies, in consideration of special rates of premiums, to be fixed by the said manager to which the reserve fund shall in no way apply." I take that to mean that when you have got a person already a member of the association, you may give him a policy in respect of which he would have no right whatever to the reserve fund, and no liability, therefore, to contribute to the reserve fund for this purpose; that is, he pays his premium and there is an end of the matter as far as he is concerned; but if a loss occurs he is entitled to call upon the other members of the association, including also himself to the extent to which he is liable under a current policy, current when the loss occurs, to contribute to that loss; but, as I understand it, his liability would be measured without any regard whatever to the amount for which he has insured by a special policy; as to that, he is under no liability. Everybody is under liability with reference to the amounts insured by what has been called the mutual policy. Assuming that to be so, in a sense no doubt he is a member of the association, and he would be liable in respect of his current mutual policy possibly to make some contribution to the loss, assuming always that the loss occurred within the period of one year from the time of his mutual policy issuing. But if a mutual policy were near expiring, I do not see how he could be made liable for anything if the mutual policy expired before the loss on the special rate policy; I do not see that he is under any liability. He is only liable from the noon of any day to the noon of the same day in the following year, so that it may well be that, though he was a member at the time when the policy was issued to him, he would, so to say, have ceased to be a member before the loss occurred, and consequently he would be entitled to call upon the other

members who had still current policies to contribute to the fund to indemnify him, but would not be entitled to call upon the members whose policies had expired. This shows the difficulty of finding out who assured, because the persons who assured are not ascertained persons at the time of the insurance being effected, but in the case of a special rate policy it can only be ascertained when the loss has actually occurred, inasmuch as the years of the mutual policies might have run off before the loss occurred.

Now the only signature to the policy is that of Messrs. "Jackson and Sheppard per prouration of the several members of the Arthur Average Association for insuring each other's ships, every member bearing his equal proportion according to the sums mutually assured therein, excepting members paying special rates." I think that does not quite express what was meant, that is, that every member, not being a special rate insured member should pay his equal proportion, and that members who have paid special rates are not to pay any more, and the result of that is that you actually do not know who insures. The members are only liable for a year from the date of their own policies, and if the loss occurred after any member's policy expired, he is not an insurer. To suppose that that is a specification of the names as required by the Act of Parliament seems to me a most remarkable conclusion for any person possessed of ordinary powers of reason to arrive at. I was told that it was concluded by authority. I do not always how to the authority of a court of co-ordinate jurisdiction, but I endeavour to do so if it is possible, and if an unanimous decision of a Court of Common Law had been brought to my notice saying that that was a specification of the names of the insurers, I am not prepared to say that I should have followed it, if it were the decision of a court of co-ordinate jurisdiction and a recent decision. But I am relieved from considering that point, because the decisions brought to my notice by no means go to any such extent. The only decision bearing on the point was this, that when the insurers consisted of a firm, an ordinary common partnership carrying on business, the statute was complied with by stating the name of the insurers, and that was the name of the firm. That is all the decision was. It does not appear to me to have any direct bearing on the argument before me, and the only indirect bearing it has is that which was put forward so frequently by Mr. Chitty, that it was evidence of the liberality of Courts of Law in construing this statute in favour of insurers. Beyond that it certainly appears to me it did not go. All I can say is that the only names I find on this policy are Jackson and Sheppard; I find the names of no one else. As I said before, if it is "members of the Arthur Average Association," that is not right; it did not mean the then present members of the Arthur Average Association, they were not the people who were to insure, and you could not tell till a future period who were the insurers. There is no description. The rules themselves even are not on the policy, that is not to be forgotten. You could not find out from the policy who were to be liable under the rules. Therefore, the argument of the case in Campbell's Reports does not apply. There were no means of ascertaining from the policy itself who the insurers were to be; and I am of opinion that that objection is fatal to the policy, and that it is

[ROLLS.]

Re ARTHUR AVERAGE ASSOCIATION; *En parte* CORY AND HAWKESLEY.

[ROLLS.]

not really necessary to consider the next objection.

But the next objection appears to me to be a very serious one, and I cannot see that there is any satisfactory answer to it. First of all it appears that the rules were altered on the 29th March 1869, by which "members" were struck out so that you might insure any one by special risks or on voyage policies. This appears to have been done not, according to the rules, at a general meeting, but at a meeting of the committee. But Mr. Cory, one of the applicants before me, was insured by policies, the last of which was dated on the 8th Sept. 1868, which of course is long before the 29th March 1869; he is, therefore, not bound by these alterations, and he never authorised his credit to be pledged. I decline to enter into the position of the other applicant, Mr. Hawkesley. But, as I said, according to the well-established rule now in suits, as regards misjoinder, you could always amend by striking out the applicant. It is not necessary to go into the question whether or not Mr. Hawkesley has sanctioned these alterations because Mr. Cory alone could support the application.

Then there being no valid alteration, the rule appears to me to authorise the managers to insure members only on these terms.

Then it was argued that the mere issuing of a policy to a person on these terms makes him a member; now I am unable to accede to that. Members are defined, and they are defined to be people who insure for a year, and inure each other's ships for that year, and the way they insure is by making contributions. But these people never insured anybody for a year; they did not insure anybody for any time whatever. They simply paid a premium as every insurer does, and it seems to me to be an abuse of terms to say that a man who pays a premium thereby pays a contribution to the insurance of his own ship. That is not the meaning of the rule. The plain and literal and common-sense meaning coincide in this case, as they generally do, and in my opinion the issuing of a policy to any person not already a member was not authorised by this rule, and consequently the act of the agents was wholly unauthorised; the power of attorney under which they acted or assumed to act did not confer upon them the authority to enter into this contract, and consequently the contract itself does not bind the association. It appears to me that persons who enter into these contracts have no right to complain. They must have had notice of the nature of the body which was contracting with them, and of course notice of the rules and regulations which form the constitution of that company. As I said before, considering the enormous importance of the question to the parties, and the nature of the objections, I thought it right to give my opinion on this objection also.

On these grounds the only conclusion I can come to is that if the question of delay is not decided adversely to the applicants, the alleged creditors are not creditors of the association, and their debts ought not to be allowed.

Now the question of delay is to a certain extent no doubt to be dealt with as a matter of discretion. The law seems to me to stand in this way. By a general order, which was authorised by Act of Parliament, the ordinary practice of the Court of Chancery has been extended to winding-up cases, and according

to the ordinary practice of the Court of Chancery, after a chief clerk has made a certificate and eight days have expired, you cannot get rid of that certificate except on special grounds. The nature of those special grounds has nowhere been strictly defined, but it must be something substantial, and it also must be at a time when you do not very much vary the position of the parties. Now in the present case it must be remembered that the certificate is obtained by the official liquidator, who in a sense represents everybody. The persons who now apply had no direct intervention in the matter. They are not in quite as bad a position, if I may say so, as parties to a suit, who are present when the decision is given; their direct intervention is caused by an attempt to make them pay something, and then their attention is first aroused. In the next place the creditors have done nothing more than prove they did not obtain a dividend, and they have not obtained a call; therefore, their position is not affected except to the extent of any costs they may have incurred subsequently, and which the court may give them. And thirdly it must be and no doubt will be considered that the questions upon which the official liquidator at first had to decide, and the questions which the court has now to decide, are not matters which every one can decide for himself: they are not matters, so to say, so plain, and so clear, and so easy that every policy holder must be considered to have known them from the beginning and to have stood by and acquiesced in what has taken place. The mere length to which this argument has gone, and the nature of the discussion which has taken place, I think will be sufficient to show that. Looking, therefore, to the fact that in the other cases as great an amount of delay has not been considered sufficient to induce the court to say that the rights of the parties are finally established, and considering that the special reasons I have mentioned are to my mind very strong indeed, I think there is no such delay as should preclude the applicants from the relief, which they would, otherwise, be entitled to.

That being so, I think the proper order to make is to expunge the debts, and, considering that the creditors have been brought here after this lapse of time, I think it would be only right to provide for their costs, as well as for the costs of the applicants and the official liquidator, out of the estate subject to the winding-up. I think inasmuch as there may be a question as to whether the creditors or alleged creditors are not entitled to obtain a return of their premiums from somebody, it would be right to add to the order that it is made without prejudice to any application which they may be advised to make to obtain the return of the premiums so paid.

Solicitors: F. W. Hilbery; W. W. Wynne; Westall, Roberts, and Barlow.

Priv. Co.]

THE CORBEQUID MARINE INSURANCE COMPANY v. BARTEAUX.

[Priv. Co.]

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

ON APPEAL FROM THE SUPREME COURT OF HALIFAX, NOVA SCOTIA.

Reported by JAMES F. ASHALL, Esq. Barrister-at-Law.

March 17 and 18, 1875.

(Present: The Right Hon. Sir J. W. COLVILLE, Sir BARNES PEACOCK, Sir MONTAGUE E. SMITH, Sir R. P. COLLIER, and Sir HENRY S. KEATING.)

THE CORBEQUID MARINE INSURANCE COMPANY v. BARTEAUX.

Marine insurance—Master's power of sale—Stringent necessity—Total loss—Notice of abandonment.

The master of a ship may, under certain circumstances, effect the sale of his ship so as to thereby render the underwriters liable for a total loss without notice of abandonment, but he can only do so in cases of stringent necessity—that is to say, a necessity that leaves the master no alternative, as a prudent and skilful man acting bona fide for the best interests of all concerned and with the best and soundest judgment that can be formed under the circumstances, but to sell the ship as she lies. If he comes to this conclusion hastily, either without sufficient examination into the actual state of the ship, or without having previously made every exertion in his power, with the means then at his disposal, to extricate her from the peril or to raise funds for her repair, he will not be justified in selling, even though the danger at the time appear exceedingly imminent.

THIS was an appeal from the judgment of the Supreme Court of Halifax, Nova Scotia, of the 8th Feb. 1873, discharging a rule nisi obtained by the appellants for a new trial in an action brought by the respondent against the appellants.

The action was brought by the respondent to recover 4000 dollars and interest upon a policy of insurance effected with the appellants in the sum of 4000 dollars upon the brigantine *Foyle*, valued at 8000 dollars, for twelve months, that is to say, from the 23rd June 1868, at noon, until the 23rd June 1869. The policy was a time policy in the usual form.

The writ and declaration were issued on the 10th Aug. 1870, and contained two counts on the policy for a total loss, and a common money count for interest. To the counts upon the policy the appellants pleaded five pleas, and to the money count never indebted. The third plea, which denied that the vessel was lost by the perils insured against, and the fourth plea, which averred that the alleged loss was caused by the fraud and negligence of the respondent and his servants, and not by the perils of the sea, are the only pleas material to this appeal.

The cause came on for trial before the Chief Justice of the Supreme Court of Halifax and a jury, on the 11th Oct. 1871. At the trial, the appellants admitted the making of the policy, and also that the respondent was interested in the vessel, and evidence was adduced of (amongst other things) the following facts:—

The respondent was port owner of the *Foyle*, the vessel insured, of which he owned 44/64ths, James Roy her master 16/64ths, and one Downie 4/64ths.

On the 15th June 1869, the *Foyle*, a brigantine of 243 tons register, then a good vessel, about three years old, and worth about 10,000 dollars,

left the harbour of Lingan, in Nova Scotia, with a cargo of coals, bound for Boston, and anchored outside the bar of the harbour. At 11 a.m. on the following day, the 16th June, the *Foyle* proceeded on her voyage, with a whole sail breeze from the south-west. About thirty minutes after getting under way the vessel ran upon a sunken reef off the southern head of Lingan Bay, distant about three miles from Lingan, about one mile from Bridgport, and at the utmost half a mile from the shore. The vessel struck about an hour before high water on a shelving ledge—not a sharp rock—on the western side of the reef, almost broadside on.

The master of the *Foyle*, upon the vessel striking the reef, threw the sails aback, but she would not back off. He then signalled for the tugboat at Lingan, and a kedge anchor with sixty or seventy fathoms of line was run out, and all the strain it would bear put upon it. The tugboat soon arrived, and at high water took a hawser from the *Foyle*. An attempt was then made to get the vessel off by jerking at the hawser, but without success, the hawser having twice parted. The master of the *Foyle* and the master of the Lingan tugboat then consented, and the master of the tugboat having told the master of the *Foyle* that he thought it was of no use trying any more with the boat, and that the master of the *Foyle* had better get the coals out of his vessel, for if the wind came from the north he would lose her, left the *Foyle* and returned with his tug to Lingan. After dinner the crew of the *Foyle* commenced to throw the cargo overboard, but they did not discharge more than about ten tons of coal. At the next high water, between 12 and 1 a.m. of the 17th June, another attempt was made to get the vessel off by heaving on the kedge anchor, but failed.

On the morning of the 17th June the wind began to change to the north, and about 5 a.m. the master of the *Foyle*, being very uneasy, went ashore, noted his protest, and procured three persons, namely, James McDonald a shipwright, and Richard Laffin formerly a shipmaster, both of Lingan, and John Diggins master of a schooner belonging to Eastport, in the United States, to go on board the vessel to survey her. The surveyors got on board the vessel between 10 and 11 a.m. the same day, the 17th June, and at the time they went ashore, which was between 11 a.m. and noon, the wind was about W.N.W., hailing northwardly. They agreed that the vessel should be condemned, but, to give every chance of getting her off, to wait until two o'clock of the 18th June before selling her, and advertisements were written out to this effect that the vessel would be sold at that time. They, however, about an hour afterwards, determined to sell the vessel on the same day, the 17th June, at four o'clock. The reason given by Richard Laffin, the only one of the surveyors who was called at the trial, for the change of determination was, that the wind actually went round to the north-east before the survey was written out.

Upon coming to this conclusion, the surveyors made a report in writing of their survey, in which they stated as follows:—

"We find that the said vessel has stranded off the southern head of Lingan Bay, exposed to the storms of the Atlantic, making water, lying on a reef, and in a very dangerous position, considerably bogged on the port side, badly strained, rolling heavily on her bilge. We also find that the said

PRIV. CO.]

THE COBEQUID MARINE INSURANCE COMPANY v. BARTEAU.

[PRIV. CO.]

vessel lies in such a dangerous position that, should the wind happen to change and blow from the north-east, south-east, or east, she would probably go to pieces immediately. We therefore recommend that the said vessel be advertised and sold this day, without running the risk of leaving her overnight, that she may be stripped of her sails and rigging, and sold as soon as possible for the benefit of all concerned."

Richard Laffin, who was examined for the plaintiff (resps.) at the trial, admitted in cross-examination that he could not say that the vessel was making water, that she had a list to port of only two or three strakes, or from 18 in. to 2 ft., and that, if she was either hogged or strained as stated by the surveyors, she would have been leaking. Evidence was given by the defendants (apps.) to show that upon these points the survey was incorrect.

About 1 p.m. of the same day, the 17th June, the Glace Bay tug went up to the *Foyle* and backed close to her. John Dunlop, the mate of the Glace Bay tug, then threw a line to the *Foyle*, but it was refused, and a man on board prevented another from catching it. On the 17th June, between four and five in the afternoon, the master of the *Foyle* sold the vessel and cargo by public auction in Lingan, two or three advertisements having been put up in Lingan about two hours before the sale. The vessel was sold for about 1000 dollars, and was bought by Richard Laffin, one of the surveyors, for his two nephews.

Immediately after the sale, preparations were made by the purchasers to get the vessel off. Between seven and eight in the evening of the same day, thirty men were taken down to the vessel with the Lingan tugboat and a schooner. Fifty to sixty tons of coal were discharged out of the vessel into the schooner, and ten tons were thrown overboard. They worked steadily until 3 a.m. on the morning of the 18th June, and the *Foyle's* bower anchor was then ran out and let go, and by hauling on the anchor and kedge, and jerking at a new 7-in. hawser which had been hired for the purpose, the vessel was got off about half-past three in the morning of the 18th June, without having sustained any damage whatever, except the loss of a small piece of her shoe.

During the whole of the time the vessel was on the reef the weather was fine, and although the wind got round to the north on the 17th June, and there was a breeze in the afternoon, the weather was not severe at all on that day; but it was alleged that if the wind had continued in the north, it would have been impossible to have got the ship off.

There were four tugs and abundance of men from Lingan to Cow Bay; and 80 to 100 men at Bridgeport, whose services could have been obtained by the master of the *Foyle*, and he had the same means of extricating his vessel as were actually used by the purchasers to get her off within his reach and in his power.

There was conflicting evidence as to the wind to be expected on the 17th June. The statement of the master was, that on the 17th he "expected a strong breeze," and that at the time of the sale "there were indications of a heavy blow," and Richard Laffin stated that at the time of the sale it "had the appearance of being rough," but they were contradicted upon this point by the master of the Lingan tugboat; a witness for the respondent, who stated that the wind "was going down at the

time of the sale," and also by the witnesses who were called for the appellants, whose evidence was to the effect that it was usually fine in June, July, and August, and that the middle of June was the finest season at Lingan, and that gales, to injure a vessel lying where the *Foyle* was, were unusual in June, and that there were no indications of a heavy blow.

There was also a conflict of opinion between the witnesses for the respondent and those for the appellants as to the course a prudent uninsured owner would have pursued under the circumstances.

At the close of the respondents' case, the counsel for the appellants moved for a nonsuit, on the grounds, amongst others, that there was no notice of abandonment, and that the sale was not justifiable, but the Chief Justice refused to nonsuit the respondent.

The Chief Justice directed the jury as follows: "The want of a notice of abandonment could only be excused by the necessity of the sale, if that necessity existed. This was a point of a good deal of nicety, which he would reserve, if the appellants' counsel desired it, for the consideration of the court. The main question was the alleged necessity for the sale, and the jury must look with a sharp and jealous eye at the transaction, marked by many unusual and suspicious circumstances. There was no evidence of a fraudulent stranding. A resident would have avoided the shoal, but it was not on the chart, and it was unknown to the master. Being competent to command the ship, his ignorance or want of caution in this matter afforded no defence to the underwriters; but, being on shore, had he exerted himself with sufficient promptitude and energy? The Chief Justice here cited the rules of law, as laid down in *Arnould*, and in our own decisions, and put it to the jury whether the master ought to have been content with the discharge of only ten tons of coal on the 16th, and should not have called in on that and the succeeding day a body of miners or other men in the neighbourhood, and attempted by their aid what the purchasers actually effected. The jury should consider, too, whether the holding of the sale on a day sooner than was at first intended was a *bona fide* and honest act, or was the result of any contrivance or collusion. The survey also had been hurriedly and incautiously drawn; all these facts, on which I forbore to give my opinion, were to be taken into account. There was no proof of the vessel having been overvalued or over-insured, and the master disclaimed any interest in the purchase. Still, if he had precipitated the sale for want of firmness or of judgment, this was one of the cases where the owners must suffer from it. He could sell his own quarter, but not the other three-quarters, so as to bind the insurers, unless an extreme over-mastering necessity, a moral necessity for the sale, had been shown to the satisfaction of the jury. I lastly told them, that if they found for the respondent this was not one of the cases in which, as I thought, they should give interest, and that the defendants were entitled to credit for one-half of the net proceeds, being 474 dollars for 3526 dollars."

The jury found a verdict for the respondent for 3526 dollars.

On the 14th Oct. 1871 the appellants obtained a *rule nisi* for a new trial, on the grounds of misdirection, the verdict being against law and evidence.

[Priv. Co.]

THE COBEQUID MARINE INSURANCE COMPANY v. BARTEAUX.

[Priv. Co.]

On the argument of the rule, on the 8th Feb. 1873, the Supreme Court gave judgment discharging the rule unanimously on the question of misdirection, but Mr. Justice Wilkins dissenting on the question whether the verdict was against evidence.

The judgment of the majority of the court, delivered by Mr. Justice Ritchie, was founded upon the argument that, although the master of the *Foyle* did not appear to have exercised all the means in his power to get his ship off, and had not exerted himself with sufficient promptitude and energy as to justify the sale of the ship, yet this was a question for the jury and not for the court, and the Chief Justice having left the question to them, and they having found for the plaintiffs, their finding ought not to be disturbed. Mr. Justice Wilkins differed from the rest of the court upon the ground that there was no necessity for a sale shown upon the facts proved, and that the finding of the jury, being in opposition to those facts, ought to be set aside.

From this judgment the appellants, on the 28th Feb. 1873, applied for and obtained from the Supreme Court of Halifax leave to appeal to Her Majesty in Council, and they appealed accordingly upon the following, amongst other grounds:

1. Because there was no evidence upon which a jury could properly proceed to find that there was a total loss of the vessel by the perils insured against.

2. Because the verdict was against the evidence.

3. Because notice of abandonment was necessary.

4. Because the learned judge misdirected the jury, and led them to suppose that even if the vessel could have been extricated from her position by means within the reach of the master, and that if he sold the vessel without first exhausting those means, the sale might still be justified by necessity.

5. Because the question whether the master could, by means within his reach, and which he could reasonably use, have extricated the vessel, was not clearly put to the jury.

6. Because the learned judge ought to have explained to the jury that the true question in the case was, whether the vessel, under the circumstances, was in such a condition, take all things together, that it was not worth while to prime her any further, or to make any further attempt to save her, with a view to recovering her and restoring her as a seagoing ship, or that the assured would have been justified as a prudent man in abandoning her, and giving up all further intention of extricating her from her position.

7. Because, owing to the want of a proper understanding of the law, and of the effect of the sale, the jury found a verdict wholly unwarranted by the evidence.

8. Because there was a miscarriage of justice, and the verdict for the respondent ought to be set aside, and a new trial granted.

Watkin Williams, Q.C. and Wood Hill, for the appellants.—There are two questions in the present case; first, whether the case is one of total loss or average loss; secondly, whether, assuming a constructive total loss, the master did right in selling, or should have given notice of abandonment, and have kept the ship and done his best with her.

First, we submit that there was no total loss

upon the facts proved. Where a ship is stranded or damaged, if it is absolutely and physically impossible to restore her, she is an absolute total loss; but, assuming the physical possibility of restoring her to her former condition, then the test of her being a total loss is not whether it is best and most expedient under the circumstances, in the interests of her owner, to sell or to try and restore her at great risk and expense, but whether the outlay in trouble and expense will exceed the value of the ship when rescued and repaired. A partial loss cannot be turned into a total loss, even by a prudent sale by a master; the test is not whether a prudent owner, uninsured, would have sold, but whether the cost of repairing (or forwarding of goods) would exceed the value of the thing insured when restored.

Reimer v. Ringrose, 6 Ex. 283;

Newton v. Hudson, 9 C. B. 30;

Parsons on Marine Insurance, vol. 1, pp. 148, 149, 150.

The power of a master to sell, so as to bind his owners and their underwriters, is entirely limited by the necessities of the case. In *Arnold on Marine Insurance* (4th edit., vol. 1, p. 333), it is said, "The exercise, however, of this power (to sell) is most jealously watched by the English courts, and rigorously confined to cases of extreme necessity, a necessity that leaves the master no alternative as a prudent and a skilful man, acting *bona fide* for the best interests of all concerned, and with the best and soundest judgment that can be formed under the circumstances, but to sell the ship as she lies. If he came to this conclusion hastily, either without sufficient examination into the actual state of the ship, or without having previously made every exertion in his power, with the means then at his disposal, to extricate her from the peril or to raise funds for her repair, he will not be justified in selling, even though the danger at the time appear exceedingly imminent."

Cambridge v. Anderson, 2 B. & C. 601;

Idle v. The Royal Exchange Assurance Company, 3

Brod. & B. 151; 8 Taunt. 755.

There is no loss by sale in marine insurance law; an assured can only recover for a total loss after a sale where the facts of the case show a total loss, independently of the sale. [Sir H. S. KEATING.—That is to say, if the facts were such as to occasion a necessity for an immediate sale, a total loss accrues as soon as the sale takes place. The sale does not make the total loss, but is justified by a proper apprehension of it; but if the ship is not actually lost there would be no total loss if the sale did not take place, so that in one sense there is a loss by sale.] But in this case there were no facts justifying the sale. It appears from the evidence that the ship could have been extricated from her position by means within the reach of the master, and this being so, the master assuming that he acted *bona fide* in the sale, was not under such a necessity to sell as to constitute the sale a total loss, either constructive or actual. The ship was not in imminent danger of destruction at the time of the sale, and it is only such danger as would have justified sale and constituted a total loss.

Secondly, but even supposing the ship had been so damaged that she would have been a constructive total loss, we submit that the facts show that it would have been a more prudent thing on the part of the master to have kept her and given notice of abandonment. Her rescue was easy, and she was at his disposal so abundant, that

[Priv. Co.]

THE CONQUID MARINE INSURANCE COMPANY v. BARTEAUX.

[Priv. Co.]

there was no reasonable excuse for the sale under such disadvantageous circumstances.

Thirdly, the necessity for notice of abandonment was not superseded by the sale. [Sir H. S. KEATING.—If there was an immediate necessity for a sale, notice of abandonment was practically impossible, and as soon as the sale had taken place there was nothing to abandon. The underwriters can claim to deduct the proceeds of the sale from the total loss as salvage, but how can they claim notice of abandonment?] The *res* still existed in specie.

Cohen, Q.C. and Grantham, for the respondent.—The appellants assume that the apprehension of danger to the ship is no material element in a case such as this. We submit, first, that if a vessel is placed by the perils of the seas in such a position that the master has by the necessity of the case an implied authority to sell her so as to convey a good title to the purchaser without the assent of the owner, and if, acting in good faith and for the interest of all concerned, he does sell her, then the assured can recover as for a total loss from the underwriter. Secondly, that the question whether there was a reasonable necessity for a sale does not depend upon the ultimate event, but upon the consideration whether there was reasonable apprehension that the ship would not be saved, and whether the master in selling acted in good faith and with a view to the interests of all concerned, and that this question is one entirely for the jury. Thirdly, that in the present case there was evidence on which the jury might reasonably find that the sale was justifiable, and that there was no misdirection, and that the verdict ought not to be disturbed. Fourthly, that no notice of abandonment was necessary.

First. In the case supposed the ship has become irrevocably the property of the purchaser, and the owner has been as much deprived of her as if she had been captured, condemned, and sold. Now it is clear that the underwriters undertake to indemnify the assured as much against deprivation of as damage to property. In Arnould on Marine Insurance (4th edit., vol. 2, p. 882), it is said: "Every effective privation of the *res recuperandi* amounts to an absolute total loss." In fact, the contract of insurance is a contract of indemnity against loss, and undoubtedly the assured has in the supposed case entirely lost his property. The only question is, whether the loss can be properly said to have been occasioned by the perils of the seas. It is argued by the appellants that the loss is occasioned by the sale, and not by perils of the seas. This argument is fallacious; it is a general principle of law that if a cause has for its necessary consequence an effect which occasions a loss, then that loss is in law occasioned by the primary cause:

Phillips on Insurance, § 1193;

Jonides v. The Universal Marine Insurance Company, 8 L. T. Rep. N. S. 705; 32 L. J. 170, C. P., 1 Mar. Law Cas. O. S. 363.

If a ship is insured against loss by fire at sea, and a fire breaks out and burns a hole in the ship's side, into which the water rushes and causes the loss of the vessel in fine weather, this would be a loss by fire. The same principle is equally true if the cause naturally and necessarily produces an act which occasions the loss; e.g., if goods are insured against fire, and damage is done by water poured in to extinguish the fire, the underwriters are liable for this damage. Again, in *Darker v. Janson*

(17 L. T. Rep. N. S. 473; L. Rep. 3 C. P. 303, 305; 3 Mar. Law Cas. O. S. 28), Willes, J., says: "If a ship is so injured that it cannot sail without repairs, and cannot be taken to a port at which the necessary repairs can be executed, there is an actual total loss, for that has ceased to be a ship which can never be used for the purposes of a ship." In the case, then, of a ship not being worth repairing, there is a total loss, but it does not become a total loss until the owner elects not to repair; and as it is his election which fixes and establishes the total loss, it would be an equally good argument to say that there was no total loss in such a case by perils of the seas. But the true answer is, that since the election not to repair is the natural and reasonably necessary consequence of the perils of the seas, the law considers that the loss occasioned by such election is a loss by perils of the seas. Where, then, any peril insured against, necessarily brings about a state of things which results in a loss, that loss falls upon the underwriters:

Dent v. Smith, 20 L. T. Rep. N. S. 898; L. Rep. 4 Q. B. 414; 3 Mar. Law Cas. O. S. 251;

Stringer v. The English and Scottish Marine Insurance Co. (Limited), 22 L. T. Rep. N. S. 802; L. Rep. 4 Q. B. 676; 3 Mar. Law Cas. O. S. 140.

If, then, the sale by the master was in this case rendered necessary by the danger to which the ship was exposed, and the sale deprived the shipowner of his ship, it follows that the loss sustained by the shipowner was occasioned in law by the perils of the sea. The correctness of this view is confirmed by the fact that, in all insurance cases similar to the present, the only question submitted to the jury has been, whether the sale was effected with a view to the interests of all concerned, and was reasonably necessary. A contrary doctrine would be most prejudicial to underwriters, because if a master is not to be encouraged in doing what is best in his judgment for all concerned, acting on reasonable probabilities, he would be at liberty to let a damaged ship go to pieces and yet recover against the underwriters. In the present case the master acted upon the probabilities laid before him by the report of the surveyors and his own judgment, and if he acted reasonably in selling the ship, he acted for the benefit of all concerned, and his acts should be binding upon the underwriters.

In all cases in which a sale is found to have been reasonably necessary, the underwriters are liable for a total loss:

Miles v. Fletcher, Dougl. 219, 222;

Doyle v. Dallas, 1 M. & R. 48;

Gardner v. Salvador, 1 M. & R. 116;

Robertson v. Carruthers, 2 Stark. 571;

Pleming v. Smith, 1 H. of L. Cas. 514;

Moant v. Harrison, 4 Bing. 388;

Farnworth v. Hyde, 34 L. J. 207, C. P.;

Arnould on Marine Insurance, 2nd edit., vol. 2, pp. 1090, 1095; 4th edit., p. 885;

Phillips on Insurance, §§ 1524, 1560, 1570, 1571.

All these cases show that if there was a reasonable necessity for the sale on account of the dangers threatening the ship, the owner can recover for a total loss, and there are two grounds on which these cases are decided; first, because the property has thereby passed out of the hands of the shipowner; secondly, because if the underwriter were upon the spot at the time, the owner might abandon to them, and that the sale marks the owner's election to abandon. Bayley, J., in *Gardner v. Salvador* (1 M. & R. 116), says that there is "no such head in insurance law as loss by

[Priv. Co.]

THE COBEQUID MARINE INSURANCE COMPANY v. BARTEAUX.

[Priv. Co.]

sale," and this is true in a certain sense, as where a ship is not worth repairing, and the owner can be communicated with and is not, or does not give notice of abandonment after receiving a communication; or where a ship is damaged but is not in any danger. In the latter case the master has no authority to sell. But when a ship is in imminent danger, there is no authority to show that the above dictum applies. It cannot be contended that if a ship is in imminent danger, and is sold, but is afterwards got off by the purchaser and repaired, there is by reason of her rescue no total loss.

Secondly, under what circumstances is there such a reasonable necessity for a sale as to justify the master in selling the ship and to enable him to give a good title to the purchaser? On this question the law has changed during the last 200 years. It has always been held that if there is no valid reason for the master not communicating with the owner before selling, a sale without previous communication is invalid. But in former times it was generally impossible to communicate within a reasonable time, and it was considered dangerous to allow a master a discretionary power of sale, the necessity for which might arise frequently, and as to which it was so difficult to procure information and evidence as to the proper or improper manner in which the master had exercised his power. But now, as there are comparatively few cases in which the master cannot in reasonable time communicate with his owners, and as the means of obtaining information from distant parts are greater than formerly, the danger of giving the master such a power in cases of emergency is very much less than it was, and the evils of depriving him of such a power in the few cases where the owner cannot be consulted, are so manifest, that where, as formerly, it seems to have been considered that the master never had any authority to sell, the law now is, that a sale is considered necessary and valid if the master, being in reasonable apprehension of not being able to avert the destruction of the vessel, and acting *bona fide* for the benefit of all concerned, both owner and underwriters, effects a sale:

- Johnson v. Shippen*, 2 Ld. Raym. 982;
Hayman v. Molten, 5 Esp. 65;
Robertson v. Clarke, 1 Bing. 445, 450;
Somars v. Lucretia, 4 C. & P. 276;
Idle v. The Royal Exchange Assurance Company, 8 Taunt. 755;
Hunter v. Parker, 7 M. & W. 340;
The Karnak, 21 L. T. Rep. N. S. 150; L. Rep. 2 P. C. 519; 3 Mar. Law Cas. O. S. 276;
The Australasian Steam Navigation Company v. Morris, 1 Asp. Mar. Law Cas. 477; 27 L. T. Rep. N. S. 357; L. Rep. 4 P. C. 222, 223.

The rule is laid down by Story J., as follows: "If the circumstances were such that an owner, of reasonable prudence and discretion, acting upon the pressure of the occasion, would have directed the sale, from a firm opinion that the vessel could not be delivered from the peril at all, or not without hazard of an expense utterly disproportionate to her real value, then the sale by the master is justifiable." (*The Sarah Ann*, 2 Sumner, 215; and see *Arnould on Marine Insurance*, 2nd edit., vol. 2, p. 1095.) There must be a necessity for a sale, and the master is to judge of this necessity by the probabilities of the case and by the assistance of the best advice he can procure at the time. [Sir H. KELING.—There can be no degrees of necessity. A sale must be either necessary or not, and that is

the question which the court has to consider.] We submit that the true question is, whether at the time of the sale it appeared a necessity to the master, acting as a prudent man. Subsequent events cannot affect the question of the apparent necessity at that time. We submit that in the present case the master took all the precautions and adopted all measures which he should have taken and adopted before proceeding to a sale. The danger was imminent, and it was shown that if there had been a change of wind the ship must have been destroyed. Attempts were made to get the ship off, and they failed. It was reasonable for the master to suppose that, as he could not get the ship off, and there was imminent danger of her destruction, a sale was the best for all concerned; and if the master and the surveyors came to this conclusion, it lies upon the defendants to show that the ship could have been saved by reasonable endeavours. The respondents are not bound to contend that at the time the ship ran on the reef there was a constructive total loss or the sale was then justifiable. The question is, whether at the time of the sale there was a constructive total loss, i.e., no real hope of recovering the ship at any expense less than her actual value when recovered and repaired. It was thought, and with reasonable probability, that the ship was hedged, and on this supposition the master and surveyors acted.

Thirdly, it is admitted that there was no misdirection or improper rejection of evidence, and therefore the question is mainly whether the verdict was against the weight of evidence. In considering this question the respondents are entitled to assume that the jury entirely disbelieved the appellants' witnesses and gave credence to the respondents' witnesses, and to contend that their finding thereon ought not to be disturbed. There was evidence on which a jury was justified in finding that a sale was a necessity under the circumstances, and the jury saw and heard the witnesses, and this court has not seen them, and must be taken as the true judges of this question of fact. It does not appear that the Chief Justice was dissatisfied with the verdict, and the court below, in the exercise of its discretion, refused a new trial. In such a case, especially an insurance case, the Court of Appeal will not interfere, nor will the court in insurance cases, as a rule, interfere even when the judge does not agree with the jury on questions of fact.

- Anderson v. Morice*, 2 Asp. Mar. Law Cas. 425; 31 L. T. Rep. N. S. 635; L. Rep. 10 C. P. 68.

Fourthly, No notice of abandonment is necessary where the circumstances are such as to necessitate an immediate sale by the master, and such a sale takes place under such circumstances, there would be nothing substantial which the underwriters could take possession of, and abandonment would be wholly superfluous.

- Rankin v. Potter*, 2 Asp. Mar. Law Cas. 65; 29 L. T. Rep. N. S. 142; 6 H. of L. Cas. 102;
Farnworth v. Hyde, 31 L. J. 207, C. P.;
Knight v. Faith, 15 Q. B. 649.

[Sir H. S. KELING.—If there was a necessity for a sale, notice of abandonment could scarcely be necessary, but the real question is, whether there was such a necessity.]

Watkin Williams, Q.C., in reply.—The contention of the respondent is that, if the master acted *bona fide* and as a reasonable man, under the circumstances of the case, and *bona fide* believed in

PRIV. CO.]

THE CORBEQUID MARINE INSURANCE COMPANY v. BARTEAUX.

[PRIV. CO.]

the report of the surveyors, he was justified in the sale, and made it binding upon the underwriters. The authorities, however, show that such a ground of action is not sufficient. In *Parsons on Marine Insurance* (Vol. II., p. 147), the following passage, supported by weighty authorities, appears: "It is frequently said that, in determining whether the master should have repaired the vessel, instead of selling her, or should have forwarded the cargo, instead of breaking up the adventure at the intermediate port, regard should be had to the question whether a prudent owner, had he been present and uninsured, would have acted as the master did. We have already said that this language is to be regretted. Nothing is more certain or more obvious than that the rule that a sale by the master is justified only by 'a stringent necessity,' and the rule that 'a sale by the master is justified if a prudent owner, under the same circumstances, would have made it,' are not only two rules, but two very different rules. If a prudent selection from alternatives be not the same thing as an adoption of a course which is forced upon one, or if choice be not the same thing as compulsion, then both these rules cannot be held applicable. One must be selected and enforced, and that should be the rule of necessity. The most that can be done with the other is to use it by way of illustration, and to use it so carefully that it shall not itself seem to be the rule. Indeed, it seems to be used with this caution in cases of the highest authority, and, as the sale by the master is not valid unless it is not only the result of necessity but is also made in entire good faith, the inquiry whether a prudent owner, then and there present, would have done as the master did, may aid the jury in determining whether this good faith had been perfectly preserved." If the respondent's evidence only is looked at in this case, then that evidence alone shows that, however prudent it might have been for the master, as part owner, to sell the ship, there was "no stringent necessity" for the sale; the master had not nearly exhausted all means of saving the ship.

March 18, 1875.—The judgment of the court was delivered by Sir H. S. KRATON.—This was an action brought in Nova Scotia upon a policy of insurance effected with the present appellants in favour of the respondent. It was a time policy for twelve months, upon a vessel called the *Foyle*, which was a comparatively new vessel, being only three years old, and carrying somewhere about 400 tons. The plaintiffs in the action below sought to make the insurers liable upon the ground of a total loss, and the total loss relied upon was the sale of the vessel under circumstances which, it was said, justified that sale, and so occasioned to the owners a total loss of the ship.

The cause was tried before the Chief Justice of the Supreme Court of Halifax, and he directed the jury that in order to justify the sale it was necessary that an urgent necessity for such sale should be shown; and he left the question, accompanied by some strong remarks on the facts, to the jury as to whether that necessity existed. A verdict was found for the plaintiff. Their Lordships do not think it necessary to inquire into the way in which the verdict was afterwards settled upon the figures, because the verdict was only questioned in the Supreme Court upon the ground, first, that the Chief Justice had misdirected the jury, and next, that the verdict as found for the plaintiff

was against the weight of the evidence in the case. The whole court were of opinion that there was no ground for imputing misdirection in the charge of the Chief Justice to the jury, and in that opinion their Lordships concur. But the majority of the court were of opinion that the verdict of the jury was so far justified by the evidence that they refused to grant a new trial upon the ground that the verdict was against the weight of the evidence, and discharged a rule obtained for such new trial. One member of the court took an opposite view, and the appeal comes up here as to how far the majority of the court was right in refusing a new trial upon the ground that the verdict was against the weight of the evidence in the case.

With reference to the law upon the subject, there seems now to be no doubt whatever; and it cannot be questioned that the master, under circumstances of stringent necessity, may effect a sale of the vessel so as thereby to affect the insurers. That he can only do so in cases of such stringent necessity has been laid down in a great variety of cases unnecessary more particularly to be referred to, as they are well summarised in the work of Mr. Parsons on Marine Insurance (vol. 2, p. 147), where he also takes the distinction between the rule that a sale is justified by stringent necessity only, and what was sometimes supposed to be a rule, that the sale would be justified if made under circumstances that a prudent owner uninsured would have made it. He distinguishes between the two, and establishes, upon satisfactory authority, that whilst what a prudent owner would have done under the circumstances if uninsured, may illustrate the question as to how far there was a stringent necessity for selling, yet that the rule is that there must be a stringent necessity. In *Arnold on Insurance* (4th edit., vol. 1, p. 333), the circumstances that will justify the master in selling seem to be well and clearly put, and to be quite borne out by the authorities that are cited in support. Mr. Arnold says: "The exercise, however, of this power," that is, the power of the master to sell, "is most jealously watched by the English Courts, and rigorously confined to cases of extreme necessity. Such a necessity, that is, as leaves the master no alternative as a prudent and skilful man, acting *bona fide* for the best interests of all concerned, and with the best and soundest judgment that can be formed under the circumstances, except to sell the ship as she lies; if he come to this conclusion hastily, either without sufficient examination into the actual state of the ship, or without having previously made every exertion in his power with the means then at his disposal to extricate her from the peril, or to raise funds for the repair, he will not be justified in selling, even although the danger at the time appear exceedingly imminent." That seems to be the true rule to apply in these cases, where it is most important to confine within strict limits the powers of a master to sell the ship.

Now, applying that rule to the circumstances of the present case, their Lordships come to the conclusion that this case ought to undergo a further inquiry.

It seems that this vessel, the *Foyle*, being at a place called Lingan, in Nova Scotia, shipped a cargo of coals to the amount of 420 tons; but that quantity being too great to admit of her passing over the bar of the port, she was lightened, and

[PRIV. CO.]

THE CORCORAN MARINE INSURANCE COMPANY v. BARTHAUX.

[PRIV. CO.]

having passed the bar, again reshipped the coals which had been taken out of her. On the 16th June 1868, at 11 a.m., she weighed her anchor, and in about thirty minutes afterwards ran upon a reef or ledge off the southern head of Lingan Bay, at a distance of about 300 yards from the shore, about three miles from Lingan, and about a mile from a place called Bridgport. It is material to consider the neighbourhood of that place, because that was a place from which it appears clearly on the evidence assistance could have been obtained. Having run upon this reef, the captain at first signalled for the tugboat at Lingan; the tug came out and attempted to haul the vessel from the reef, but the hawser parted. Having repaired that hawser, it parted a second time. The hawser having parted a second time, the master of the tug, who was called as a witness, seems to have given very good advice, namely, that the ship should be lightened in order that further efforts should be made. The captain of the *Fogles* appears to have acted upon that advice to a certain extent, for about ten tons were taken out of the vessel by the crew, and they worked at it up to about nine o'clock that night. Whether that was a sufficient quantity or an insufficient quantity does not become, perhaps, in the result, very material. That was the only quantity that was got out up to that period. The master afterwards became anxious, because he was told that if the wind shifted to the north he would be in great peril. At 5 a.m. on the 17th he went on shore, and between 10 and 11 a.m. brought off three persons to make a survey of the vessel, and what is called a survey was thereupon made. The surveyors agreed that the vessel should be condemned, and at first were of opinion that the sale might be delayed until the 18th, but they seem suddenly to have changed that opinion and to have thought that the sale ought to take place on the 17th, and with a view to that sale they drew up the form of their survey. They stated that, having "carefully and particularly inspected, examined, and surveyed the said vessel, we find that the said vessel lies stranded off the southern head of Lingan Bay, exposed to the storms of the Atlantic, making water, lying on a reef, and in a very dangerous position, considerably hogged on the portside, badly strained, rolling heavily on her bilge. We also find that the said vessel lies in such a dangerous position that should the wind happen to change and blow from the north-east, south-east, or east, she would probably go to pieces immediately." And they recommended a sale to take place the same day.

Now, in deciding the question how far the verdict was or was not against the weight of the evidence, Mr. Cohen would seem to be justified in saying that the case as made upon the part of the plaintiff should alone be looked at, as he was entitled to assume that the jury might possibly have believed the case on the part of the plaintiff and utterly disbelieved all the witnesses on the part of the defendant, even though no proof is furnished that would justify a conclusion that such was the case. But even looking only to the case of the plaintiff, and the evidence given upon his part, it appears to their Lordships that this report of the surveyors was manifestly incorrect, and indeed wholly unfounded. There is no evidence that the ship was "making water;" or that she was "considerably hogged on the port side;" or hogged at all; or that she was "badly strained;" indeed, the

reverse was the case; and it is of great importance to observe that those statements as to the vessel were statements of facts which ought to have been apparent to the eye of the master himself how far they were correct or the reverse, as he states that he was present when the vessel was surveyed by the surveyors, and he says, "I saw no pumping, I did not know that she had suffered any injury." In that he was quite right, because, in fact, the vessel had not suffered any injury, and there was no necessity for pumping, because the ship had made no water.

Now, in judging of the question, how far the sale was justified by stringent necessity, of course the state of the vessel—that is, not the reported state but the true state of the vessel—becomes an important element for consideration. Here the vessel was, in fact, uninjured, as the master must or ought to have known, and yet with the exception of taking a very small quantity of her cargo out and hauling upon the kedge, which he could not have supposed would be of any effect, he seems to have done nothing between the 16th and the sale, although it does not appear that all the means subsequently used by the purchasers, which floated her within a few hours, might not have been equally made available by himself for the same purpose had he endeavoured to obtain them. As to the state of weather, there is a conflict of evidence as between a calm and a breeze, but there is no evidence of anything like rough weather, and whilst the sale was going on any wind that existed is admitted to have gone down.

The sale took place. It is not necessary to go into the particulars of the sale. The ship was sold of course very much below her value, and purchased by one of the surveyors, for his two nephews, who quickly took the means neglected by the master and floated her substantially uninjured in a few hours.

The judges who formed the majority of the court upon this occasion, professed themselves unable to understand or to collect from the evidence why further efforts had not been made.

"In the light of these facts, I confess," says the learned judge who delivers the judgment, which must be taken to be the judgment of the whole of the majority of the court, "I cannot quite understand the conduct of the master, nor why he did not pursue the course subsequently adopted by the purchasers after his first attempt had failed. The lightening of the vessel by the discharge of her cargo would seem the obvious course to be pursued, and this, on consultation with the master of the tug, was determined upon. He did indeed employ his crew for a time in doing this; but, if he really considered his vessel in jeopardy, and Hall, the master of the tug, had told him to get the coals out of her, for if the wind came from the north he would lose her, ought he not to have sought assistance from the shore, which he could have obtained as easily as the purchasers did? If I were asked whether in my opinion the master had done what was required of him, I should be slow in arriving at the conclusion that he had resorted to all the measures within his reach, and had exerted himself with efficient promptitude and energy so as to justify the sale of the vessel." But the learned judge added that it was a practical matter for the consideration of the jury.

Now their Lordships entirely agree with the learned judge in their inability to discover on the

PRIV. CO.]

GUNESTAD V. PRICE AND OTHERS; FULLMORE V. WAIT.

[EX.]

evidence for the plaintiff himself why those efforts were not made; and inasmuch as to justify the sale those efforts ought to have been made, there seems to be strong reason for ascertaining how far another jury would agree in the very sound and sensible opinions expressed by the majority of the court themselves, or whether they would coincide in the view taken by the former jury.

Of course their Lordships would be slow to advise a new trial where there was a substantial conflict of evidence. In the present case the record does not disclose the fact whether the Lord Chief Justice expressed himself dissatisfied with the verdict. It does not state the fact either way, that he expressed himself to be satisfied or dissatisfied. That he was not perfectly satisfied with the verdict, their Lordships can perhaps collect from the passage just read, and which must be taken to be the expression of the opinion of the Chief Justice himself. But in an ordinary case, although the non-expression of the dissatisfaction upon the part of the judge is generally looked upon as forming a serious obstacle to ordering a new trial, yet at the same time, if it is plain that the evidence was such that there is ground for the belief that the jury really did act without giving that weight which they ought to do to the evidence that was laid before them, there is no reason whatever why a new trial in the interests of justice should not be directed.

In this case it would be too much to say that there was no evidence of the stringent necessity that would have justified a sale. Had there been no evidence there would have been a misdirection; but their Lordships are of opinion, having regard to the evidence given of the absence of those efforts upon the part of the master, which efforts would alone justify a valid sale—that is, a sale which should be valid as against the insurers—that the verdict of the jury as given was undoubtedly against the weight of the evidence. The learned judge who dissented, Mr. Justice Wilkins, states "That he gathered from the opinion expressed by a majority of the court, that had the respective judges who composed it been on the jury that tried the case, they would not have found as the jury found. I should certainly, had I been in the jury box, not have concurred in such a finding. My opinion is, moreover, that wherever such a sentiment pervades the bench in relation to such a case as this, the result of investigation and deliberation that induces it ought to constitute a sufficient ground for setting the verdict aside."

It is not necessary to pronounce an opinion as to how far that does or does not lay down the rule too broadly. It is sufficient to say that the verdict is against the weight of the evidence. The rule which is correctly laid down in *Arnould* (4th ed., vol. 1, p. 333) seems to fit this case so completely as to render a new trial inevitable upon this evidence: "If the master come to the conclusion to sell hastily, either without sufficient examination into the state of the ship or without having previously made every exertion in his power with the means then at his disposal to extricate her from the peril, he will not be justified in selling over through the danger at the time appear exceedingly imminent."

Not only in the opinion of the judges forming the majority of the court were not such efforts made, but they were unable to perceive, even upon the evidence of the plaintiff himself, any reason

why those efforts were not made. Their Lordships agree with that view; and therefore they will humbly advise Her Majesty that the judgment of the court below, refusing to make the rule absolute for a new trial, be reversed, that the rule be made absolute for a new trial, and that the costs of the first trial and of this appeal do abide the event.

Solicitors for the appellants, *Daines and Sons*.
Solicitors for the respondent, *Hill and Son*.

COURT OF EXCHEQUER.

Reported by H. LEWIS and GUTHRIE DODD, Esqrs., Barristers at-Law.

Nov. 23, 1874; and Feb. 12, 1875.

GUNESTAD V. PRICE AND OTHERS.

FULLMORE V. WAIT.

County Courts Admiralty Jurisdiction Acts (31 & 32 Vict. c. 71, s. 9; 32 & 33 Vict. c. 51, s. 2)—*Action for demurrage in Superior Court—Claim under 300l.—Jurisdiction—Plaintiff's right to costs—Certificate for—Construction of statute.*

The jurisdiction given to the County Courts by the County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71) sect. 3, and the County Courts Admiralty Jurisdiction Amendment Act 1869 (32 & 33 Vict. c. 51) sect. 2, is confined to causes within the jurisdiction of the High Court of Admiralty; and, therefore, in an action in a Superior Court on a charter-party for freight or demurrage, which is a cause not within the jurisdiction of the Admiralty Court, a plaintiff, claiming and recovering a sum between 20l. and 300l., is entitled to his costs, and cannot be deprived of them by the operation of sect. 9 of the Act of 1868 (31 & 32 Vict. c. 71), which is not applicable to such a case.

Simpson v. Blues (ante, vol. 1, p. 326; *L. Rep.* 7 C. P. 290; 26 L. T. Rep. N. S. 679) approved, and *Cargo ex Argos* (ante vol. 1, p. 519; *L. Rep.* 5 P. C. 134; 28 L. T. Rep. N. S. 77) dissented from.

The first-mentioned of these cases, *Gunestad v. Price and others*, was an action brought by the plaintiff, a shipowner, against the defendants, as charterers, to recover the balance of an account for freight and demurrage, amounting to the sum of 95l. 6s. 3d. Two counts of the plaintiffs' declaration were upon a charter-party for the freight and demurrage, and there were also the usual money counts. In answer to the action the defendants paid into court the sum of 33l. 16s. 6d., and with respect to the residue of the plaintiffs' claim they pleaded several pleas. The cause came on for trial on the 26th Feb. 1874, at the sittings for London after Hilary Term 1874, before Kelly, C.B., and a special jury, when a verdict was found in favour of the plaintiff for the sum of 19l. 1s. 9d., beyond the amount paid into court as above-mentioned.

Subsequently thereto the plaintiff delivered his bill of costs, and upon its coming in the usual course before the master for taxation, it was objected on the part of the defendants that inasmuch as under the second section of the County Courts Admiralty Jurisdiction Amendment Act 1869 (32 & 33 Vict. c. 51), the action should have been brought and tried in the County Court, the plaintiff came under sect. 9 of the County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict.

[Ex.]

GUNESTRAD v. PRICE AND OTHERS; FULLMORE v. WAIT.

[Ex.]

c. 71), and was thereby disentitled to recover his costs, and was also liable to pay the defendant's costs. The master, however, was of opinion that the case did not come within the jurisdiction of the County Court, and could not have been tried there, and he accordingly decided that the plaintiff was entitled to his costs; and for the purpose of having the question brought before the court for its decision, he, at the request of the defendants, and with the plaintiff's consent, gave his allocatur for the sum of 120*l.*, a nominal amount agreed to by both parties.

The defendants afterwards moved for and obtained a rule nisi calling on the plaintiff to show cause why the master should not review his taxation, and the allocatur be set aside, on the ground that the cause was an Admiralty cause within the meaning of the County Courts Admiralty Jurisdiction Act 1868, and the County Courts Admiralty Jurisdiction Amendment Act 1869; and subsequently to that rule having been obtained by the defendants, an application was made on the part of the plaintiff to the learned Chief Baron for a certificate that the cause was one that was proper to be tried in the Superior Court, and the certificate was accordingly given by the learned judge.

The other case of *Fullmore v. Wait* was also an action by a shipowner against the charterer to recover the sum of 100*l.* for freight and demurrage. The declaration, in addition to the common money counts, contained a count which charged that a cargo was shipped on board the plaintiff's vessel to be delivered at Bristol under a bill of lading, incorporating the terms of the charter-party, and that the defendant as indorsee of the bill of lading, promised the plaintiff to discharge the cargo within the time prescribed for so doing by the charter party, and to pay a demurrage of 13*l.* a day for every day's detention beyond that limited time according to the terms of the charter-party; and it charged a detention by the defendant of the plaintiff's vessel for seven days on demurrage. In answer to this claim, the defendant paid 78*l.* into court, and pleaded never indebted except as to the said 78*l.* The defendant took this 78*l.* out of court in full satisfaction of his claim, and entered a *nolle prosequi* as to the residue.

In this case also the master taxed the plaintiff's costs, although an objection was taken by the defendant similar to that which was taken in the previous case, and having given his allocatur for the amount, a rule nisi was obtained by the defendant for the master to review his taxation, upon the ground that the action should have been brought in the County Court and not in a Superior Court, but no certificate for costs was obtained in this case.

The following sections of the various Acts of Parliament relating to the jurisdiction of the High Court of Admiralty, and to the Admiralty Jurisdiction of the County Courts, were cited and referred to in the arguments of counsel and the judgments of the court, and are material to the case.

The Admiralty Court Act 1861 (24 Vict. c. 10).

Sec. 6. The High Court of Admiralty shall have jurisdiction over any claim by the owner, or co-owner, or assignee of any bill of lading of any goods carried into any port in England or Wales in any ship, for damage done to the goods, or any part thereof, by the negligence or misconduct of, or for any breach of duty or breach of

contract on the part of the owners, master, or crew of the ship, unless it is shown to the satisfaction of the court, that, at the time of the institution of the cause, any owner or part owner of the ship is domiciled in England or Wales: Provided always, that if in such cases the plaintiff do not recover 20*l.* he shall not be entitled to any costs, charges, or expenses incurred by him therein, unless the judge shall certify that the cause was a *bona fide* to be tried in the said court.

The County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71).

Sec. 2. If at any time after the passing of this Act it appears to Her Majesty in council expedient that any County Court should have admiralty jurisdiction, it shall be lawful for Her Majesty by order in council to appoint that County Court to have admiralty jurisdiction . . . and such County Court so appointed to have such admiralty jurisdiction shall for the purposes of this Act be deemed a County Court having admiralty jurisdiction.

Sec. 3. Any County Court having admiralty jurisdiction shall have jurisdiction and all powers and authorities relating thereto, to try and determine the following causes (in the Act referred to as admiralty causes):

- (1) As to any claim for salvage, any cause in which the value of the property saved does not exceed 1000*l.*, or the amount claimed exceed 300*l.*
- (2) As to any claim for towage, necessaries, wages, &c.; any cause in which the claim does not exceed 150*l.*
- (3) As to any claim for damage to cargo, or by collision; any cause in which the amount claimed does not exceed 300*l.*
- (4) Any cause in respect of any such claim aforesaid where the amount of claim exceeds the amount limited as above, when the parties agree that any County Court having admiralty jurisdiction shall have jurisdiction.

Sec. 6. The High Court of Admiralty, on motion by any party to an admiralty cause pending in a County Court, may, if it shall think fit, with previous notice to the other party, transfer the cause to the High Court of Admiralty, and may order security for costs, or impose such other terms as to the court may seem fit.

Sec. 9. If any person shall take in the High Court of Admiralty of England, or in any Superior Court, proceedings which he might, without agreement, have taken in a County Court, except by order of the judge of the High Court of Admiralty, or of such Superior Court, or of a County Court having admiralty jurisdiction, and shall not recover a sum exceeding the amount to which the jurisdiction of the County Court in that admiralty cause is limited by this Act, and also if any person without agreement shall, except by order as aforesaid, take proceedings as to salvage in the High Court of Admiralty or in any Superior Court in respect of property saved, the value of which when saved does not exceed 1000*l.*, he shall not be entitled to costs, and shall be liable to be condemned in costs, unless the judge of the High Court of Admiralty, or of a Superior Court before whom the cause is tried or heard, shall certify that it was a proper cause to be tried in the High Court of Admiralty of England, or in a Superior Court.

The County Courts Admiralty Jurisdiction Amendment Act 1869 (32 & 33 Vict. c. 51).

Sec. 1. Enacts that the Act shall be read and interpreted as one Act with the County Courts Admiralty Jurisdiction Act 1868.

Sec. 2. Any County Court appointed or to be appointed to have admiralty jurisdiction, shall have jurisdiction, and all provisions and authorities relating thereto, to try and determine the following causes:

- (1) As to any claim arising out of any agreement made in relation to the use or hire of any ship, or in relation to the carriage of goods in any ship, and also as to any claim in tort in respect of goods carried in any ship, provided the amount claimed does not exceed 300*l.*
- (2) As to any cause in respect to any such claim as aforesaid, but in which the amount claimed is beyond the amount limited as above-mentioned, when the parties agree, by a memorandum signed by them or their attorneys, or agents, that any County Court having admiralty jurisdiction and specified in the memorandum, shall have jurisdiction.

[Ex.]

GUNSTEAD v. PRICE AND OTHERS; FULLMORE v. WAIT.

[Ex.]

Both rules now came on for argument, and against the first-mentioned rule in *Gunstead v. Price and others*:

Benjamin, Q.C., and *Bigham* for the plaintiff, showed cause, relying on the decision of the Court of Common Pleas in the case of *Simpson v. Blues* (*ante*, vol. 1, p. 326; 26 L. T. Rep. N. S. 679; L. Rep. 7 C. P. 290), and contending that the court should follow that case rather than the decision of the case in the Privy Council of *Carago ex Argos* (*ante*, vol. 1, p. 519; 28 L. T. Rep. N. S. 77; L. Rep. 5 P. C. App. Cas. 134), which they urged was not binding on this court: (*The Merchant Shipping Company v. Ardwick and others* in the Exchequer Chamber in error from the Queen's Bench, *ante*, p. 185; 29 L. T. Rep. N. S. 809; L. Rep. 9 Q. B. 99; *Smith and others v. Brown and others*, 1 Asp. Mar. Law Cas. 56; 24 L. T. Rep. N. S. 808; L. Rep. 6 Q. B. 729, and various dicta of the learned judges in these cases). With regard to the certificate of the learned Chief Baron being given in time they cited *Swift v. Jewsbury* (30 L. T. Rep. N. S. 31; L. Rep. 9 Q. B. 560); *Ligon v. Hyman* (20 L. J. 1, Ex.; 5 Ex. 749), and contended that if the judgment here was to be taken as a final judgment, then before the present application on the part of the defendants could be entertained, they should have applied to set the judgment aside; but if a final judgment had not been signed, then the certificate was in good time, as it could be given at any time before the signing of final judgment.

Field, Q.C. and *Foard* for the defendants supported their rule.—The certificate of the learned Chief Baron was given too late, first, because it was after final judgment had been signed; and, secondly, because it was not given until after the master's allocutus; and thirdly, because it was not granted until after the present rule nisi had been granted to the defendants, and it was not within the competency of the learned judge to give it. The action was for demurrage, and the claim which arose out of an agreement for the use of the plaintiffs' ship, presented a question, which was a simple one of fact for a jury, and the case was one which should have been brought and tried in the County Court.

In the other case of *Fullmore v. Wait*,

Cohen Q.C. (with whom was *F. Meadows White*) shewed cause for the plaintiff.—This was not a case within sect. 9 of the Act of 1868 (31 & 32 Vict. c. 71), which applied to cases over which the Court of Admiralty had exclusive jurisdiction, and there would be a great and manifest hardship in holding that that section applied to a case where judgment was suffered by default, and where consequently the cause was not either "tried or heard" before a judge within the section. In such a case there is no judge who could give a certificate. That was the true construction of the statute according to its literal interpretation, and that was the construction which it should receive, for otherwise anyone with a clear irresistible claim would have to apply for leave to bring his action in the Superior Court, since otherwise the claim might be satisfied by the payment into court of less than 300*l.*, and no certificate could be obtained. The words of the section also, "the judge of a Superior Court" go to shew that it did not apply to an action in a common law court, in which there are a plurality of judges. In *Hewitt*

v. Cory (22 L. T. Rep. N. S. 666; L. Rep. 5 Q. B. 418; 3 Mar. Law. Cas. O. S. 425), this point was not brought to the attention of the court. It is contended that *Simpson v. Blues* (*ubi sup.*)—to their decision in which case the Court of Common Pleas had adhered since the case of *Carago ex Argos* in the Privy Council—should be followed by this court on the present occasion rather than the case of *Carago ex Argos*. He referred also to a decision in the High Court of Admiralty a few days ago to the effect that the Court of Admiralty may have jurisdiction over charter-parties so far as they relate to obligations which have to be fulfilled after the goods have been shipped on board the vessel, but not before. (See this case since reported, *The Dannebrog*, *ante*, p. 452; 31 L. T. Rep. N. S. 759.)

R. E. Webster for the defendant, in support of his rule.—The argument arising from the hardship, which it is said by the plaintiff would occur in these cases if the defendants' construction of the statute is to prevail, is answered by the fact that a plaintiff can always, before commencing an action, apply for and obtain leave to bring his action in the superior courts, and then he would not be deprived of his costs by a payment into court. The scope of the County Courts Admiralty Jurisdiction Amendment Act 1869 is larger than that of the Act of 1868, and the later Act not only amends the former Act, but gives an extended jurisdiction. The present case comes clearly within the definition of Admiralty causes which is contained in sect. 3 of the Act of 1868. The decision of the Privy Council in *Carago ex Argos* was, he contended, preferable to that of the Court of Common Pleas in *Simpson v. Blues*, and should be followed on the present occasion. He cited also *Purkie v. Flower*, in the Bail Court, before Lush and Archibald, J.J. (*ante*, p. 226; 30 L. T. Rep. N. S. 45; L. Rep. 9 Q. B. 114.)

Cur. adv. vult.

Feb. 12, 1875.—*CLEARY, B.* (reading his own written judgment, in which the learned judge said that *Kelly, C.B.* and *Amphlett, B.*, concurred). It is unnecessary to state the facts of this case. The claim in each case is one by the owner of a ship against the charterer for demurrage, and the question raised and argued before us was, whether such a claim being under 300*l.*, could be entertained by the County Court by a jurisdiction conferred upon it by the County Courts Admiralty Jurisdiction Amendment Act 1869 (32 & 33 Vict. c. 51). The County Courts Admiralty Jurisdiction Act 1868 had first given admiralty jurisdiction to the County Courts, and by the Act of the next year the jurisdiction was extended. The question is to what extent? The first Act had only given the County Courts jurisdiction to a limited amount in certain matters in which the Court of Admiralty had jurisdiction, and the question is whether the late Act only increased the jurisdiction of the County Courts over matters then subject to admiralty jurisdiction, or created a new admiralty jurisdiction. The enactment by section 2 is that any County Court appointed to have admiralty jurisdiction, shall have jurisdiction to try the following causes:

"As to any claim arising out of any agreement made in relation to the use or hire of any ship, or in relation to the carriage of goods in any ship, and also as to any claim in respect of goods carried in any ship, provided the amount claimed does not exceed 300*l.*"

[Ex.]

GUNESTAD v. PRICE AND OTHERS; FULLMORE v. WAIT.

[Ex.]

Those words, in their natural sense, are, no doubt, large enough to comprise a claim by shipowners for demurrage, which was not at the time the subject of admiralty jurisdiction at all, and we have to consider whether there is any reason why they should receive a more limited construction, so as to exclude such a claim. If the words were so definite and specific as to apply themselves to an understood subject, they would speak for themselves, and there would be no ground for getting at their proper effect by construction. But if the language is general, and so general that it appears inapplicable without some limitation, then we are entitled to see by the immediate context, or the subject-matter to which they are intended to apply, what, if any, limitation ought to be put upon them. Now the words, in their terms, include causes (that is all causes) as to any claim whatever (whether made by shipowner, charterer, passenger, shipper of goods, consignee or assignee of bill of lading, or any other person) arising out of any agreement relating to the use or hire of any ship. The words are not "any agreement for the hire of any ship," but "in relation" thereto, and would, therefore, include an agreement for commission upon obtaining charter, or an agreement to repair, if coupled with an agreement to charter, and a variety of collateral agreements of that nature. The limitation of amount does not in any way limit the character of the claims, and the words may, I think, be regarded as general words properly limited in their meaning, if there is anything in the context or the nature of the subject to limit them.

The maxim that general words are limited in their application is constantly acted upon. The maxim itself is thus expressed by Bacon (Maxims, Reg. 10), "For all words, whether they be in deeds or statutes or otherwise, if they be general and not express and precise, shall be restrained unto the fineness of the matter or person."

Where they follow an enumeration of particular things, they do not introduce things of a higher and different character (see *The Archbishop of Canterbury's case*, 1 Co. Rep. part 2, 46a; *Cashe v. Holmes*, 2 B. & Ad. 592; 9 L. J. 280, K.B.). In the judgment in *Reg. v. Edmondson* (28 L. J. 213, at p. 215 M. C.; 2 Eil. & Ell. 77, at p. 83), Lord Campbell, C.J. thus lays down the rule: "The general principle laid down in all the cases which have been cited is, that where particular words are followed by general words, the latter must be construed as *ejusdem generis* with the former." And in the judgment in *Reg. v. Cleworth* (9 L. T. Rep. N. S. 642; 4 B. & S. 927), the present Lord Chief Justice (4 B. & S. 932) uses the following language: "Then there is a general expression, 'other persons whatsoever,' but, according to a well established rule in the construction of statutes, general terms following particular ones apply only to such persons and things as are *ejusdem generis*."

If in the present case, instead of the general words in the section standing alone, we had had an enumeration of the causes subject to admiralty jurisdiction, similar to what is contained in the 3rd section of the 31 & 32 Vict. c. 71, and had then had the general words found in the section in question, I should certainly have thought that these general words would have been limited to causes of the same character as those enumerated—namely, causes over which the Court of Admiralty itself had

jurisdiction. As the two Acts are to be read together, and the first Act gives Admiralty jurisdiction, and the second extends it, the particular words in the first may perhaps be regarded as followed by the general words in the second, and so the rule would apply. But, independent of this, general words are to be limited to the subject-matter, as in the ordinary case of a recital in a deed qualifying general words of release following (not to mention other instances), as in *Fayler v. Hanerakhan* (4 M. & S. 423); *Sinuous v. Johnson* (3 B. & Ad. 175; 1 L. J. N.S. 98 K.B.). See the note to *Bee v. Transmar* (2 Smith's Lead. Cas., 6th edit. p. 476; 5th edit. p. 451). For example, if in this case, taking the two Acts to be one, there had been a recital that it was "expedient to enlarge the jurisdiction of the County Courts," and no more, then the general words of the enactment would be read by giving the fullest effect to them, so as to enlarge that jurisdiction. In that case the subject-matter of legislation would have been simply the enlargement of the jurisdiction of the County Courts. But, if the recital in the Act had been "whereas it is expedient to transfer to the County Courts a portion of the jurisdiction of the Admiralty Court to a limited amount," then I feel satisfied that the words, however general, should be read as only including causes within admiralty jurisdiction. In that case the subject-matter of legislation would have been admiralty jurisdiction, and the subject would have been to make the County Courts available for the exercise of it to a limited amount.

In arriving at a proper conclusion upon the present question, which is no doubt one of much difficulty, from loose legislation, we could not take a safer guide than the recital of the first statute, the 31 & 32 Vict. c. 71 (which is to be read as one statute with the second Act, the 32 & 33 Vict. c. 51), if there were one. But though there is no formal recital, the first enacting clause may, I think, be regarded as having the same effect in showing what the subject-matter of legislation was. That clause (sect. 2) enacts that if Her Majesty thinks it expedient she may give the County Courts "Admiralty jurisdiction." What does that mean? The natural meaning of it is to give to the County Courts jurisdiction possessed by the Court of Admiralty; I can give it no other meaning. There is nothing in that Act to give it any other meaning. The use of the words "Admiralty causes" in that Act afterwards does not do so. Indeed, the difficulty does not arise under that Act of Parliament, but under the second Act, as to which it may no doubt be urged that the language of the second section of the former Act is inapplicable. And, if it was clear that the whole of the Admiralty jurisdiction was exhausted by the former Act, and that the second Act, to have any operation at all, must be applied to new and additional subjects of jurisdiction, I should think the argument conclusive. But that is undoubtedly not the case. There are subjects included in the Admiralty Court Act 1861 (24 Vict. c. 10) which are not included in the County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71), and upon which the subsequent statute may take effect.

The question before us has formed the subject of two most able judgments in the Court of Common Pleas in *Simpson v. Blane* (*ubi sup.*) and in the Privy Council in *Cargo ex Argos* (*ubi sup.*), and

[Ex.]

GUNESTEAR V. PRICE AND OTHERS; FULLMORE V. WAIT.

[Ex.]

It would be impossible to weigh and then correctly balance the strong reasons brought forward in favour of each view. And I have found myself compelled, in a case of great difficulty, to resort to the simple and well-grounded means of ascertaining what ought to be regarded as the real subject-matter of legislation; and in this way I have come to the conclusion that nothing but admiralty jurisdiction was operated upon. But I must notice one argument founded upon the 6th section of the first Act (31 & 32 Vict. c. 71), by which the Court of Admiralty may transfer from the County Court any admiralty cause then pending to the Court of Admiralty. This section is no doubt incorporated in the subsequent statute (32 & 33 Vict. c. 51) as was held in *The Scotia* (23 L. T. Rep. N. S. 633; L. Rep. 3 Adm. & Ecc. 311; 40 L. J. 8, Adm.). The alternative then arises of holding, either that the County Court only entertains admiralty causes within the jurisdiction of the Court of Admiralty, or that the Court of Admiralty has indirectly acquired jurisdiction over a new subject matter. It certainly seems to me that the latter alternative involves a more violent breach of the first principles of construction than the former.

I only wish further to notice the 6th section of the Admiralty Court Act 1861 (24 & 25 Vict. c. 10), for the purpose of guarding against an argument that the County Court has acquired a jurisdiction not possessed by the Court of Admiralty. That section, after giving to the High Court of Admiralty a large jurisdiction in claims by owners of any goods carried into any port, adds: "Unless it be shown to the satisfaction of the court that, at the time of the institution of the cause, any owner or part owner of the ship is domiciled in England or Wales." These latter words do not, properly speaking, limit the subject-matter of jurisdiction, but they assume the jurisdiction in the cases provided for, and provide that, upon proof to the satisfaction of the court, that the owner is so domiciled, the jurisdiction shall not be exercised. But the court could only be satisfied by proof given in some cause over which, but for the application of the proviso, it would have jurisdiction. There is nothing, therefore, inconsistent in the County Court, by means of its process under the 3rd section of the Act of 1869 (32 & 33 Vict. c. 51), exercising its jurisdiction when the owner is domiciled in England or Wales, though the Court of Admiralty would not do so.

The conclusion is that the plaintiffs in both these cases proceeded properly in the Superior Court, and are, therefore, entitled to their costs.

BRAMWELL, B.—I am of opinion in these cases that, whether we thought the Court of Common Pleas or the Privy Council right, we ought to give judgment for the plaintiffs that they should respectively recover their costs. We are invited to say that they are not entitled to them because they should have sued in the County Court in which (if they had sued therein) the Court of Common Pleas have said that they would have prohibited them from proceeding. If we were so to hold, it would be ludicrous and a scandal. It is no answer to this to say that the plaintiffs might have got leave to sue in the superior courts. They might or they might not have gotten such leave. But what they are now claiming they claim as of right and not as a matter

dependent on the opinion of any superior court as to where the action should have been brought.

This being my view, and it being always a matter in which the difficulty might be obviated by leave being granted to sue in the Superior Courts (which I should think no judge would ever refuse), and it being in the power of the Legislature to state what was or is its intention, the subject is, perhaps not worth much discussion, with all respect be it said to the two great authorities who have differed.

But, if we are to choose between them it seems to me that the Court of Common Pleas, in their decision in *Simpson v. Blues* (*ubi sup.*), was right. The difficulties in the way of the decision of the Privy Council in *Cargo ex Argos* (*ubi sup.*) are most forcibly put in their judgment, and to these are added most cogent arguments in the judgment of the Court of Common Pleas in *Simpson v. Blues* against the expediency of giving admiralty jurisdiction in such cases as those in question either to the High Court of Admiralty or to the County Court. Shortly stated, the objections are that, on the construction contended for by the defendants, the County Court would have an admiralty jurisdiction in cases in which the Admiralty Court had no original jurisdiction; that the High Court of Admiralty would have an appellate jurisdiction where it had not an original jurisdiction; that there would be transferred to it from the County Court causes which it could not originally entertain, and so that it could hear and decide cases not properly within its own jurisdiction, or that of the County Court. To these objections are to be added, not as aiding the construction of the statute, but as helping to the probable intention of the Legislature, the objections, so forcibly stated in the judgment of the Court of Common Pleas, to admiralty procedure being applied to such cases as those in question.

These different considerations were felt so strongly by the Privy Council, that they would perhaps have decided as the Common Pleas did, but for the necessity of finding an application for words for which they saw none if the decision of the Common Pleas were right. With great respect, it seems to me that a meaning may be given to the words without the admittedly posterous consequences which the defendants contend for. The words are, "any claim arising out of any agreement made in relation to the use or hire of any ship." I cannot think that the enactment is in plain and intelligible language, free from any ambiguity. If I found the words without anything to control them or to guide me in their interpretation, I should say that they included the cases before us, and much more. But, as it is, I declare I do not know what they mean or were intended to mean. A charter-party is not an "agreement for the use or hire of a ship," but it is said to be included in the words "any claim arising out of any agreement made in relation to the use or hire of any ship." Would that include the shipbroker's claim for finding a charter? See the case of *The Naves Rindholm* (1 Asp. Mar. Law Cas. 16; L. Rep. 3 Adm. & Ecc. 483.) Take the next word, "any claim arising out of any agreement in relation to the carriage of goods in any ship." Does that include a claim on a policy of insurance? The policy is an agreement not for but "in relation to

[EX.]

THE PURITAN.

[AMERICAN REPS.]

the carriage of goods in a ship." Some restriction must be put upon the words. If the ship were in dock, and hired for a dance to be given on board in the dock, it surely would not be an admiralty case. Nor, one would think, would an agreement by the owner of a river steamer to take a party to Richmond. Would a ship on Lake Windermere be within the enactment, or a trading barge on a canal? Let us read the words thus, "Shall have jurisdiction to try and determine the following cases: Where the High Court of Admiralty has jurisdiction as to any claim arising out of any agreement made in relation to the use or hire of any ship or in relation to the carriage of goods in any ship." Are there such cases? I think there are. The High Court of Admiralty has jurisdiction over any "claim" (the same word) "by the owner, or consignee, or assignee of any bill of lading of any goods carried into any port in England or Wales, in any ship, for damage done to the goods, or any part thereof, by the negligence or misconduct of, or from any breach of duty on the part of, the owner, master, or crew of the ship" (24 Vict. c. 10, s. 6, and vide *The Piece Supérieure*, ante, pp. 162, 319; 29 L. T. Rep. N. S. 702; L. Rep. 5 P. C. App. Cas. 482.) So that the owner of goods carried into any port in England, having a claim for damages to them, arising out of a breach of contract by the owner of the ship, may sue in the High Court of Admiralty. But the contract broken may be a charter-party, which is a contract in a sense, although not strictly so, for "the use or hire of a ship." So as to the latter part of the clause, "agreement made in relation to the carriage of any goods in any ship." This would apply to claims by the charterer or shipper under a bill of lading, or other owner of goods carried under charters or otherwise. This construction, as it seems to me, gives a meaning to the words without the absurd consequences which would follow on the defendant's construction. Therefore, I think that both these rules should be discharged.

As to the other point arising in one of the present cases, that of *Fallmore v. Wait*, namely, that the section as to costs, does not apply where there is judgment by default, and that it does not apply to actions in common law courts, we need express no opinion with regard to them. The arguments presented to us were not presented to the Court of Queen's Bench in the case of *Hewitt v. Cory* (*ubi sup.*). We do not, therefore, recognise that case as an authority against the plaintiffs here.

It seems preposterous to suppose that the Legislature has intended that cases over 300*l.* may be tried either on common law or admiralty principles; cases under 20*l.* on the same; but cases between these amounts on admiralty principles only, except at the peril of the plaintiff losing his costs. The difficulty arises from the use of the words "any Superior Court." Perhaps they should be read as "Superior Court of Admiralty, if any." (See Mr. Day's argument on this point in his *Common Law Procedure Acts*, 4th edit. p. 377.) The section supposes that "the judge" always hears or decides the case, apparently pointing to a court where there is one judge, and where the case is usually adjudged. Rule discharged.

In *Gunstead v. Price and others*:

Attorneys for the plaintiff, Chester, Urquhart, Mayhew and Holbein, agents for Bradshaw and Pearson, Barrow-in-Furness.

Attorneys for the defendants, Scott, Jarmain, and Co., agents for Frank Taylor, Barrow-in-Furness.

In *Fallmore v. Wait*:

Attorneys for the plaintiff, Thos. White and Sons, agents for H. Britton, Press, and Inskip, Bristol.

Attorneys for the defendant, Stibbard and Croushay.

AMERICAN REPORTS.

Reported by R. D. BENEDET, Proctor and Advocate.

UNITED STATES DISTRICT COURT. EASTERN DISTRICT OF NEW YORK.

THE PURITAN.

Salvage by steamtugs near a port—Derelict—Apportionment.

Where an abandoned ship is found ashore on a shoal by two tugs which, while she is ashore are unable to render assistance, but on her floating off with wind and tide make fast and prevent her from going ashore again and take her to a place of safety, their service is salvage and not mere towage, nor is their service diminished in value by the proximity of a third tug, which could, but did not, render any assistance.

Where the master and crew of a ship in distress are taken off by a steam tug (there being no immediate danger to life), and are taken ashore by the tug, which afterwards returns to the ship with her master and finds her placed in safety by other salvors, that tug has no claim for salvage reward.

The ship *P.*, in endeavouring to enter the harbour of New York, struck on the False Hook, a bar running parallel to Sandy Hook. The channel to the west, between it and Sandy Hook, is about 300 yards wide, and to the east of it is the open sea. The wind was blowing a gale directly on shore, and the ship grounded so hard on the shoal that in fifteen minutes she had 8 ft. of water in her, and soon after portions of her keel came up alongside.

A powerful tug, the *C.*, came near her, and the captain and crew of the ship, thinking that the ship would not come off from the shoal, left her and went up to New York in the *C.* Another tug, the *W.*, had also in the meantime approached, but her captain, seeing the condition of the ship, also thought she would never come off, and she went away looking for other business.

About an hour afterwards two other tugs, the *J. G. N.* and the *J. M.*, seeing the flag of distress which had been left flying, went to the ship and found her abandoned. They lay by her, and after a while found that she was moving, and went about to come off the shoal on the inshore side. Having agreed to share in the salvage, they ran in close to her, and put on board four men, and got a hawser to her, when she came off the shoal, and they succeeded in towing her round the point of Sandy Hook into the Bay, where they put her on the mud, pumped her all night, and the next day at noon brought her to a dock in safety.

When the captain of the *W.* saw the ship moving he came up also and offered his assistance to the two tugs, which then were towing the ship, but it was refused. The captain of the ship, on the tug *C.*, on his way up to New York, left word with a wrecking company to be ready to go to the ship.

[AMERICAN REFS.]

THE PURITAN.

[AMERICAN REFS.]

He left his crew in New York, and the next morning early he went himself on board the *C.* to look for the ship, and found her on the mud in charge of the salvors.

The owners of the two tugs filed a libel for salvage.

The owners of the *C.* also filed a petition claiming salvage. The ship and her cargo and freight were worth from 225,000 to 237,000 dols. The tugs were worth, one of them 9000 dols., and the other 17,000 dols. Each of them had a crew of six, all told, and on one of them was a boy who had gone with the tug for a pleasure trip.

Held, that in view of the peril to the property, the value of the property saved, the risk of loss of the tugs, and the danger to the lives of their crews (although such danger and risk was not excessive, and the services did not extend over about twenty hours), the sum of 30,000 dols. was a proper amount of salvage to be paid to the two tugs.

That the *C.* was not entitled to recover salvage.

That the amount of salvage be divided equally between the two tugs; that the masters of them receive 3000 dols. each; that the men who went on board the ship, and especially one who took charge on board of her, receive a higher rate than their fellows, and that the rate of wages afforded a proper criterion by which to fix the shares of the men.

BENNETT, J.—This action is brought by the owners and crews of two steam tugs, called respectively the *Jacob G. Noe* and the *Jacob Myers*, to recover for salvage services rendered to the ship *Puritan*.

On the 17th April 1874, the ship *Puritan*, laden with a valuable cargo, when attempting to enter the harbour of New York during an easterly gale, grounded upon what is called by some the Outer Middle, but on the charts is named the False Hook, a shoal lying outside of Sandy Hook, between which and Sandy Hook there runs a narrow channel 300 or 400 yards wide, and outside of which to eastward is the open sea. At the time the ship grounded on this shoal the waves broke heavily about her, and she grounded so that in a very short time portions of her keel appeared on the surface of the water, and she was found to have made 8 ft. of water in her hold within ten or fifteen minutes after striking. While in this condition she was approached by the steaming *Cyclops*, a powerful tug, when all on board left the ship in a boat, and went on board the *Cyclops* and proceeded to New York, leaving the ship abandoned, and, as was supposed, permanently fast upon the shoal. Afterwards, on the same day, the tugs *Noe* and *Myers*, while proceeding down the bay inside, observed the ship with her signal of distress flying. They at once proceeded to her assistance. Upon reaching her they found no one on board, and that it was impossible to assist her as she then lay. They did not, however, depart, but remained by her with the intent to afford her aid if the opportunity should arise, as it was observed by them that the action of the heavy seas upon the ship seemed likely to drive her over the shoal. This actually occurred, and after the lapse of an hour or so it was seen that the ship was about to come off the shoal on the inside. Thereupon the two tugs, having first come to an understanding to share in the labour and the reward, placed four men on board of her, and having got out hawsers, took her in tow as soon as she cleared the shoal, and succeeded in towing

her past the Hook in safety, and in placing her upon the mud at the Horse Shoe in the Lower Bay. She was there pumped all night, and the next morning was brought by the salvors to a wharf in Brooklyn.

A dispute thereupon arose between the salvors and the owners of the ship and cargo as to the amount of compensation to be paid for the services rendered by these two tugs, to determine which the present action has been brought. The parties differ widely—the libellants asking for a large reward as for a salvage service of unusual merit, while the claimants earnestly contend that 1000 dols. would be a liberal compensation.

This difference arises mainly from a dispute as to the proper effect of the evidence in regard to two controlling features of the case. The libellants insist that the ship was rescued from a position of great danger, inasmuch as, without the aid of these tugs, she would have been driven by the storm upon the exposed beach of Sandy Hook outside; while the claimants contend that without any aid from the tugs, the ship would have drifted past the Hook and into safe water in the Lower Bay.

Upon this question of fact, I am of opinion that the evidence fails to sustain the position taken by the claimants. The weight of evidence shows that the ship when she came off the shoal would, if unaided, have been driven upon the beach, which was some 300 or 400 yards to leeward, and would there have sustained very great damage, if not put in peril of total loss of the ship and her cargo. This appears not only from the testimony of the salvors, but from that of the captain of the *Walcott*, a disinterested person, who returned to the ship after the libellants had taken hold, and who states that with two tugs towing the ship it was all they could do to keep her off the beach.

A second great point of controversy is this: the claimants contend that the ship was not rescued from danger, because she came off the shoal without aid, and then not only were the two tugs of the libellants there, but the *Walcott*, also a powerful tug, was at hand. It is said, therefore, that these tugs should be deemed to be competitors for a towage service there to be performed, and that, whatever either of them would have been willing to have been employed for to perform the service is a fair price for the *Puritan* to pay.

The evidence in respect to the *Walcott* is, that in the afternoon, having been informed by a Sandy Hook pilot that the *Puritan* was ashore, she steered towards her by compass, the weather being then too thick to enable the ship to be seen, and found the *Cyclops* at the ship. As the *Walcott* was expecting a Calcutta ship she remained outside, and for a time in the neighbourhood of the *Puritan*. After the *Cyclops* departed for New York with the *Puritan's* crew on board, the *Walcott* departed, because the captain judged it to be useless to stay. He says he did not think the ship would come off. She looked bad. He did not calculate she would ever get off, except in pieces. Afterwards, when he saw the *Noe* and the *Myers* at the ship, he ran again near to her, and was ready to afford additional aid, if such aid had been required. I am unable to see how the presence of the *Walcott* under such circumstances can

[AMERICAN REPS.]

THE PURITAN.

[AMERICAN REPS.]

affect the claim of the libellants. The *Walcott* certainly had no idea of being able to rescue the ship. She had departed on her own business, and it cannot be known that she would have returned to the ship at all if she had not observed the *Neafie* and the *Myers* there. When she did return her presence was of no value, for the other tugs already had held of the ship, and were safely conducting her towards the harbour. Moreover, it is not certain that when the *Walcott* arrived she could have saved the ship. She was no doubt powerful enough to tow the ship, but she was not on the spot when the ship began to move, and, situated as this ship then was, time was everything—a little delay would have carried the ship so near to the beach that no tug could have then rescued her. One of the witnesses says that the ship would have been ashore in ten minutes after she began to move if it had not been for the exertions of the libellants. Furthermore, the service of the *Neafie* and the *Myers* to this ship commenced when, in answer to her signal of distress, they put out from the harbour into the open sea; the service continued while they lay by her in order to be able to render the instant assistance demanded by the position of the ship when she came off the shoal; and it did not terminate until the vessel was moored at the Brooklyn Wharf. It is difficult to see why the promptness and zeal displayed by these two tugs should be held less meritorious because another tug, which had entertained no idea of being able to aid the ship, presented herself while they were in the act of affording aid.

Nor does it strike me as reasonable to say that the position of this ship was that of a vessel free from danger having three tugs by her competing for the employment of towing her to the harbour. The ship was abandoned. There was no one there to employ the tugs, and the tugs were under no obligation to tow her without being employed. Although under no obligation to do it, these two tugs did voluntarily aid this ship, and by combining their efforts they were enabled to do what neither of them could have done alone, namely, to save the ship from going ashore.

To bring about precisely such results is the sole object of the law of salvage; and in my opinion it would be a violation of that law to refuse to these salvors the liberal reward which the maritime law holds out as an inducement to exertion on the part of those who may be so situated as to be able to render service to a ship in distress. The luck of being in a position to render assistance to a ship in distress, the maritime law makes good luck, to the end that distressed ships may receive all possible aid.

My conclusion, therefore, is that the grounds upon which the claimants have based their refusal to pay the libellants a salvage reward are untenable in view of the evidence, and that the libellants are entitled to a liberal salvage reward.

There remains, then, but to notice some features of the case in addition to those already alluded to, which, in accordance with established rules, are to be taken into account in determining the amount to be awarded.

It is said these tugs incurred no danger, inasmuch as they kept at a respectful distance from the labouring ship, so long as she was grounding on the shoal. But it was useless then to approach near her. The evidence is, that nothing

could be done until the ship freed herself from the shoal. To keep out of danger until the time when exposure to danger would avail something is no fault to be blamed, but a prudence to be commended. When the ship moved the tugs did not shrink from exposure to danger; for it cannot be said that no danger was incurred when one of the tugs, in order to put men on board the ship, approached her near enough to enable the men to jump on board. Such an approach to such a large ship in such a sea required great care and skill, and could not be accomplished without danger, not only of the destruction of the tug, but also of loss of the lives of the men themselves. Nor can it be said upon the evidence that danger was not present from the time the tugs passed out of the harbour. The precautions taken on board the tugs show that the idea of peril was present.

The exertions of the salvors after the ship was safely located upon the mud in the Horse Shoe are also worthy to be considered. Their efforts did not slacken when the safety of the ship herself had been secured, but were continued and were incessant during the night, in the hope of saving the cargo from further damage, by which means the cargo was delivered much less damaged than was to have been expected.

When vessel and cargo both are saved the reward is to be increased: (Marvin on Wrecks, p. 119.) The persons, twenty-nine in all, who are entitled to share in the reward, should also be considered. The value of the tugs themselves—one being worth 1000 dols. and the other 17,000 dols.—must be taken into the account; for at more than one period of the service a brookage of the engine or of the steering gear of either tug would at once have brought her in danger of destruction. The value of the property saved is very large. The cargo, as saved, is conceded to be worth 188,700 dols.; the freight earned was 28,531 dols.; the ship herself in her damaged condition is valued by the claimants at 25,000 dols., and by the libellants at 37,000 dols. The total value saved was from 222,000 dols. to 234,000 dols.

When the amount saved is large, the reward is for that reason increased. On the other hand, it is not to be forgotten that no excessive danger to life or property was incurred by these salvors; that the services did not extend over a long period of time, being about twenty hours in duration; that all the expenses to which the salvors were put in hiring men to enable the pumping of the ship to continue without cessation have been paid by claimants; and it should also be recollected that the amount of the probable loss, if the ship had gone ashore on the beach in leuward by the fact that she was at the mouth of a great harbour, and that all appliances available to remove the cargo, and if possible get off the ship, would have been at the service of the ship early the next morning. The state of the weather made it impossible that any assistance could have reached her during the night.

In view of all the circumstances, and in accordance with the established rules applicable in such cases, I am of the opinion that the sum of 30,000 dols. is the proper reward to be given in this case.

There is one additional question of this case to be disposed of which has been raised by a petition, to be allowed salvage filed in the cause on behalf of the steam tug *Cyclops*, which is

PRIV. CO.]

THE *IDA*.

[PRIV. CO.]

will be remembered was the first tug to approach the *Puritan*, and which at the request of the master of the ship took all her crew on board and carried them to New York. It appears that on the way up the *Cyclops* stopped at the Coast Wrecking Company's docks, where notice of the disaster to the ship was left, and next morning took the master on board again in New York to carry him to the wreck. But on reaching Sandy Hook the ship was found on the Horse Shoe in custody of the salvors, and they accordingly returned. I see nothing in these facts to entitle the *Cyclops* to salvage reward, and the petition filed in her behalf must be dismissed.

I have been requested to apportion the salvage award between the respective salvors upon the evidence as it stands, and I accordingly do so. In view of the understanding come to at the time of the performance of the service, I am of the opinion that the tugs should share alike equally in the reward, and in accordance with precedent I give them one half. I am also of opinion that the two masters should share alike; that the men who went from the tugs on board the wreck should receive more than the other seamen, and that of these Hobart should receive the greatest sum, as he in some sort took the responsibility of what was done on board the wreck after he boarded it, and that the rate of wages affords a proper criterion by which to determine the relative proportions of the men. I therefore award

	Dols
To the owners of the <i>Jacob Myers</i> , the sum of	7650
" the captain, Charles W. Brooks, the sum of	3000
[The same to include the percentage payable to him by the terms of the contract of hiring.]	
" Thomas Waldron, engineer	1350
" James Russell, deck hand	1650
" Frank Roddy, fireman	825
" Clement Doty, fireman	825
" Robert Stevenson	600
I award to	
The owners of the <i>Jacob G. Neale</i>	7500
To the master of the <i>Neale</i> , F. H. Cooley	3000
" Peter C. Brown, engineer	1350
" Benjamin K. Hobart, deck hand	1150
" Frank Van Hoven, fireman	825
" Oscar Polton, fireman	825
" Samuel Riggs, cook	600
" Frank Westerwelt (a boy passenger on board for a pleasure trip)	50

For libellants, *Benedict, Teft, and Benedict.*

For the *Cyclops*, *Bude*, *Wilcox*, and *Hobbs.*

For the ship, *A. F. Smith*, and *Scudden and Carlen.*

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY OF ENGLAND.

Reported by J. P. ASPINALL, Esq., Barrister-at-Law.

March 19, 20, and 23, 1875.

(Present: The Right Hon. Sir BARNES PEACOCK, Sir MONTAGUE SMITH, Sir R. P. COLLIER, and Sir H. S. KEATINGE.)

THE *IDA*.

Damage to cargo—Bill of lading, "quality and quantity unknown"—Burdens of proof.

A bill of lading, stating goods to have been shipped

in good order and condition, but indorsed by the master with the words "quality and quantity unknown," does not admit as against the shipowner that the goods were shipped in good order and condition.

There is no rule of law by which the consignee of goods under a bill of lading, stating goods to have been shipped in good order and condition, but containing the words "quality and quantity unknown," is bound to show that the goods were shipped in good order and condition, or fall in his suit against the shipowner for damage done to the cargo; but failing proof of the condition of the cargo when shipped, the consignee is bound to show that the damage which it sustained is traceable to causes for which the shipowner is responsible.

The *Prosperino Palasso* (ante, p. 158) disapproved of.

Thus was an appeal from a decree of Sir R. J. Phillimore, the learned judge of the High Court of Admiralty of England, in a cause instituted under the 6th section of the Admiralty Court Act 1861, on behalf of Messrs. G. Koenig and Company, merchants, the respondents, against the vessel *Ida*, her tackle, apparel, and furniture, and against the appellant, Giacomo Gazzolo, of Genoa, in Italy, shipowner, the owner of the *Ida*.

In their petition filed in the court below, the respondents alleged as follows:

1. The *Ida* is a vessel of which no owner or part owner was, at the time of the institution of this cause, domiciled in England or Wales.

2. In the month of Feb. 1873, Messrs. E. B. Liddell and Company, of Alexandria, caused to be shipped 6110 ardebs of cotton seed on board the said vessel, then lying in Port Said, Egypt; and the then master of the said vessel received and accepted the same, to be carried on board the said vessel from Port Said aforesaid to Hull, upon the terms of three bills of lading, by the said master, duly signed and delivered to the said Messrs. E. B. Liddell and Company, for the said cotton seed.

3. The said three bills of lading, being in form exactly similar to one another, were and are, so far as is material to the present case, in the words, letters, and figures following, that is to say:—

"Shipped in good order and well conditioned by E. B. Liddell and Company, Alexandria, Egypt, in and upon the good ship called the *Ida*, whereof is master for the present voyage Ambrasio Chiappella, and now riding at anchor in the port of Port Said, Egypt, and bound for Hull, 6110 ardebs cotton seed, being marked and numbered as in the margin, and are to be delivered in the like good order and well conditioned at the aforesaid port of Hull (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever save risk of break so far as ships are liable thereto excepted), unto order, or to assigns, paying freight for the said goods at the rate of 12s. (say nineteen shillings) sterling in full per ton of 20 cwt. delivered, with 10s. gratuity. Other conditions as per charter-party, dated London, 4th Oct. 1872, with primarge and average accustomed.

"In witness whereof the master or purser of the said ship hath affirmed to three bills of lading, all of this tenor and date, the one of which three bills being accomplished, the other two to stand void.

"Dated in Port Said, Egypt, 6th Feb. 1873. 100 dismance mats. Fifteen working days remain for discharging."

4. The persons constituting the firm of Messrs. E. B. Liddell and Company are identical with the members of the plaintiffs' firm.

5. The said vessel sailed on her voyage to Hull, and duly arrived there on or about the 7th May 1873.

6. The said cotton seed was not delivered to the plaintiffs according to the terms of the said bills of lading in as good order and condition as it was when shipped on board the said vessel at Port Said aforesaid; but, on the

PRIV. CO.]

THE IDA.

[PRIV. CO.]

contrary, the same was delivered to the plaintiffs in much worse order and condition, and greatly damaged.

7. Such non-delivery as aforesaid to the plaintiffs of the said cotton seed in as good order and condition as when it was shipped, was not occasioned by any of the perils or causes in the said bill of lading excepted.

8. The plaintiffs paid to the master of the said vessel the freight and gratuity due, according to the terms of the said bill of lading, and did and were ready to do all things necessary to entitle the plaintiffs to have the said cotton seed delivered to them in as good order and condition as it was in when shipped at Port Said as aforesaid.

9. By reason of the premises the plaintiffs lost a great part of the value of the said cotton seed, and were put to great expense in and about keeping, warehousing, and improving the condition of the said cotton seed and in and about having the same surveyed.

The appellant by his answer denied that the bill of lading was so far as material in the words and figures set forth in the petition, and craved leave to refer to the said bill of lading when produced.

He further denied the truth of the 4th, 6th, 7th, and 9th articles of the petition, and alleged that the deterioration and damage, if any, to the cotton seed in the petition mentioned were occasioned by the character and quality of the cotton seed when shipped on board the *Ida*, and by the inherent qualities of the said cotton seed, and by the dangers and accidents of the seas, rivers, and navigation, or by some or one of such causes, and not by any breach of contract on the part of the defendant.

The respondents filed a reply and conclusion, by which they denied generally the truth of the allegations contained in the answer, and prayed that the pleadings might be concluded.

The bill of lading, when produced, was found to contain the words, *ignaro qualitate et quantitate*.

It will be observed that the respondents did not in their petition or reply make any charge of negligence against the appellant, but at the hearing they endeavoured to make out that the damage to the cargo had been occasioned by the *Ida* having been improperly ballasted with sand ballast, and to her net having been properly damaged. Their contention was, that the sand had been put on board wet, or that it had got wet in the course of the voyage, and that the natural heat of the cargo had drawn up the moisture into the cargo, and so occasioned the damage. The effect of their evidence on this point will be found fully stated in the judgment.

The only evidence attempted to be given as to the condition of the cargo when shipped was, that of one of the respondents, Mr. E. B. Liddell, who said he saw samples of the cargo.

It appeared, however, that Mr. Liddell, at the time of shipment, was at Alexandria, which is 120 miles from Port Said, where the cargo was shipped, and no evidence whatever was given to verify the alleged samples.

On the part of the appellant it was contended that the ship was properly damaged, and it was proved that the said ballast was dry desert sand, put on board in a perfectly dry state, and that it never had before, or whilst on board the *Ida*, been wetted, and they proved that of the cargoes of cotton seed arriving in this country from Port Said in the spring of 1873, a very large and unusual number arrived heated to a very extraordinary extent, and they gave evidence to prove that the *Ida*'s cargo had been shipped imperfectly dried, or matured, or, as it is technically termed, "green."

They further proved that cotton seed, however well dried, is an article very liable to become heated even in a warehouse, and especially in the hold of a ship; and that whereas the ordinary length of voyage for a sailing ship from Port Said to England is about forty days, the *Ida*, owing to tempestuous weather and foul winds, was about ninety days on her voyage. The few tons of seed which were sea damaged were in the sides of the ship where she had strained in heavy weather, and not from the bottom of the hold, where it was alleged that she was insufficiently damaged, and where the sand ballast had been placed.

The appellants gave evidence to show that the ship was permanently damaged from the keelson to each of her bilges, but there was a conflict as to whether the planking called by the appellant permanent damage, was so or not. The learned judge made a decree by which he pronounced for the damage proceeded for, and condemned the defendant and his bail therein and in costs, and referred the question as to the amount of damage to the registrar: (see *ante*, p. 158.);

It is from such decree that this appeal was brought, and it was submitted that the decree appealed from ought to be reversed, for the following amongst other reasons:

1. Because upon the bill of lading, signed by the master of the *Ida*, the burden of proving that the cotton seed was in good order and condition when shipped, lay upon the respondents, and they did not discharge such burden of proof.

2. Because the appellant proved that the ship was properly damaged and ballasted.

3. Because the evidence negatived every cause of damage other than those suggested by the appellant, viz., the character and quality of the cotton seed when shipped, the inherent qualities of the said seed, and the dangers and accidents of the seas, rivers, and navigation.

4. Because the respondents fail to prove any negligence on the part of the appellant, either by ballasting the ship with sand, or in not properly damaging her.

5. Because the respondents failed to prove that the heated and damaged condition of the cargo was in any way caused by, or connected with, the sand ballast, or my insufficiency in the damage.

6. Because the appellant proved that the heating of the cotton seed was occasioned by its not having been matured when shipped.

March 19 and 20.—*Milward, Q.C.* and *E. C. Clarkson*, for the appellants.—As the bill of lading in this case contains words meaning "quantity and quality unknown," and indorsed thereon by the master, there is no admission by the master that the cargo was shipped in good condition. The duty of showing that it was so shipped lies upon the plaintiffs, and before they can recover they must give affirmative evidence that the cargo was sound when shipped. In *The Prosperino Palazzo* (29 L.T. Rep. N. S. 622; 2 Asp. Mar. Law Cas. 158), it was ruled that a plaintiff in a cause of damage to cargo must give evidence of the sound condition of the cargo when shipped before he can call upon the defendants to show that the damage was caused by any excepted peril and not by their negligence. In the present case there was no evidence whatever as to the condition of the cargo when shipped, save that of a person who was not at the place of shipment, and only saw samples afterwards. [Sir

PRIV. CO.]

THE *IDA*.

[PRIV. CO.]

R. P. COLLIER.—Would it not be sufficient for the plaintiffs to show that the damage was occasioned by some default on the part of the shipowner for which he was responsible? We submit not; but even if it were so, the respondents have wholly failed to prove any default on the appellants' part. They omit to call the persons who actually shipped the goods, and have given no proof of damage except of such as might be fairly attributable to perils of the sea; their theory that the stowage was defective has wholly failed. The appellants' case is, that the cargo was shipped in bad condition, and became heated and damaged in consequence, and that the ship was properly dunnaged and ballasted, and that such sea damage as the cargo received resulted from the extraordinarily bad weather the ship encountered, and, consequently, from an excepted peril.

Bull, Q.C. and *Cohen, Q.C.*, for the respondents.—There is no such duty upon plaintiffs in a case of this description as is laid down in *The Prosperina Palaseo* (*ubi sup.*). No doubt there is no admission on the face of the bill of lading of the condition of the cargo when shipped. But the plaintiffs must show some negligence on the part of the shipowner before they are entitled to recover, but there is no necessity to show the condition of the cargo at the time of shipment. We submit that the respondents have satisfied the onus upon them by showing the defective nature of the ship's dunnage, and if the damage done to the cargo can be attributed to this cause, the court should presume that the cargo has been shipped in good condition, and then the shipowner will be responsible for the injury done. The appellants' witnesses alleged that the ship was permanently damaged; this turns out to be wholly untrue, and, consequently, we ask the court to discredit the other part of their case, which sets up that the sand ballast was in good condition and was properly laid for the cargo. It was positively shown that there was no damage by sea water, and as this damage was done to the cargo in the bottom of the hold, this in itself is enough to show the defective dunnage. The damp produced by the sea water would be absorbed by the cargo, and this was the occasion of the damage.

Milward, Q.C., in reply.

March 23.—The judgment of the court was delivered by

Sir H. S. KEATINGE.—This was a suit brought by the shipper of the cargo against the shipowner to recover damages sustained by the cargo in consequence, as it was alleged, of improper stowage. The cargo consisted of some 700 tons of cotton seed, loaded in bulk on board the ship *Ida* at Port Said, in Egypt, to be delivered at Hull. The *Ida* left Port Said on the 7th Feb. 1873, and arrived at Hull in May, after a passage of nearly twice the usual length, in consequence of adverse winds and stormy weather. On the unloading of the cargo it was unquestionably in a very damaged condition; a great part of it had heated so much that it had become almost charred, while a comparatively small portion, some forty or fifty tons, was found in a tolerably sound condition. The case of the plaintiffs was, that this cargo was shipped in a dry and good condition at Port Said, and that it had become damaged through improper stowage. The case of the defendants was, that the cargo had been shipped in a green state, and had become heated in consequence, and that the heat

had been increased by the unusual length of the voyage.

The case was heard before the learned judge of the Admiralty Court, who found generally for the plaintiffs, directing the usual inquiry as to damages. From this judgment the defendants have appealed. Undoubtedly, the question is one of fact, and their Lordships are always slow to reverse the judgment of the court below upon a pure question of fact, when that court has had the advantage, which they have not, of hearing and seeing the witnesses, unless they come to a very clear conclusion that the judgment was wrong.

It has been contended, firstly, on the part of the appellants, that the learned judge was wrong in holding, as he did, that the plaintiffs had given *prima facie* evidence that the cargo was in good condition at the time of its being shipped—evidence calling upon the defendants to rebut it. This was obviously a cardinal question in the case, and this finding may be considered as, in a great degree, the foundation of the judgment. The bill of lading throws no light upon the question, the master having written across it, "*ignora qualitas à quantitas*," thereby preventing its constituting any admission by him of the state of the cargo, as was rightly held by the learned judge. It appears that the cargo was shipped by a Mr. Miami and his clerk at Port Said, who acted there as the factors of the plaintiffs, who have two houses, one in London, the other at Alexandria. Mr. Miami and his clerk are described by the captain as having superintended the lading of the cargo, and having been constantly on board the vessel, and they must, of course, have been perfectly well acquainted with the quality of the cargo. Neither Mr. Miami nor his clerk, nor any witness from Port Said, was called by the plaintiffs, or examined by them on interrogatories; but for the purpose of proving the condition of the cargo they call Mr. Liddell, who is a partner in the plaintiffs' firm, and at the time of the shipment of the cargo was residing in Alexandria, a distance of 125 miles from Port Said, and who had never seen the ship or the cargo. This gentleman, in answer to a leading question put to him by the counsel for the plaintiffs, says that, as far as he knows, the cargo when shipped was in good condition. It appears, however, that his means of knowledge consisted simply in his having been supplied, as he says, with samples of the cargo from Port Said, which samples he does not produce, saying that they had been destroyed; but he does not show, as indeed he could not, that he had examined these samples with the bulk, nor is any person called who did examine them with the bulk, nor is any evidence whatever given that the samples which this gentleman alleges that he saw, and on which he founded his opinion, whatever it may be worth, did fairly represent the cargo which was shipped. The learned judge seems to have been under some little misapprehension with respect to the evidence of this witness, for the learned judge observed: "He said, in answer to a question whether the cargo was shipped in good condition, it was; and he gave us his reason for it, that he knew it was from the samples which he had seen of it at Port Said." The learned judge would appear to be under the impression that the witness was at Port Said for some time during the loading of the vessel. That, undoubtedly, was an erroneous impression, the witness not having been nearer, as

PRIV. CO.]

THE *IDA*.

[PRIV. CO.]

far as we know, than Alexandria. The learned judge held upon this that *prima facie* evidence was given that the seed was shipped in proper condition, subject, of course, to be rebutted by the evidence of the other side.

Their Lordships have come to the conclusion that the learned judge was wrong in holding that this was *prima facie* evidence of the seed being shipped in good condition. They are of opinion that no evidence whatever was given upon this subject.

Their Lordships collect from the report of a case which has been laid before them, *The Prosperino Palaso* (29 L. T. Rep. N. S. 622; 2 Asp. Mar. Law Cas. 158), that, if the learned judge had come to the conclusion which their Lordships have that no evidence had been given by the plaintiffs of the condition of the cargo when shipped, he would have found for the defendants. Their Lordships cannot, indeed, suppose that the learned judge intended to lay down, as the marginal note to that case represents him, that there is a rule of law which requires that a plaintiff in such a case as this must show, in the first instance, that the goods were shipped in good order and condition, or fail in his suit. Undoubtedly there is no such rule of law. But their Lordships think that in this case, considering that the plaintiffs must have known how material it was to prove the condition of the cargo, that they abstained from calling witnesses who knew its condition and called a witness who was ignorant of it, when further it appears, from evidence uncontradicted, that a great number of cargoes arrived at this time in a heated and damaged condition from Port Said, and that this would seem to have been a bad season for seed, their Lordships think it not too much to say that there appears a good deal of reason to suspect that this seed was in a condition at the time of its being shipped which would account for its appearance when unloaded; and that the plaintiffs, having failed to show its condition on loading, were bound to give very clear and cogent evidence that the damage which it sustained was traceable to causes for which the shipowner was responsible.

The plaintiffs have endeavoured to prove this in the following manner: They put forward a theory by their witnesses which seems to have been adopted by the learned judge to this effect, viz., that sand ballast was used in this vessel, which is improper, inasmuch as it is liable to get wet and to communicate wet to the cargo; that there was no sufficient damage between the sand and the cargo; that the sand wetted the lower portion of the cargo; that that wet spread to other portions of it, whereby the bulk became wet and heated, and all the damage ensued. This appeared to be, as far as their Lordships are able to understand it, the original view of the case put forward by the plaintiffs. It is now, indeed, suggested by their learned counsel that this may not be quite the accurate view; that it may be that the cargo did of itself heat to some extent, being somewhat damp; that the sand below may not have been completely wet, and may not have communicated its wetness to the cargo to any great extent by contact; but that, the cargo having heated, the heat of the cargo would dry up the moisture from the sand, and thereby the damage which the cargo would otherwise sustain by its heating would be increased. Their Lordships have to observe upon this, that this view would appear to open a new

subject of inquiry which has not been considered by the learned judge, namely, assuming some damage to have resulted from the defective state of the cargo when shipped, and some additional damage from the wetness of the sand, how much of the damage was due to the one cause and how much to the other. Their Lordships have no materials whatever for deciding such a question; and if there are no such materials it is entirely the fault of the plaintiffs, inasmuch as they have given no evidence of the state of the cargo when it was shipped.

But both these hypotheses assume that the sand was more or less wet, and whether it was so or not becomes a very important question, which it is necessary to determine. It seems that at the bottom of the ship on each side of the keelson, which is in itself some 17in. wide, a plank extends to about 2ft. 6in., making a kind of deck of rather more than 6ft. wide, and this deck is about 2ft. 6in. from the very bottom or lowest skin of the vessel, and that under it there is what is called a watercourse; that is to say, the water courses freely backwards and forwards from stem to stern under this deck. Some of the witnesses for the defendant called this permanent damage; the witnesses for the plaintiff denied that it was permanent damage, alleging that in order to constitute permanent damage it ought to have extended further towards the bilges of the vessel. It would appear that permanent damage is often found in steamers, but rarely, if ever, in merchant vessels, and that in English merchant vessels no approach to permanent damage is usually to be found. The *Ida* is an Italian vessel, and undoubtedly this planking of 6ft. and upwards is in the nature of permanent damage, and, as far as it goes, is an advantage. Above this planking, by the account of both sides, there was a layer of sand some 10in. or 15in. thick; above that sand there was, according to the evidence of the plaintiffs, only one layer of matting between it and the cargo; according to the evidence of the defendants, there was between the sand and the cargo damage in the shape of timber throughout the vessel, and in the middle of the vessel some five or six layers of matting besides. On this question there is undoubtedly a conflict of evidence; but it does not appear to their Lordships, in the view which they take of the case, to be necessary to decide on which side the evidence on this question preponderates. It may be taken that there was between the sand and the cargo at least one layer of matting.

[Their Lordships here minutely examined the evidences as to the sand put on board being sea sand or dry desert sand, and as to its having got wet during the voyage and having communicated the wetness to the cargo, and concluded that it was dry desert sand, and that it had not been wetted in the course of the voyage.]

Their Lordships have, therefore, come to the conclusion that the plaintiffs have not made out their case that the cargo suffered any damage in consequence of the wetness of the sand, or in consequence of improper stowage.

Upon the hypothesis that the cargo was originally stored in a green condition, its state on arrival is accounted for simply and naturally without having recourse to ingenious and far-fetched theories. If the cargo was in a green state, as several other cargoes appear to have been which were shipped about the same time from the same

[Priv. Co.]

MIEDEBRODT v. FITZSIMON; THE ENERGEIE.

[Priv. Co.]

port, it would naturally heat. The heating would be where it is represented to be, principally in the middle where the greatest bulk was collected, especially after a long voyage. The very top of the cargo is represented as being to some extent wet and mildewy. That would naturally result from the steam rising and becoming precipitated into water by the coldness of the deck. Some portions of the cargo, comparatively small, about the extent of which the witnesses did not quite agree, but which portions are put at the highest as between six and seven tons lying immediately on the sides of the vessel, appear to have been wetted by salt water. They stuck to the sides, they presented all the appearance of having been wetted by salt water, and they are what the witnesses called sea damaged. But these portions of the cargo were not immediately above the sand where the wettest part of the cargo might be expected to be found if the wet had been originally derived from the sand, but upon the sides of the vessel, and with respect to this there is no serious conflict of evidence. It may be here observed that the learned judge appears to have fallen into some misapprehension upon this subject, for he treats the portion of the cargo actually sea damaged as that which was at the bottom of the cargo and in contact with the sand. If that had been so, the case might have presented a somewhat different aspect; but from the evidence of several of the witnesses, more especially of Mr. Bee, the witness for the plaintiff, it is manifest that that is not so. Bee gives very distinct evidence upon this subject. He says some of the seed was wet and it was wet at the sides, and he subsequently represents the wet part as going all up the sides and to a certain extent adhering to the sides; and he says they cleared that away and took it out into baskets. The learned judge appears to have been misled by an expression which fell from one of the witnesses, Watson, who looked down into the hold of the vessel when the unloading was nearly completed, and speaks of seeing some six or seven tons lying at the bottom of the vessel which he supposes to have been there originally; but this was clearly a mistake, as appears from the evidence of Bee and of several other witnesses, and in fact from all the evidence on both sides. The damage to this small portion of the cargo is ascribed by the witnesses on both sides to small leaks which the ship had sprung when straining in heavy weather, and is not a description of damage for which the shipowner would be liable.

Under these circumstances, their Lordships have come clearly to the conclusion that the plaintiffs have failed to make out their case. They have failed to launch their case by *prima facie* evidence of the condition of the cargo, and they have certainly not adduced any evidence at all conclusive, or even cogent, for the purpose of showing that the damage which the cargo sustained on the voyage was due to the fault of the shipowner.

Under these circumstances, their Lordships will humbly advise her Majesty that the judgment of the court below be reversed, and the appellants must have the costs in the court below and in this appeal.

Solicitor for the appellants, Thomas Cooper.

Solicitors for the respondents, Hollans, Son, and Coward.

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY OF IRELAND.

March 24 and 25, and April 24, 1875.

(Present: The Right Hon. Sir J. W. COLVILLE, Sir BARNES PEACOCK, Sir MONTAGUE E. SMITH, and Sir R. P. COLLIER.)

MIEDEBRODT v. FITZSIMON.
THE ENERGEIE.

Breach of contract of carriage of goods—Charter-party—Bill of lading—Detention of cargo by master—Lien—Freight and general average, when due—Demurrage—Merchant Shipping Act Amendment Act 1862 (25 & 26 Vict. c. 63), ss. 67, et seq.—Landing and warehousing goods—Stop order for excessive amount—Duty and liability of master.

Where, by a charter-party and bill of lading, freight is "to be paid on unloading and right delivery of the cargo," the master having a lien by common law for freight and general average, and a lien by contract for demurrage, the payment of the freight and the delivery of the goods are concurrent acts in which all that is required from the owner of the cargo is readiness and willingness to pay at the time of delivery; and before paying any sum for general average, the owner of cargo is entitled to be satisfied that the amount claimed is the result of a proper adjustment; and if the owner of cargo on arrival of the ship in port, and before discharge, refuses to pay the amount claimed for freight and general average before the amount due is finally ascertained, but offers to pay a large proportion of the freight, and, there being no doubt as to his solvency, to sign an average bond for the payment of the general when ascertained, but the master, nevertheless, insists upon retaining the cargo on board ship until his lien for freight and general average is satisfied, detention by the master is not wrongful, but, *quere*, can he impute the delay in the discharge to the owner of cargo or claim for demurrage on that ground?

To justify the master of a ship in landing or warehousing a cargo under the Merchant Shipping Act Amendment Act 1862 (25 & 26 Vict. c. 63), s. 67, by which it is enacted that where the owner of goods imported "fails to land and take delivery thereof, and to proceed therewith with all convenient speed" by the time named in the charter-party, *Sec.*, "the shipowner may land and unship the said goods" and warehouse them, it is not necessary that the failure of the owner of cargo should be a "wilful default" in landing, *Sec.*, but the master is at liberty to land the goods whenever the delivery of them to the owner within the proper time has been prevented by circumstances, whether the latter is or is not to blame.

The provisions of the Merchant Shipping Act Amendment Act 1862 (ss. 67 and 68), giving power to a master to land and warehouse a cargo, and give notice of his lien to the warehouseman, enable the master to retain his lien, but do not extend it to charges not due at the time of landing, and if the master wilfully, and for the purpose of extracting from the cargo owner charges for which he has no lien, places upon the goods a stop order for an excessive amount, which the cargo owner is compelled to pay before he can obtain his goods, the landing and detention of the goods for that amount is a wrongful act, for which the owner of cargo may recover.

Where a master lands and warehouses goods under the Merchant Shipping Act Amendment Act 1862,

Priv. Co.]

MIEDBRODT v. FITZSIMON; THE *ENERGIE*.

[Priv. Co.]

and, to preserve his lien for freight and general average, places on them a stop order for the amounts claimed, and one of those amounts is paid by the cargo owner, it becomes the duty of the master to reduce the stop order to the amount for which he can after such payment reasonably claim a lien, and his refusal to do so amounts to a wrongful detention of the cargo.

Seemle, that a master is not liable merely because he lands and warehouses goods under a stop order for a sum in excess of the amount due to him if he bona fide claims a lien for that sum.

THIS was an appeal from a decree of the Court of Appeal in Chancery in Ireland, reversing a decree of the High Court of Admiralty of Ireland.

The cause was instituted in the High Court of Admiralty in Ireland, under the 37th section of the Admiralty Court (Ireland) Act 1867 (30 & 31 Vict. c. 114), by James Charles Fitzsimon, merchant, of Dublin, in rem, against the ship *Energie*, to recover damages for breach of contract in respect of the non-delivery of certain goods belonging to the respondent (plaintiff), and carried into the port of Dublin in the *Energie*. An appearance was entered in the cause by Wilhelm Gustav Miedbrodt, the master of the *Energie*.

The respondent's (plaintiff's) petition in the High Court, alleged that on the 8th Oct. 1872, a charter-party was entered into between the owner of the *Energie* and one H. W. Plaw, as agent for Joseph Dawson and Co., of London, by which charter-party it was agreed that the said ship should load at Memel a full and complete cargo of fir timber, and should carry the same to Dublin, and there deliver on being paid freight at the rate of 11. per load of fifty cubic feet, calliper measure, the usual perils excepted, the freight to be paid on unloading and right delivery of the cargo, the cargo to be received at the port of discharge in fourteen running days, and if she were longer detained through any act of the receivers, the captain to be paid 6s. a day demurrage for each and every day the vessel was detained over and above the stipulated laying days, the captain to have an absolute lien on cargo for all freight and demurrage. That the cargo was duly shipped by the said H. W. Plaw at Memel, and the master signed a bill of lading for the same, whereby he undertook to deliver the same at the port of Dublin (the usual perils excepted), unto order or assigns, the freight to be paid for the said goods and other conditions as per charter-party. That the said H. W. Plaw duly indorsed the said bill of lading to the plaintiff, to whom the property in the said cargo thereby passed; and that the plaintiff then was and continued to be the owner of the said cargo. That the *Energie* having sustained some damage during her voyage with the said cargo from Memel to Dublin, the master was obliged to cut away her masts, and the said vessel was brought into Copenhagen in a disabled condition, to be refitted, and that, to secure the expenses of the repairs effected, a bottomry bond was executed for a large amount by the said master. That after the repairs were completed, the said vessel again proceeded on her voyage, and arrived in Dublin on the 15th April 1875. That on that date the master called upon the plaintiff and informed him that there was a claim on foot of the said bottomry bond, and that until it was settled he could not deliver the cargo. That the plaintiff thereupon required the said master then to deliver the said cargo to him, and the plaintiff offered to pay the

freight due for the transportation thereof, and to sign an average statement according to the usual and accustomed course of business; but the master stated that he had no such statement, and refused to deliver the cargo to the plaintiff. That subsequently to the last-mentioned interview, the said master demanded an excessive and improper amount from the plaintiff as his average contribution, and refused to deliver the cargo, though frequently required to do so by the plaintiff, until the same and freight and other charges were paid by the plaintiff. That the plaintiff tendered the amount of freight and charges properly payable by him in respect of the said cargo to the said master, who declined to receive the same or to deliver the said cargo. That the plaintiff repeatedly demanded the delivery of the said cargo, and was always ready and willing to pay all sums properly payable by him, and offered and tendered the same to the master, but, notwithstanding, the master improperly and unlawfully refused to deliver the said cargo to the plaintiff, and landed and warehoused the same, and gave a notice in writing to the warehouse owners that the said cargo should remain in their hands, subject to a claim by the said master of 2200l. for charges alleged to be payable thereon, and the said notice was not thereafter withdrawn by the said master. That the plaintiff alleged the said landing and warehousing of the said cargo was wholly illegal, and that even if the same were legal, the amount claimed by the said notice was grossly in excess of all charges to which the said master was then entitled. That various offers and tenders were made by and on behalf of the plaintiff to the master in order to enable the plaintiff to obtain the said cargo, but notwithstanding the same the master refused to release the said cargo, except on terms of the plaintiff paying the said sum of 2200l., and the plaintiff had been obliged to pay and had paid the said sum to the warehouse owners to obtain the said cargo. That by reason of the aforesaid breaches of duty and breaches of contract on the part of the master of the *Energie* the plaintiff sustained heavy losses. And the petition concluded by praying the judge to pronounce for the damage proceeded for, and to condemn the *Energie* and her bail therein, and in costs, and if necessary to refer the amount of the damage to the registrar assisted by merchants.

The answer of the appellant (defendant) set out the facts at length, averred that the sum demanded for average was 1221l. 2s. 11d., and that the average statement adjusting such sum as payable by the respondent had been made up by competent average adjusters at Lloyd's upon a valuation of the ship, freight, and cargo, estimated by competent parties at Copenhagen, the port of average, and that the said sum was properly due to the plaintiff in respect of the said average; that the plaintiff did not at any time tender the amount of charges and freight properly due by him in respect of the said cargo, and the defendant never at any time demanded an excessive or improper amount; that in consequence of being unable to obtain a settlement from the plaintiff, the defendant, on the 3rd May, and after the expiration of the running days named in the charter-party for the discharge of the cargo, commenced to discharge the cargo and landed the same in the Custom House Docks, being the cheapest and best place for the purpose, and a notice was given to

[Priv. Co.]

MIEDHRODT v. FITZSIMON; THE ENERGIE.

[Priv. Co.]

the warehouse owners that the said goods were to remain, subject to a lien for 2200*l.* for freight and other charges, payable by the owner of the *Energie*, which sum of 2200*l.* was an estimate, as near as possible, of the amount that would be due by the plaintiff when the cargo was discharged, and was not grossly in excess of all the charges to which the defendant was entitled. The answer in substance set up that the appellant had a lien for freight, general average, demurrage, and other charges which the respondent did not satisfy, and that he warehoused the cargo under a stop order for a sum sufficient to discharge this lien.

The pleadings were thereupon concluded. The cause came on for hearing before the High Court in Dec. 1873, and evidence was given on both sides. The facts proved (as given in the judgment of the Judicial Committee) were as follows:

"As to the principal facts in the cause, there is little or no dispute. The vessel was chartered at Memel on the 8th Oct. 1872 by the agent of Joseph Dawson and Co., of London, who shipped thereon a full cargo of fir timber, to be delivered at the port of Dublin under a bill of lading, dated the 6th Nov., and duly indorsed to the plaintiff, the owner of the cargo. This bill of lading describes the timber by running feet, but makes the freight payable 'as per charter-party;' and under the latter instrument freight is to be calculated 'per load of fifty cubic feet, calliper measure.' The vessel encountered severe weather in the Baltic, and had to put into Copenhagen for repairs, for the expenses of which the master passed a bottomry bond for 2975*l.*, payable at or before the expiration of three days after the safe arrival of the ship in Dublin, and hypothecating ship, cargo, and freight. The validity of this bottomry bond is not disputed. A general average statement was adjusted, by which the sum of 1221*l.* 2*s.* 11*d.* was charged against the cargo. The ship arrived in Dublin on the 14th April 1873.

"There is some dispute as to what then took place. The plaintiff by his petition (paragraph 5) alleges that on that day the master called upon him and informed him of the claim on the foot of the bottomry bond, and that until it was settled he could not deliver the cargo. But in his evidence he says this statement in his pleading is incorrect; that the master called upon him on the 16th, and promised to commence delivery on the following day, but on the 17th refused to do so, on the ground that he had received orders from the ship's agents in London (Messrs. Hoffman and Co.) not to deliver until he should receive further directions from them, there being a charge on the cargo. The master's evidence supports the statement in the petition. Certain however it is, that on the 18th the master called on the plaintiff with a telegram of that date, received from Messrs. Hoffman and Co., which is in these words:— 'Average statement ready. Net amount due from cargo 1221*l.* 2*s.* 11*d.* Ask receivers whether they wish statement sent to Dublin or delivered here. We must have this money to pay bottomry before discharging commences.' And then at least, if not before, the master seems distinctly to have claimed a right of lien on the cargo for the amount due for general average.

"The plaintiff appears to have referred this question of general average to his London agents, Messrs. Tagart, Boyson, and Slee, who submitted it to the underwriters.

"Between the 18th April and the 1st May some correspondence went on between the plaintiff and the master in Dublin and their respective agents in London. In Dublin the plaintiff writes on the 28th April to the master: 'We have got a telegram from London stating that your claim will be paid, and there is nothing to prevent your discharging our cargo, and we are ready to sign average bond, as you were told on Saturday, so we now hold you accountable for any loss sustained by us by non-delivery of the cargo.' In London, on the 29th April, Messrs. Hoffman and Co., in answer apparently to a similar application from Messrs. Tagart, Boyson, and Slee, write as follows: 'It is quite correct that Capt. Miedhrodt will not discharge until he receives our instructions, and those instructions we cannot give him until the amount due from the cargo is paid to enable us to discharge the bottomry bond, because by that document all the interests are hypothecated to the bottomry holder.

"And on the 30th April the master writes to the plaintiff, reminding him that the days allowed by the charter-party for taking delivery of the cargo have expired, giving notice that if the conditions precedent necessary to delivery are not complied with within twenty-four hours, he will land the cargo at the risk and expense of the plaintiff, retaining his lien thereon, and claiming demurrage 'at 6*l.* per day, as per charter-party, for every day that may now elapse before cargo is out of the ship.'

"Thus matters stood on the 1st May, when Mr. Harper, a member of the firm of Hoffman and Co., arrived in Dublin. He saw the plaintiff on that day, and endeavoured to come to a settlement with him. He began by claiming, as sums for which there was a lien on the cargo, 1221*l.* 2*s.* 11*d.* for general average, and about 700*l.* for freight. The plaintiff disputed both items. Calculating the freight according to the running feet mentioned in the bill of lading, he made it only 671*l.*; and he complained that in the average statement the cargo had been valued at 2686*l.*, whereas its invoice price was but a little above 2000*l.*, and the sum for which it was insured only 2300*l.* Thereupon Mr. Harper agreed to calculate the average payable by cargo upon the last-mentioned sum, reducing its amount to 1136*l.* 2*s.* 4*d.*; and, after some further discussion, offered to release the cargo on the payment of 1800*l.*, and the execution of an agreement that if he should have received too much or too little, the error should be made good to the sufferer. The plaintiff not assenting to these terms, offered to write a cheque for 1700*l.*, and afterwards increased his offer to 1750*l.*; but Mr. Harper declined to take less than the 1800*l.*, and thus, unfortunately for both parties, the negotiation went off on this question of 50*l.* more or less. If the plaintiff had paid the 1800*l.* he would have got delivery of his cargo on the payment of less than in the event proved to be actually due from him; and if the other party had taken the 1750*l.* they would have succeeded to that extent in their object of being put in funds to meet the bottomry bond, although their right to call upon the plaintiff for present payment of so large a sum, whilst the land was outstanding and unproduced, and the precise amount of freight had not been ascertained by measurement, was questionable. Neither party, therefore, evinced much prudence in rendering this attempt to compromise

[Priv. Co.]

MIDDEBRODT v. FITZSIMON; THE ENERGIE.

[Priv. Co.]

abortive. It is not, however, necessary for their Lordships to say which was on this occasion the less reasonable. They have only to determine whether the master, by his subsequent acts, incurred a legal liability enforceable in this action.

"On the 3rd May the master, notwithstanding a letter from the plaintiff of that date, offering to pay the proportion of the average falling on the cargo in full, and to give security for the freight, proceeded to discharge the cargo, and place it in the custody of the Port and Docks Board, under the 67th and 68th sections of the Merchant Shipping Act Amendment Act 1862 (25 & 26 Vict. c. 63), putting upon it a stop order for the sum of 2200*l.* The delivery, though begun on the 3rd, was not completed until the 16th May.

"In the meantime the following correspondence took place between Messrs. Waltons, Bubb, and Walton, acting as the solicitors of the plaintiff in London, and Messrs. Hoffman and Co. The former wrote on the 5th May: 'We cannot understand that you represent both the shipowner and the bottomry bondholder, and if this is so there will be no difficulty. Please let us know how this is, and what amount you claim from the cargo on behalf of your respective clients. Our clients are quite prepared to pay the freight on delivery of the cargo, but we understand that the master, professing to act under your instructions, is refusing to deliver unless the whole freight is paid before delivery. Please see to this.' And in answer to this Messrs. Hoffman and Co., in a letter of the 6th May, after expressing their satisfaction that the master had got into the hands of those who were capable of understanding the position of the proprietors of the cargo, and stating that the lay days having expired, and every means having been tried whilst they were running to induce the proprietors of the cargo to pay the amount due from them, the cargo was then being landed by the captain in the Custom House Docks, say, 'The claims we make upon the cargo are: First, 122*l.* 2*s.* 11*d.*, contribution to average charges, as per Messrs. Hopkin's statement' (thereby reverting to their original claim); 'secondly, 770*l.* for freight, demurrage, and landing charges; and on payment to us of these two sums we are willing to give a guarantee that shall be made satisfactory to you for the subsequent adjustment of either of the amounts by the repayment by us of any surplus if it should afterwards appear that such has been paid us.'

"Nothing appears to have come of this correspondence until the 12th May, when the claim for general average contribution was settled by a payment to Messrs. Hoffman and Co. in London of 1136*l.* 2*s.* 4*d.*, upon the terms expressed in the following receipt, which was signed by Hoffman and Co., as agents for the master and shipowners, and also as holders, or agents for the holders, of the bottomry bond:

Received from Messrs. Fitzsimon and Son the sum of 1136*l.* 2*s.* 4*d.*, in full satisfaction and discharge of all claims against the cargo per *Energie*, for general average or special charges, as per statement of Mr. Manley Hopkin, the contributory value of the said cargo being taken at 2200*l.* instead of 2000*l.*, and also in full satisfaction and discharge of all claims against the cargo under the bottomry bond, which is to be liquidated by the shipowner.

"The plaintiff, having been advised of this payment in London through his solicitors in Dublin, on the 13th May, offered to lodge with the Port

and Docks Board the full sum of 770*l.*, being the amount of the claim made by the letter of the 6th May, exclusive of that for general average contribution; but this offer was expressly made under protest, for the purpose of obtaining the cargo, and with notice to the board not to part with the money lodged until the plaintiff should take the necessary steps to compel the refunding of the same. The board declined to deliver the cargo until the stop order for 2200*l.* had been withdrawn, or that sum lodged.

"Upon this the plaintiff appears to have taken simultaneous action in London and in Dublin. In London, on the 14th May, Messrs. Waltons, Bubb, and Waltons wrote to Messrs. Hoffman and Co. as follows: 'We have a letter from Dublin complaining that, although our clients have offered to deposit with the Port and Docks Board, or to tender under protest 770*l.*, being the amount claimed by you for freight charges, &c., the board refused to deliver the cargo, on the ground that it is stopped by you for 2200*l.*, and that they can accept nothing short of that sum. From this we assume that you have not advised the payment of the general average, and we shall, therefore, be glad if you will instruct the board by wire to deliver on the 770*l.* being deposited.' Messrs. Hoffman and Co.'s answer to this communication was written on the 15th, and was in the following terms: 'In reply to your note of yesterday, we can only say that this matter must now take its course, as we fear that we are not justified in interfering now with the original stop.'

"In the meantime the plaintiff's solicitors in Dublin had served the master of the vessel, on the 14th May, with a notice in these terms:

On behalf of Messrs. James Fitzsimon and Sons, timber merchants, Dublin, we hereby require you to attend at the office of Mr. Thurgood, superintendent of the Custom House Dock, Dublin, to-morrow at twelve o'clock noon, at which time and place we shall pay you the sum of 671*l.* 10*s.* 4*d.*, being the amount due by Messrs. Fitzsimon for freight of goods brought to Dublin by the ship *Energie*, or such further sum as you shall show us to be due for freight only, and we shall pay such sum on your releasing the cargo of the ship *Energie*, so that Messrs. Fitzsimon may remove the same.

The master and Mr. George Fottrell, one of the plaintiff's solicitors, did meet at the place and time appointed. There is some discrepancy in their evidence as to what then took place. The master's statement is, 'That Mr. Fottrell had a bundle of notes in his hand. He offered me some money, but I cannot say how much. They asked me what more I wanted? I said, demurrage and expenses, and showed them the telegram from Hoffman, which I received on the 15th, telling me to take any money I could get, but not to release the cargo until the charges should be paid.' Mr. Fottrell says: 'The master said that he would be happy to receive the money, but that he would not release the cargo. He would not take the money on the terms I offered it; but he showed a telegram which he had from Hoffman in these words: Receive any money you can get, but don't release the ship.' This telegram is not produced. Looking at the evidence by the light thrown upon it by the correspondence, their Lordships have come to the conclusion that the plaintiff was willing to pay what was demanded for freight, though possibly under protest as to anything in excess of 671*l.* 10*s.* 4*d.*; and that, on the other hand, the master, acting under instructions from Messrs.

[Priv. Co.]

MIEDREDT v. FITZSIMON; THE ENERGIE.

[Priv. Co.]

Hoffman and Co., would not release the cargo except upon payment not only of freight but of the sums claimed for demurrage and other charges; the whole probably amounting to the sum of 830*l.* 5*s.* 7*d.*, as shown by the subsequent letter of the 26th May, and the account therein referred to.

"The result was, that the interview having proved infructuous, the present action was commenced on the same day, viz., the 13th May.

"The only other facts which require mention are, that on the 21st May the plaintiff paid the 2200*l.* to the Port and Docks Board, and obtained delivery of his cargo; that at the same time he served the board with a letter, in which he admitted the sum of 701*l.* 3*s.* 3*d.* (the then ascertained amount of freight) to be payable to the shipowners, but required them to retain the balance, pursuant to the provisions of the 72nd section of the Merchant Shipping Act; that on the 26th May the Master expressed his willingness to receive (as he afterwards received) the amount thus admitted to be due for freight, intimating, however, his intention to take proceedings against the plaintiff for the recovery of the difference between that sum and the 830*l.* 5*s.* 7*d.*, and to give the Port and Docks Board the statutory notice of the institution of such proceedings; but that ultimately, and about the 8th July, the plaintiff did receive the whole balance of the 2200*l.*, being 189*l.* 16*s.* 8*d.*, the shipowners having apparently determined to waive their alleged lien on the fund, and to present their remedy against the plaintiff for the additional amount claimed in an independent action."

Upon these facts the learned judge of the High Court, in a considered judgment, dismissed the suit with costs, holding that up to the 3rd May the plaintiff had a right to hold the cargo as security for the discharge of his lien for freight, general average, and demurrage, and that up to that date no payment or tender of the sums due to him on these accounts from the plaintiff had been made to the defendant, and that, considering the amounts due to the defendant, the amount with which the cargo was charged by the stop order in the hands of the Port and Docks Board, was not unreasonably excessive, and, consequently, there was no improper detention after the 3rd May; and that, under the Merchant Shipping Act 1862, the shipowner has a reasonable latitude allowed him in fixing the amount for which he stops the cargo.

From this decree the plaintiff (respondent) appealed to the Court of Appeal in Chancery in Ireland, on the following grounds:

1. Because the master of the *Energie* refused to deliver the said cargo to appellant unless and until he would pay moneys to which he was not liable at the time the same were so demanded.

2. Because the said master refused to deliver said cargo to appellant, and claimed to retain same under a lien for general average when no such lien existed.

3. Because the said master, when he demanded payment of the moneys demanded by him as a condition precedent to the delivery of said cargo to appellant, was not the holder of the said bottomry bond, and was not in a position to release appellant's said cargo therefrom.

4. Because the said master improperly demanded the prepayment of the freight, when same was only payable concurrently with the delivery of the said cargo.

5. Because the said master improperly and illegally landed and warehoused the said cargo.

6. Because the said master, when he landed and warehoused said cargo, placed an excessive and improper stop on the delivery of said cargo to appellant.

7. Because the stop placed upon the said cargo was retained thereon after the greater portion of the moneys, in respect of which said stop was placed thereon, had been paid.

8. Because the said master was guilty of breaches of duty and breaches of the contract contained in said charter-party and bill of lading.

May 1 and 4, 1874.—The appeal came on for hearing before the Court of Appeal in Ireland, then composed of Sir Joseph Napier, Mr. Justice Lawson, and Lord Justice Christian (the Great Seal being then in commission), and the Court having taken time to consider, the following judgments were delivered on

May 13, 1874.—Sir J. Napier.—In this case the appellants are the consignees of a cargo of Memel timber under a bill of lading, duly indorsed, and a charter-party in the usual terms. The cargo was to be delivered in the port of Dublin. The charter-party bears date the 8th Oct. 1872, and the bill of lading the 6th Nov. 1872. On her voyage from Memel the ship encountered very severe weather. The masts had to be cut away; other damage was suffered, and the master put into Copenhagen for repairs. In the usual way the master passed a bottomry bond for 2375*l.* for the purpose of obtaining the repairs. The condition of the bond was, payment of the principal sum, with the premiums due thereon, at or before the expiration of three days after the safe arrival of the ship in Dublin. By that the ship, freight, and cargo, were hypothecated to the lender to secure payment of the bond. The vessel arrived in Dublin on the 15th April 1873, and as the adjustment of general average, the master demanded a sum of 122*l.* 2*s.* 11*d.*, and for freight a sum of 700*l.* A good deal of negotiation as to the proper amount of claim took place amongst the parties interested, and during April a gentleman named Harper came over from London, on the part of the shipowner, to settle the matter in dispute. He reduced the claim to 1150*l.*, and estimated the freight at 700*l.*, and offered to the appellant that if he would pay a sum of 1850*l.*, the cargo would be delivered to him. Mr. Harper further offered to draw up an agreement between the parties, that if the respondent had received too much or too little, the excess on the one side or the deficiency on the other should be made good. This seems to me to have been a very fair arrangement and proposal, but it was rejected by the appellant, who offered to draw a cheque for 1750*l.*, which Mr. Harper refused. On the 2nd May there was a further attempt to settle, but the appellant stood off, and refused any further negotiation. The refusal of the appellant was, in my opinion, unreasonable and profligate. Some mutual confidence is required in commercial dealings, and a selfish course usually brings on those practising it a proper penalty. Up to this point, however, I saw no reason to differ from the learned judge of the Admiralty Court, who has given a very noble and carefully prepared judgment. The way in which the bottomry bond has been referred to and introduced into the case by both parties has tended to obscure and complicate the material issue. A

PRIV. CO.]

MIEDSBROT V. FITZSIMON; THE ENERGIE.

[PRIV. CO.]

bottomry bond is an instrument by which the master of a vessel, acting within the scope of his authority, under circumstances such as in the case of *The Karnak* (6 Moore P. C. C., N. S., 136), is at liberty to hypothecate the ship, freight, and cargo to the man who advances the money to the master in a foreign port for the purpose of carrying out the repairs of the ship; the bondholder under the bond acquires the right to be paid at the end of the voyage, and may attach the ship, but the owner of the ship was not made personally liable, nor has the shipowner any lien on the cargo for moneys paid under the bond. In *Steinback v. Shepperd* (13 C. B. 418) this subject was fully discussed and an authoritative decision given. Pollock, C.B., in his judgment, pointing out the distinction between the transfer of the property subject to the debt and lien and the hypothecation that only gave a right to be enforced in a particular way against it. The bond is not payable until the vessel arrives at the port of destination—the end of the voyage. No particular form is necessary, but the bond is valid so far as it is within the scope of the master's authority, and no further. The process is in Admiralty, where the proceeding is *in rem*. The usual course is to attach under process at the suit of the bondholder for whatever is due on the bond, and after the value of the ship and freight is exhausted, but not before, the cargo would be available to the bondholder for what may remain due. The course of the proceeding under the attachment process, and the amount for which the cargo is to be liable, are under the control of the court, and it is the Judge of the Admiralty who decides or not on allowing the cargo to secure the payment of the liability imposed. It is only in that way the cargo can be made liable to contribute, and there is no right of detention of the cargo to enforce contribution except that which is incident to the process of Admiralty in the proceeding of attachment, and for whatever amount the owner of the cargo may be liable to contribute he has a remedy over against the owner of the ship by way of indemnity. The latter is the person ultimately liable for the money borrowed. That was recently settled by the case of *Duncan v. Benson*; (1 Ex. 537), and affirmed by Exchequer Chamber (3 Ex. 644). In that case it was authoritatively decided that that judgment of Lord Stowell was only an authority with respect to the power of the master to bottomry the cargo, but that it determined nothing of the relative rights of the owners of the ship and of the cargo *inter se*. If the cargo is hypothecated to secure the debt of the owner of the ship, the owner of the cargo has a right to be reimbursed by the owner of the ship for what he may be compelled to pay under the bond, inasmuch as that sum is considered by the law to be really the debt of the owner of the ship, but the master cannot detain the goods for the bottomry debt for the debt to the bottomry creditor. He is not authorised to do that, but he may detain for freight if not attached under Admiralty process and for general average. But that is wholly different from a bottomry debt: it is a claim which the shipowner has against the owner of the cargo, whereas there is no such claim on the bond. The Chief Baron (Pollock), in *Duncan v. Benson*, delivering the judgment of the Exchequer, said: "The owner of the goods is under no obligation to contribute to any expense except such as constitute a general average, and that of the repairs in

this particular case does not fall under that description." What is "general average" for which there is a debt upon the owner of the goods is stated in *Simmonds v. White* (2 B. & C. 311), where the Chief Justice says: "The principle of general average, namely, that all whose property has been saved by the sacrifice of the property of another shall contribute to make good his loss, is of very ancient date, and of universal reception among commercial nations. The obligation to contribute, therefore, depends not so much upon the terms of any particular instrument, as upon a general rule of maritime law. There are, however, many variations in the laws and usages of different nations as to the losses that are considered to fall within this principle. But in one point all agree, namely, the place at which the average shall be adjusted, which is the place of the ship's destination or delivery of her cargo." As to the lien for general average, it was decided in *Cargo ex Golan* (9 L. T. Rep. N. S. 550; 2 Moore P. C., N. S., 32; 1 Mar. Law Cas. O. S. 408), that the Court of Admiralty was bound to recognise it as a clear legal right; and it was not allowed to impair or prejudice in any way the security of the bondholder, but as between the shipowner and the owner of the cargo, the case is entirely different, and no better or more instructive illustration can be given of the importance in dealing with a case of looking at what is the precise issue between the parties than the case of *Duncan v. Benson* (*supra*), which decides that the shipowner is the man really responsible for the money raised for the repairs, and that only a portion of that can properly be called general average is what goes to save the ship and all the cargo, and this rests on the universal principle that all whose property is saved by the expenditure must be held to contribute to the expenditure. But the shipowner is the man really responsible, and can only recoup himself from the owner of the cargo. Therefore the parties treat the case as one for the amount of freight and general average. It may be that the average included expenditure for repairs that ought not to be called for as contribution for general average; however that may be, I have no means of correcting it. We must treat the case as if no distinction arose, and as if the adjustment made was for general average properly so called, and that there was some little difference as to the proper amount which was tried to be settled by Mr. Harper up to the 3rd May. Now, up to this point, I see no reason whatever to differ from the views taken by the learned Judge of Admiralty; but with the greatest possible respect to him, from the 3rd May—after the refusal of the appellant to settle—we must part company. The master of the ship began to discharge the cargo and place it in the custody of the Port and Docks Board, under the 6th and 7th sections of the Merchant Shipping Act, for the sum due. The appellant wrote a letter to the master, in which he stated that he was prepared to pay the full proportion of average, and lodge security for the freight. No tender, however, was made to the master, who proceeded to discharge the cargo and lodge it with the Port and Docks Board, upon whom a notice was served that they should detain the cargo until appellants paid a sum of £2200, for freight and average. On the 12th May appellant paid to the shipowner a sum of £1200, in settlement of the average contribution, but the haul

[Priv. Co.]

MIEGHBOUT v. FITZSIMON; THE ENERGIE.

[Priv. Co.]

refused to take it into account with respect to the stop order, for they don't involve themselves, and very properly, in any matter of dispute between parties, leaving them to settle as they may, and only requiring to be paid the amount of the order lodged with them. On the 21st May the sum of 2200*l.* was lodged with the Port and Docks Board by the solicitor of the appellant, and the latter gave notice, admitting that the sum due for freight was 701*l.* Now that was a complete admission of the propriety of Mr. Harper's proposal, and of its fairness, that 1100*l.* should be paid for average, and 700*l.* for freight; and I must say, that but for the perverse refusal to agree to that fair proposition, the whole of this trouble and expense would have been saved. It only showed how unwise it is to stand out on selfish views, and not at once fairly and frankly to meet a proposition that left no difficulty, to pay a certain sum, leaving the deficiency or the excess to be adjusted subsequently. That was refused, and I must say I think the refusal was very perverse. But the appellant could not get his cargo without paying the sum of 2200*l.* After paying that amount to the Port and Docks Board he got possession of the cargo. He could not get it without that full payment after the lodgment of the cargo with the stop order upon it. In my opinion this was undoubtedly wrong, unless that sum of 2200*l.* was due and payable on the 3rd May, for general average and for freight, and for such demurrage as there was a right under the charter-party to demand. Now no explanation has been given that does not leave some excess beyond the legal limit that could be demanded, be it more or less. It appears to me that there was a sum of between 300*l.* and 400*l.* too much in that stop order, a sum which had no right to be added in, and for which there was no lien. 1800*l.* was the sum demanded, and then there might be some two or three days' demurrage, which the party might be compelled to pay to get his goods delivered. But nothing could take them out of the custody of the Port and Docks Board except a payment of 2200*l.* After the 3rd May the owner of the cargo could not send in any claim for delivery, except on payment of that sum, that was the effect of the stop order. In that respect the detention of the cargo must be treated as the act or rather the default of the master, in placing the cargo in such custody and subject to such a charge, and consequently he must be held responsible for the unlawful detention—unlawful because the stop order included more than he had a right to get from the owner of the cargo, the unlawful detention being a breach of duty on the part of the master. I may add that common law would give an action in the case. There was a case bearing on the point in the reports of the tribunal where after all was to be found the best principles and authorities, and the best instruction—the House of Lords: (*Somes v. The British Imperial Shipping Company*, 8 H. of L. Cas. 338.) There the vessel was repaired, and there was a lien on the vessel for the charge. A dispute arose about the amount, and the vessel was detained. Then came the question whether any charge was to be made for the possession under the detention, whether that was to be added to the lien. In the Queen's Bench, Mr. Justice Blackburn laid down the principle that where possession is retained for the purpose of preserving the lien the expense cannot be charged unless there is a special contract, because

the lien is for the benefit, not of the owner of the goods but of the party who says he has the lien on them, and he detains them at his own expense: (see *Ell. Bl. & Ell. 353.*) Lord Cranworth, in the House of Lords judgment, says a wrong was done when the ship was seized, and it was said it would not be given up until the party paid something *ultra* that which he was bound to pay. And Lord Wensleydale said: "They became wrongdoers by that act. I am clearly of opinion that they made a demand in this case which they had no right to make for keeping possession of the ship till this charge for dock hire was paid. They have by that means obtained money which they had no right to obtain, and consequently an action for money had and received will lie, and the shipowners are entitled to a verdict." Now, in this case there was a wrongful act from the time the improper sum was sought to be levied, and we think it is clear that that dates from the 3rd May. Before that no distinction was made by separating the portion due for general average, under the bond and for freight. Before this 1800*l.* was demanded from the appellant, and he refused to give so much. Then the stop order is put on for 2200*l.*, which sum the owner of the cargo had to pay before he could get out the goods. If the appellant tendered the 1800*l.* after the stop order was put on he could not get the cargo. If he tendered something more than that he could not get it. The amount added on was between 300*l.* and 400*l.* The owner had the option of abandoning his right to the cargo or paying the excessive sum, and to put him into that position was a breach of duty for which the master is responsible to the owner. The judgment of the court below must therefore be set aside, and judgment given here for the appellant. In the case of *The Freedom* (24 L. T. Rep. N. S. 452; L. Rep. 3 P. C. 594; 1 Asp. Mar. Law Cas. 28), the court held that the proper practice was to refer the case back to the officer of the Court of Admiralty, who would be assisted by mercantile assessors to estimate the damages incurred by the detention, taking all proper circumstances into account. In this case the detention will date from the 3rd May till the 21st May, and for that time the damages will be fixed; the appellant to get costs of the proceedings under the petition, but no costs of this appeal. He is entitled to costs below up to judgment. The case is of some importance, and I think that these mercantile people, by the exercise of good sense, could have avoided all this. The case has been complicated by the confusion of mixing up the claims for general average, and upon the bottomry bond, as to which the rights are different. Under the latter the ship may be attached; then the freight and then the cargo, but the latter only in case it becomes necessary to complete the payment of the bondholder, and then the owner of the cargo has his remedy over against the owner of the ship for his share of it. The case must go back to the Admiralty Court to assess the damages.

Mr. Justice Lawson.—In agreeing in the conclusion at which Sir Joseph Napier has arrived, I wish to say that I give no opinion on the several questions that have been raised with respect to the original rights of these parties. I rest my judgment on the transaction of the 3rd May. On the 1st May there was an interview between Mr. Harper and Mr. Fitzsimon, and the parties were nearly coming to an arrangement, on the one side 1750*l.*

[Priv. Co.]

MIGNEROT v. FITZSIMON; THE ENERGIE.

[Priv. Co.]

was offered, on the other 1800*l.* was demanded and refused. Now the outside claim of Mr. Harper on that occasion was 1900*l.*—1220*l.* for the average and 700*l.* for freight. That being so, in my opinion he had no right to put on a stop order for 2200*l.*; I think that was an illegal detention. I think if he acted under the sections of the Merchant Shipping Act and put the cargo into dock, he had a right to leave it in exactly the same position as on the 1st May, or before that in the stop order. There is no question that before that he would have taken, and been bound to take, 1900*l.*—I mean up to the time he put on the stop order; he added 300*l.* to that, he put on the stop for 2200*l.*, thereby placing and deliberately placing the cargo in such a position that it could not be released from that detention by the owner of the cargo without payment of money that was not due, and and that could not be due. That was an abuse of the process of law. He was bound in law to leave the cargo in the same position as before, but what he did was in point of law the same as if this man came to him before the stop order was put on and offered him 1900*l.*, and he said, 'No, you must give me 2200*l.*.' The case cannot stand on that. In my opinion there was an illegal detention on the 3rd May. We must refer back the case to the Court of Admiralty with that declaration, and to have the damages ascertained.

Lord Justice Christian.—This is a case of some novelty and importance, and it would not be expected that this court should assume to carry the decision further than the decision may be actually necessary for disposing of this particular case. It was strongly contended before us that the ordinary master's lien on the cargo for general average was superseded by the bare fact of the passing of this bottomry bond, that the lien was then in the nature of a thing recoverable by the special power of attaching the cargo of the ship, which the master, as the agent both of the shipowner and the merchant, by that contract of hypothecation conferred upon the bondholder; it was contended, following that up, that when the ship arrived at the port of discharge it was this bottomry transaction, and not the ordinary master's lien on the cargo for average, that regulated the liability of the cargo; and then it was further contended that in the absence of the bondholder, who had the special rights given to him by the bond, the master could not be considered as his agent for giving effect at the port of discharge to the liability imposed by the hypothecation transaction, or that, if he could have done so, his proper course was not the one he took, namely, of his own authority, retaining possession of the cargo, but he should have resorted to the Court of Admiralty for the purpose of attaching it. Now, as to that last proposition, that is to say, if the master was obliged to defend his proceedings upon the footing of the rights created by the bottomry bond, he could only do so by attachment, proceeding in the Court of Admiralty. I am of opinion that the argument of the counsel for the appellant was perfectly well founded; but as to all the other questions, and the most important of all, namely, whether or not the ordinary lien on cargo for general average is compatible with the existence of the right of attachment, such as this bottomry transaction conferred on the bondholder. On that I give no opinion whatever. It is unnecessary to do so, for the ground referred to by the Lords

Commissioners is amply sufficient for a decision of the case. I think, whatever may be thought of the legal relation in which the master stood to the cargo, he had no right to make the payment for the repairs—an excessive demand—the condition precedent to the delivery of the cargo to the merchant. In making that excessive demand he acted at his peril. It is clearly proved that he demanded a sum of at least 300*l.* beyond what, at the utmost, he should have demanded. What he seems to have done is this: he seems to have taken first the amount for which the cargo might be called to contribute for general average; he seems to have then taken his own estimate of what the freight ought to be, a matter not conceded between the parties. These two together came to 1800*l.*, or thereabouts. He then assumed that there were some other charges that might accrue in the future in the shape of demurrage, &c., and so he puts on a round sum of 400*l.* for the purpose of covering all these possible contingent demands, and makes it a condition precedent to the giving up of the cargo that the merchant shall pay 2200*l.* I hold that the master, in refusing to deliver the cargo unless that demand was satisfied, was guilty of an illegal detention, for which he must answer in damages; and, furthermore, I must say that I think, throughout the whole of this transaction the master, and those in whose interest he was acting, and those who no doubt were encouraging him, manifested a most reckless and reprehensible disregard of the interest of the owner of the ship. They manifested it, first, by the excess and stringency of the demand, as a condition precedent to the delivery of the cargo; next, by following up that demand by the stop order for 2200*l.* by 300*l.* more than was at first demanded; and lastly, by what, perhaps, more than anything else, shows the nature of the transaction, that after the merchant had been obliged to go to the Custom House and pay that sum of 2200*l.* in order to get possession of his goods, and when some little time after that he sent to London the 1136*l.*, which I think was the amount ultimately ascertained to be the fair amount payable on foot of the claim for general average, and when he then asked these people to assist him to get back the 1136*l.*, part of the 2200*l.*, deposited with the Port and Docks Board, they said, "No, we will do nothing of the kind, the matter must now be allowed to take its course," the consequence of which was, that for nearly two months the merchant was kept out of that 1136*l.*, an unmitigated wrong, as from the very first it was an unmitigated wrong to have demanded an extra 300*l.* or 400*l.* from the merchant before he could obtain possession of his goods. I entirely agree in the decision, on the ground mentioned. The order of the court below must be reversed, and the case remitted to the court below for the purpose of ascertaining the damages, which I trust these gentlemen will have to pay for their high-handed proceedings.

In accordance with such judgment a decree was drawn up, by which it was ordered that "the judgment for the defendant given in the Court of Admiralty be reversed and set aside, and judgment given for the plaintiff, to be entered up for such sum as the Registrar of the said Court of Admiralty, with his mercantile assessors, may ascertain to be due from the defendant to the plaintiff for damages arising from or consequential upon the detention of the cargo of timber

[Priv. Co.]

MIEDERDOUT V. FITZSIMON; THE ENERGEIE.

[Priv. Co.]

from the lodging of the stop order, on the 3rd May 1873 until the 21st May, and that the plaintiff do have the costs of the proceeding on his petition in the said Court of Admiralty up to the time of the entering up of the judgment for damages; when ascertained, the said costs to be taxed and ascertained by the Registrar of the Court of Admiralty; and that each party do abide their own costs of this appeal matter, and that the deposit of 10*l.* lodged with the registrar of this court be handed back to the said appellant James Charles Fitzsimon, or to Messrs. George Drevar Fottrell and George Fottrell, jun., or either of them, his solicitors.

From this decree the master of the *Energie* appealed to the Judicial Committee of her Majesty's Privy Council, giving the following grounds of appeal:—

1. Because the said Court of Appeal erroneously held that the amount for which the appellant put a stop order on the said cargo, viz., 2200*l.*, was improper and excessive.

2. Because the said Court of Appeal erroneously held that after such stop order had been put on nothing could take the cargo out of the hands of the dock board, except a payment of 2200*l.*

3. Because the respondent, at any time after such stop order was put on the cargo, could, by paying or legally tendering to the appellant, or giving notice to the dock board to pay to the appellant the amount of his lien on the said cargo, have entitled himself to a receipt for the amount claimed as due, and to delivery of the said cargo, and could have obtained delivery thereof.

4. Because the respondent did not at any time before the institution of this suit, tender to the appellant the amount due to him in respect of his claim and lien on the said cargo for freight, demurrage, and landing charges, and the appellant never dispensed with such tender.

5. Because at the time of the institution of this suit the appellant had not committed any breach of contract or duty with or to the respondent, within the meaning of the 37th section of the Court of Admiralty (Ireland) Act 1867.

6. Because the respondent, as soon as he paid or caused to be paid the amount due to the appellant for freight, received delivery of the said cargo.

7. Because the said decree of the High Court of Admiralty of Ireland was and is right, for the reasons stated in the judgment of the learned judge of that court and otherwise, and such decree ought to have been affirmed by the said Court of Appeal.

8. Because, even if the appellant had, before the institution of this suit, committed any breach of contract or breach of duty with or to the respondent, yet the respondent did not, by his evidence, prove that he had thereby suffered any loss or damage recoverable by law.

March 24 and 25, 1875.—*Cohen, Q.C.* and *E. C. Clarkson*, for the appellant, contended that the appellant, being ready and willing to deliver on payment of freight and general average, was entitled to payment on giving up the goods:

Paynter v. James, 18 L. T. Rep. N. S. 440; L. Rep. 2 C. P. 348; 3 Mar. Law Cas. O. S. 76;
Black v. Rose, 11 L. T. Rep. N. S. 31; 2 Mar. Law Cas. O. S. 80.

That, whatever sum the master may have asked

before the exact amount of freight was ascertained, that demand was no excuse for the respondents not having tendered the amount due (*The Norway*, 12 L. T. Rep. N. S. 57; 2 Mar. Law Cas. O. S. 254); that the lien upon the cargo for general average and freight justified the detention of the cargo on board the ship up to the 3rd May, and that the landing and warehousing the cargo on that date was justified in consequence of the respondents' refusal to pay the amount due; that the amount named in the stop order was not excessive, considering the amount then due for general average freight, demurrage, and other charges; that masters landing and warehousing cargoes are not bound to confine the stop order to the exact amount of money due upon the cargo, but may declare a lien upon the cargo for such reasonable amount as they deem necessary to discharge their lien; that the respondents might have had their cargo if they had tendered the proper amount due when ascertained, and had asked the appellant to give notice to the Ports and Docks Board that all that was due had been paid; that the Merchant Shipping Act Amendment Act 1862 (25 & 26 Vict. c. 63), sects. 67, 68, 69, 70, and 71, providing for the landing and warehousing of the goods and the preserving of a shipowner's lien thereon, were merely a mode of giving the shipowner the right to procure bail for his freight and average, and that there could be no wrongful non-delivery short of a wilful detention by the master for an improper amount.

Butt, Q.C. and *J. C. Matthew*.—First, the general average did not become payable until after the bottomry bond had been discharged, and, consequently, at the time of the ship's arrival in Dublin, there was no lien for general average, and there was not improper detention of the cargo from the time of the first demand for delivery made by the shipowner. Until the shipowner had himself become out of pocket by paying off the bond, he could not claim for general average from the cargo owner. Secondly, the claim for freight was in the first instance excessive, no larger sum being ascertained than 671*l.* Before a master can claim payment of freight, it must be ascertained, and here it was not ascertained until after the 3rd May. The respondent was quite willing to pay the freight when ascertained, and there is no question of tender in the present case, as the master was never ready and willing to deliver. On the 1st May, when the London agent for the ship saw the master, the plaintiff was not liable to pay anything—not in respect of freight, because none was due, the cargo being then undischarged, and the freight was only payable on delivery; nor in respect of general average, because the bond in respect of which it was payable, was neither produced nor discharged. The discharge of the cargo by the master was in itself unlawful, and a detention under the circumstances, because there was no failure on the part of the respondent to take delivery, within the meaning of the Merchant Shipping Act Amendment Act 1862, sect. 27, and without such failure goods cannot be landed and warehoused. But even if such landing and warehousing was lawful in itself, there was a wrongful detention of the goods, by reason of the master putting a stop order upon them for more than was due. And, moreover, there was a further wrongful act when the master refused to inform the warehousemen of the payment of the amount due for general average.

PRIV. CO.]

MIDDEBRODT V. FITZSIMON; THE ENERGIE.

[PRIV. CO.]

The refusal of a master to deliver dispenses with the necessity for a tender:

Keeford v. Maudslayi, 28 L. J. 303, Ex.;
Scarj v. Morgan, 4 M. & W. 270.

A master has no lien for demurrage occasioned by his own refusal to deliver, even when such refusal is for the purpose of preserving his lien for other charges.

Cohen, Q.C., in reply, cited

Cargo ex Galam, 9 L. T. Rep. N. S. 559; 1 Mar. Law Cas. O. S. 408.

Cur. adv. vult.

April 24, 1875.—The judgment of the court was delivered by

SIR MONTAGUE E. SMITH.—The question on this appeal is, whether the respondent (the plaintiff in the cause and the owner of the cargo) has established a good cause of action against the appellant (the master of the ship *Energie*) for breach of duty or of contract in relation to the delivery of the cargo. The Judge of the High Court of Admiralty in Ireland held that he had failed to do so, and dismissed his suit. The Court of Appeal in Chancery in Ireland, to which, subject to a final appeal to Her Majesty in Council, an appeal from the Court of Admiralty lies, reversed that decision, maintained the action, and remitted the case to the court below for the purpose of ascertaining the damages. The present appeal is against that judgment. As to the principal facts in the cause, there is little or no dispute. [His Lordship then stated the facts, as given above.]

It is now to be considered upon what ground, if any, the present action is maintainable.

The judgment of the Court of Admiralty has found, and that of the Appellate Court assumes, that up to the 3rd May the master was acting within his strict legal rights. Their Lordships do not dissent from that conclusion.

The argument, however, that was addressed to them on behalf of the respondent makes it desirable to consider briefly what those rights were. That the master had, by Common Law, a lien for freight and general average contribution, and, by contract, a lien for demurrage upon the cargo, was not and could not have been successfully disputed. The freight, however, was not payable before delivery, and could only be ascertained by measurement upon delivery. The case, therefore, was one of those in which the payment of the freight and the delivery of the goods are concurrent acts, in which, as is shown by the case of *Paynter v. James* (L. Rep. 2 C. P. 348; 3 Mar. Law Cas. O. S. 76), all that is required from the owner of the cargo is readiness and willingness to pay at the time of delivery, and in which a settlement can hardly be practically effected without some mutual trust and accommodation. In such circumstances the offer to pay so large a proportion of the freight as 550*l.*, before breaking bulk, was not unreasonable.

Again, before paying the sum demanded for average, the plaintiff had a right to be satisfied that it was the result of a proper adjustment. He did not himself see the average statement before the 1st May, though it had been in the hands of his London agents on the 18th April, when it was forwarded by them to the underwriters. There seems to have been a *bonâ fide* dispute as to the principle of the adjustment, which the subsequent conduct of the shipowners shows to have been at

least questionable. He had, moreover, fair grounds for declining to pay the average contribution, until he was satisfied that no claim would be made by the bottomry bondholder against the cargo. And of this he had no assurance before the 3rd, if before the 6th, of May. He offered at least, as early as the 28th April, to sign an average bond, which, there being no doubt of his solvency, it would have been but reasonable in the shipowners to accept. It is true that their object was to get cash, in order to pay the bondholder. But the owner of cargo is under no obligation to put the shipowners in funds to meet a debt for which they are primarily liable.

Hence it appears to their Lordships that the detention of the cargo by the master up to the 3rd May, though not wrongful, was an act done in the rigid exercise of his rights; and that it is fairly open to argument whether, if he chose to detain the cargo under the circumstances above stated, he could impute the delay in its discharge thereby caused to the plaintiff, or make that a ground for a claim of demurrage. It does not, however, seem to them to be necessary for the determination of this case, to consider whether the lien for demurrage, which was once claimed, but finally waived, ever existed; and they abstain the more willingly from expressing an opinion upon this point, because the claim for demurrage is said to be now *sub judice* in another forum.

The judgment under appeal has found that there was a wrongful detention of the cargo on and after the 3rd May, and that a right of action then accrued to the plaintiff by reason of the delivery to the Port and Docks Board, begun on that day, under a stop order for the excessive sum of 2200*l.*

In support of this judgment it has been argued that the delivery to the Port and Docks Board, of itself and irrespectively of the sum specified in the stop order was wrongful, inasmuch as the plaintiff had not "failed to land and take delivery" of his goods within the meaning of the 67th section of The Merchant Shipping Act Amendment Act. Their Lordships, however, cannot assent to this proposition. They conceive that the word "failed" need not be taken to imply wilful default in the cargo owner; but that, upon the true construction of the section, the shipowner is at liberty to land the goods under it, whenever the delivery of them to the owner within the proper time has been prevented by the force of circumstances, whether the latter is or is not to blame. They think that this construction is fortified by some of the provisions of the section which, in certain cases, throw the risk and expense of the landing upon the shipowner.

On the other hand it was argued against the judgment that it implies, if it does not express, that the master is liable to an action for damages whenever he lands under a stop order for a sum in excess, no matter how slightly in excess, of the amount due to him. Their Lordships do not so read the judgment. The proposition said to be involved in it is not necessary to support it, and seems to be inconsistent with the 72nd section of the statute, which assumes that the master in some cases may *bonâ fide* have claimed a lien for more than was really due to him.

The provisions of the statute which relate to this question are obviously designed both to give the master the means of discharging the cargo,

PRIV. CO.]

THE FANNY M. CARVILL.

[PRIV. CO.]

retaining his lien, and to give the cargo owner the means of obtaining his goods by the deposit of a sum sufficient to cover the master's claim. But they do not extend the lien. The lien for the warehouse rent and charges occasioned by a landing, under the 67th section, is another and distinct lien created by the 76th section. The words of the 68th clause are: "If the shipowner gives to the warehouse owner notice in writing that the goods are to remain, subject to a lien for freight or other charges payable to the shipowner, to an amount to be mentioned in such notice, the goods so landed shall, in the hands of the warehouse owner, continue liable to the same lien, if any, for such charges as they were subject to before the landing thereof." If, then, the master wilfully inserts in his notice a sum which he knows to be in excess of that for which he had a lien before delivery, he not only injuriously affects the cargo owner by compelling him to deposit more than the statute requires in order to release his goods, but intends to produce that result by decess of the goods; and thus the delivery to the warehouse keeper is tantamount to a wrongful detention of the goods, and, as such, an actionable breach of duty. In the present case, the sum inserted in the notice was manifestly and grossly in excess of that for which the master could *bona fide* claim a lien. The outside sum claimed so late as the 6th May was 190*l.* 2*s.* 11*d.*, being 122*l.* 2*s.* 11*d.* for general average, and 770*l.* for freight, demurrage, and landing charges. On the 21st May the latter item had been swollen to 830*l.* 3*s.* 7*d.*, but the average claim had then been settled by the payment of 1136*l.* 2*s.* 4*d.*; and even if the sum of 830*l.* had been present to the mind of the master on the 3rd May as the amount claimable, in addition to the larger sum claimed for average, the aggregate of the two would have fallen short of 2200*l.* by 150*l.*

It was, however, argued that the mere insertion of an excessive sum in the notice is not actionable, because the statute gives to the cargo owner, by the 68th section, the means of releasing his goods otherwise than by a deposit of the sum specified in the notice; viz., by obtaining from the shipowner either a receipt for the amount claimed as due, or a release of freight. But upon the hypothesis that the goods are wrongfully detained by the shipowner for an excessive demand, it is not to be assumed in his favour that he would give such a receipt or release upon the offer of a less sum than that demanded; and a payment to the shipowner under protest would put the cargo owner in a worse position than he would be in by the deposit of the sum claimed by the shipowner; since, in the latter case, the shipowner would have to establish his claim *ultra* the amount admitted by proceedings under the 72nd section; whereas, in an action for money had and received, the burthen of proof would be on the plaintiff, the cargo owner.

The evidence, moreover, in this case shows that the plaintiff did his best to obtain his timber under the 68th section. He actually paid the average; he was ready and willing to pay, though under protest, the whole amount demanded for freight; but the master, under the instructions of Hoffmann and Co., refused to release the cargo upon any terms, or at all events upon any terms short of the payment of the 830*l.*, which, besides the amount claimed for demurrage, included items for which it is clear that the master when he loaded the cargo

had no lien. The plaintiff, therefore, was driven to make the deposit of 2200*l.* by the determination of the shipowners to use the stop order as the means of exacting the payment of charges for which they had no lien.

Their Lordships are of opinion that, from the evidence in the cause, the Appellate Court might fairly infer that it was with this object and intention that the excessive amount was originally inserted in the stop order, and, consequently, that the landing and detention of the cargo under that stop order was a wrongful act, which gave the plaintiff a right of action as from the 3rd May.

Had their Lordships been of a different opinion, the result would only have affected the date from which the wrongful detention is to be reckoned; for they entertain no doubt that the plaintiff had a good cause of action on the 15th May, the date of action brought. After the settlement of the claim for average by actual payment, it was clearly the duty of the master, and of the London agents for the ship, to reduce the stop order to the amount for which they then had, or could reasonably claim, a lien.

This they refused to do; they refused either to release the goods or to reduce the stop order upon the receipt of the freight, which the plaintiff, on the 15th May, was ready and willing to pay.

That this would have given to the plaintiff a right of action, if he had not one before, their Lordships have felt no doubt, but for the reasons above stated they are of opinion that the judgment of the Appellate Court in Ireland was correct in finding that the right of action was complete on the 3rd May.

Upon the point taken, to the effect that the plaintiff being entitled at most to nominal damages, the remand to the Admiralty Court is improper, it is sufficient to say that it is premature to say that the damages, though they may be small, will not be substantial. Their Lordships, will, therefore, humbly advise her Majesty to affirm the judgment under appeal, and to dismiss this appeal with costs.

Solicitors for the appellants, *Hollans, Son, and Coeard.*

Solicitors for the respondent, *Watsons, Bubb, and Walton.*

April 29 and June 9, 1875.

(Present: The Right Hon. Sir J. W. COLEMAN, Sir HENRY FRANK, Sir M. E. SMITH, Sir R. P. COLLIER, and Sir H. S. KEATING.)

THE FANNY M. CARVILL.

Collision—Breach of regulations for preventing collision—Light—Scurvy—Merchant Shipping Act 1873 (35 & 36 Vict. c. 85), s. 17—Construction.

To render a ship liable to be deemed in fault under the Merchant Shipping Act 1873, sect. 17, for an infringement of the regulations for preventing collisions, the infringement must be one having some possible connection with the collision in question; a mere infringement, which by no possibility could have anything to do with the collision, will not render the ship liable.

A ship carrying her side lights, with screens shorter than required by the regulations, is not to be deemed in fault if the shortness of the screens could not by any possibility have contributed to the collision.

Priv. Co.]

THE FANNY M. CARVILL.

[Priv. Co.]

Seem, that the peculiar build of a ship requiring her side light screens to be shorter than provided in the regulations, is not a "circumstance of the case making a departure from the regulation necessary," within the meaning of the Merchant Shipping Act 1873, sect. 17.

This is an appeal from a decree of the Right Hon. Sir R. J. Phillimore, Judge of the High Court of Admiralty of England, in a case of damage lately pending in that court, brought by the respondents as the owners of a barque called the *Peru*, and the owners of the cargo lately laden on board her, against the barque *Fanny M. Carvill*, of which the appellants were owners, for the recovery of damages in respect of losses occasioned to the respondents by reason of a collision between the said vessels.

The collision happened between 9 p.m. and 10 p.m. on the 18th Nov. 1874, in the English Channel, about fifteen miles off Beachy Head.

The *Peru*, which is a Swedish barque of 589 tons register, was prosecuting a voyage from the Tyne to Monte Video with a cargo of coals. The *Fanny M. Carvill*, which is a British barque of 502 tons register, was on a voyage from London to Barcelona with a cargo of deals.

The case on behalf of the *Peru* was that she was sailing close hauled by the wind on the starboard tack, heading about S.W., making about three knots an hour, with the wind about W.N.W., and the weather fine, clear, and moonlight, and that she had a red light on her port side and a green light on her starboard side, both burning brightly, and that whilst so proceeding the green light of the *Fanny M. Carvill*, which vessel was on the port tack, was seen at the distance of about one mile and a half from the *Peru*, bearing about two points on the port or lee bow, that the *Peru* was kept close hauled by the wind on the starboard tack, but that the *Fanny M. Carvill* approached, and though loudly hailed, ran into and struck the *Peru* on her port side. The respondents attributed blame to the *Fanny M. Carvill*, which was the port tacked vessel, for not keeping out of the way of the *Peru*, the close-hauled starboard-tacked vessel.

The case set up by the appellants was that the red light of the *Peru* was seen bearing four points on the starboard bow of the *Fanny M. Carvill*, distant about two miles, and that almost immediately afterwards the green light of the *Peru* came into view, and that the *Peru* continued to approach showing both lights broad on the starboard bow of the *Fanny M. Carvill*, that in about ten minutes the *Fanny M. Carvill* showed a flash light, and shortly afterwards the red light of the *Peru* was shut in and the two vessels would have passed clear, starboard side to starboard side, but that the *Peru* shut in her green light and again opened her red light, causing immediate danger of collision, that thereupon the helm of the *Fanny M. Carvill* was put hard aport and her mainyard squared, but that she was unable to clear the *Peru*, and with the bluff of her port bow struck the *Peru* on her port side amidships. The appellants charged the *Peru* first with having neglected to keep a good look-out; secondly, with having neglected to keep her course; thirdly, with having her lights improperly fixed and screened, and they attributed the collision to such alleged acts of neglect, and they further alleged that the *Peru* was in fault within the true intent and meaning

of the 17th section of the Merchant Shipping Act 1873, for infringing the regulations for preventing collisions at sea by neglecting to carry proper side lights.

The case was heard on oral evidence before the learned Judge of the court below, assisted by two of the Elder Brethren of the Trinity Corporation. It then appeared that the screens of the lights of the *Peru* fell short of the regulation length by nearly one foot, but no other complaint was made against the lights. The appellants alleged that, in consequence of the shortness of the screens, the green light of the *Peru* was seen across her port bow. The evidence as to the position of the lights and the other facts will be found in the report of the case below (32 L. T. Rep. N. S. 129, 134; 2 Asp. Mar. Law Cas. 478, 483).

The learned judge of the court below, after hearing the evidence and consulting with the Elder Brethren, came to the conclusion that the story told by the witnesses from the *Peru* was true, and that that told by the witnesses from the *Fanny M. Carvill* was untrue, and that the deficiency in the length of the screens of the lights of the *Peru* did not, in fact, in any way contribute to the collision; but he reserved his judgment as to whether, owing to such deficiency, the *Peru* must also be held to blame under the said statute. The learned judge subsequently gave judgment upon this point in favour of the *Peru*, and made the usual decree, pronouncing for the damage proceeded for with costs. The judgments of the court below will be found: (32 L. T. Rep. N. S. 135; 2 Asp. Mar. Law Cas. 485). From the decree so made the owners of the *Fanny M. Carvill* appealed for the following, amongst other, reasons:

1. That on the evidence taken in the court below, the collision was solely attributable to the negligence and improper navigation of those on board the *Peru*.

2. That the collision was in no way occasioned by any negligence or improper conduct of those on board the *Fanny M. Carvill*.

3. That on the evidence the side lights of the *Peru* were improperly screened, allowing the green light to show across her bow.

4. That on the evidence those on board the *Fanny M. Carvill* were misled by the improper exhibition of the lights on board the *Peru*.

5. That on the evidence it is clear that the collision was occasioned by the improper exhibition of the green light of the *Peru*.

6. That the finding of the learned judge that the green light of the *Peru* was not seen across the bow of the *Peru* by those on board the *Fanny M. Carvill* is not warranted by the evidence in the case.

7. That the evidence established that the green light must have been and was seen across the bows of the *Peru* by those on board the *Fanny M. Carvill*.

8. That the learned judge should have found the *Peru* in fault within the meaning of 17th section of the 36 & 37 Viet. c. 85, on the ground of the improper condition of her side lights.

9. That upon the evidence given at the hearing of the cause, the circumstances of the case were not such as to make a departure from the regulation as to side lights necessary.

April 29. — *Butt, Q.C.* and *R. Webster* for the appellants.—We submit, first, that the facts show that the *Peru* altered her course; secondly,

[Priv. Co.]

THE FANNY M. CARVILL.

[Priv. Co.]

she showed her green light, and so brought about the collision; thirdly, that even if she did not show her green light, the lights were not screened in accordance with the regulations, and that under 36 & 37 Vict. c. 85, s. 17, she must be held to blame; fourthly, that even if the judgment in the court below is right, the lights were so screened that they could by possibility have contributed to the collision, and that consequently upon that construction of the statute the *Pern* must be held to blame. As to the construction of the statute we submit that it is so worded that an infringement of the regulations, even if it does not, and cannot, in any way contribute to a collision, renders the ship infringing liable for the collision. In the present case it is clearly established that the screens were too short, which is an infringement of Art. 3 (d) and Art. 5 of the regulations for preventing collisions, and is consequently an infringement within the meaning of the Merchant Shipping Act 1873, sect. 17; that section expressly enacts, if such a regulation "has been infringed, the ship by which such regulation has been infringed, shall be deemed to be in fault, unless it is shown to the satisfaction of the court that the circumstances of the case made departure from the regulation necessary." Before the passing of this Act a departure from the rules must have contributed to the collision before the ship infringing could be deemed in fault. Hence it is to be presumed that the Legislature intended some change. The judgment of the court below says that the infringement meant by the last Act must be "an infringement material to the case, and by possibility causing or contributing to" the collision. But with submission, that is not the plain meaning of the words which clearly include every infringement, whether causing, or contributing, or not, and this construction has already been put upon the statute in the *Hibernia* (31 L. T. Rep. N. S., 805; 2 Asp. Mar. Law Cas. 454), where it was held that in every case of collision the questions for the court to inquire into were, first, if the regulations had been infringed, and, secondly, if the circumstances had rendered a departure from those regulations necessary.

Milneard, Q.C., and *E. C. Clarke*, for the respondent.—We submit that, as the facts were found in our favour in the court below, which proceeded entirely on the credibility of evidence, the finding ought not to be disturbed. On the question of law, we submit, first, that there was a substantial compliance with the regulations. The Regulations Art. 3 (b and c) require the lights to be so placed that they cannot be seen across the bows, and so long as this is complied with there is no infringement; Art. 3 (d) is merely subsidiary to Arts. 3 (b and c), and only points out the mode of carrying them out, and so long as the object is effected the mere length of the screens is unimportant. Secondly, the circumstances rendered a departure from the rule necessary. The lights were placed on the round of the ship's bows, the only available place; if the screen had been longer the lights would have been washed out by the sea; if the position had been altered the lights would have been obscured. (*Sir R. P. Collier*.—"You can't support that proposition. If your ship is of such a construction that she cannot comply with the regulation, she ought to be altered so as to make compliance possible. *Sir Montague Smith*.—A departure from the regulations is not

necessary if occasioned by something under the shipowner's own control.] Thirdly, the defect in the screens could not by any possibility have contributed to the collision, and hence under the true meaning of the Merchant Shipping Act 1873 the *Pern* cannot be deemed in fault; the lights of the *Pern* could not possibly have been seen across her bows. Fourthly, the *Pern* is a foreign ship, and if the statute is to be construed, as contended for by the appellant, it cannot be applied to a foreign ship. A British Act of Parliament cannot be binding upon a foreign vessel upon the high seas.

The Amalia, 1 Moore P. C. 2, N. S., 484;
The Halley, L. Rep. 2 P. C. 196; 18 L. T. Rep. N. S. 879; 3 Mar. Law Cas. O. S. 131;
The Guldfose, L. Rep. 2 Adm. & Ecc. 325; 19 L. T. Rep. N. S. 741; Mar. Law Cas. O. S. 291;
The Saronia, Lush. 410.

Bull, Q.C., in reply.—The *Pern* is seeking to recover against the *Fanny M. Carvill* in an English court, and she must in consequence accept the *lex fori* in all matters consequent upon the jurisdiction, and as the Merchant Shipping Act 1873 enacts that the court shall take a certain course on certain facts appearing, any sailor, British or foreign, puts in motion the jurisdiction subject to that provision.

Curr. adv. vult.

June 9.—The judgment of the court was delivered by

Sir James W. Colvile.—This is a case of collision between the American barque the *Fanny M. Carvill*, and the Swedish barque *Pern*. The undisputed facts of the case are that the collision took place about half-past nine of the evening of the 18th Nov. 1874, some fourteen or fifteen miles off Beachy Head; that both vessels were beating down Channel close hauled against a westerly wind, and were crossing so as to involve risk of collision; that the *Fanny M. Carvill* was on the port, and the *Pern* on the starboard tack, and accordingly that it was the duty of the former to get out of the way of the latter, and the duty of the latter to keep her course.

Of the case made by the appellants in order to excuse the failure of the *Fanny M. Carvill* to keep out of the way of the *Pern*, and to cast the responsibility of having caused the collision wholly or partially on the latter, the material allegations are that those on board the *Pern* improperly neglected to keep their course, and that the lights of the *Pern* were improperly fixed and screened.

The principal witness in support of this defence was *Martin Scheringer*, the mate of the *Fanny M. Carvill*, and the officer of the watch at the time of the collision. His testimony is, that when the *Pern* was first sighted he saw her red light; that he knew she must be beating down Channel, close hauled on the starboard tack, and that it was his duty to keep out of her way; but that before he took, or could take, any means towards that end, she opened her green light, and continued to show both her lights for ten minutes; that, inferring from this that she was bearing away, he kept his own course, after showing a flash light in order to make the other vessel give him a free berth; but that she, after having apparently kept away at least two points, ultimately luffed four points, with her sails slack and shivering, shutting out by the last manoeuvre the green light; and thus caused the collision.

PRIV. CO.]

THE FANNY M. CARVILL.

[PRIV. CO.]

Their lordships must remark on this evidence that it is inconsistent with any theory except an actual deviation from her course on the part of the *Peru*. If, as is now suggested, the improper length of the screen would account for the fact that the green light was seen by those on board the *Fanny M. Carvill*, although the *Peru* may have kept her course, it would not account for what the mate has sworn touching her luffing and the appearances of her sails.

It is therefore material to come to a clear conclusion upon the question whether the *Peru* did, in fact, keep her course. That she did so their lordships have no doubt. The learned judge of the Court of Admiralty, upon the conflicting evidence before him, has found in terms:—"That the *Peru*, a starboard tacked vessel, continued on her course without alteration up to the time of the collision; that it is untrue, as stated by the witnesses on the part of the *Fanny M. Carvill*, that the *Peru* ever came right up into the wind two and a half points with her sails flat aback." There is nothing in the case to induce their lordships to doubt the correctness of this finding, which is materially confirmed by the fact that, in the first instance, the master of the *Fanny M. Carvill* has so little faith in the account given by his own officer, that he openly threw the blame of the collision upon him, and would, under legal advice, have admitted his liability, had it not been ascertained that the screens of the *Peru's* lights were of less than the prescribed length. And accordingly, the learned counsel who urged the appeal have faintly, if at all, contended that the *Peru* did, in fact, alter her course, and have chiefly directed their arguments to show that the green light was, by means of the defect in the screen, visible to those on board the *Fanny M. Carvill*; was, in fact, seen by them; and, therefore, naturally gave rise to the inference that the *Peru* was bearing away.

To this defence, as to that founded on an actual deviation by the *Peru* from her course, it is essential to establish that the green light was, in fact, seen by those on board the *Fanny M. Carvill* across the bows of the *Peru*. Upon this point there is the direct evidence of the mate and look-out man, who, having been disbelieved upon other points, cannot be treated as trustworthy witnesses. Their evidence on this point, however, is in some degree corroborated by that of the captain, the surveyors for the Board of Trade, and the other witnesses who were called to prove that the green light might be seen across the bows of the *Peru*.

On the other hand, there was a considerable body of testimony to the contrary, and the learned judge of the Admiralty Court, upon this conflict of evidence, has found as a fact that the green light of the *Peru* was not seen across the bows of the *Peru* by those on board the *Fanny M. Carvill*; and, therefore, could not have contributed to the collision.

Their lordships are so far from dissenting from this finding, that they are prepared to go beyond what is directly expressed by it, and to hold upon the evidence before them, and for the reasons next to be stated, that in the circumstances in which these vessels were placed, the green light of the *Peru* could not by any possibility have been seen by those on board the *Fanny M. Carvill*. The vessels, though on opposite tacks, were both close hauled, and may be assumed to have been sailing within six points of the wind, whether the direction of that was west, or two points to the north of west.

This being so, their lordships are of opinion that each must first have seen the other as stated by those on board the *Peru*, about two points on her own lee bow. For if the bearing of the *Peru*, when first sighted by the *Fanny M. Carvill*, was four or even three points on the lee bow of the latter, as stated by her mate, it is difficult to see how the two vessels, sailing as they were sailing, and each keeping her course, could ever have come in collision. Now their lordships are satisfied that the green light of the *Peru* could not have been visible two points over her port bow, if the screen projected, as it is proved to have projected, considerably more than one foot from the position of the light in a direction parallel to the keel. For these reasons, as well as upon the direct evidence in the cause, they have come to the conclusion, in which they are confirmed by their assessors, that the green light of the *Peru* not only was not, but could not by possibility have been seen by those on board the other vessel; and, accordingly, that the defect in her screens neither did, nor could have contributed to the collision. This conclusion was probably intended to be implied, though it is not in terms expressed, in the finding of the Court of Admiralty.

These being the facts of the case, it follows that the *Fanny M. Carvill*, which failed to keep out of the way of the *Peru*, must be pronounced solely to blame for the collision, unless by force of the 17th section of the Merchant Shipping Act 1873 (36 & 37 Vict. c. 85), as construed in the recent case of *The Hibernia* (ante, p. 451), the *Peru* is to be deemed to be also in fault; although the particular infringement of the sailing rules imputed to her neither did, nor could by possibility, have contributed to the accident.

The words of the statute are, "If, in any case of collision, it is proved to the court before which the case is tried, that any of the regulations for preventing collisions contained in, or made under the Merchant Shipping Acts 1854 to 1873, have been infringed, the ship by which such regulation has been infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the court that the circumstances of the case made a departure from the regulations necessary."

The alleged infringement is of that part of Article 3 of the sailing Rules which prescribes that "the green and red side lights shall be fitted with in-board screens, projecting at least three feet forward from the light, so as to prevent these lights from being seen across the bow." The screen of the *Peru* is shown to have been nearly a foot (about 11 inches) short of the prescribed length. It must be assumed that those under whose advice the rule was framed considered that a length of 3ft. was necessary in order to prevent the light from being seen, under any circumstances whatever, across the bow. And there is evidence in the cause, independent of that of the discredited witnesses, to show that, under some circumstances, the green light might be perceptible across the bow. Their Lordships, therefore, notwithstanding their conviction that the green light could not have been seen more than a very few degrees (if at all) across the bow of the *Peru*, will assume that there was an infringement of the regulation within the meaning of the statute. And it has certainly not been shown that the circumstances of the case made a departure from the regulation necessary.

[Priv. Co.]

THE FANNY M. CARVILL.

[Priv. Co.]

In construing the clause in question, it is to be observed that the Act of 1873 did not repeal, nor was it a substitute for, the Merchant Shipping Acts of 1854 and 1862. On the contrary, its 2nd section declares that it is to be construed as one with them. Now, the 28th section of the Act of 1854, and the 29th section of the Act of 1862, provides each that in certain cases of infringement of the sailing regulations those guilty of the infringement shall incur certain consequences. But each contains the qualification that the collision shall appear to the court to have been occasioned by the non-observance of the regulation infringed. When, therefore, in the 17th section of the Act of 1873, the Legislature omitted this qualification, it must be presumed to have done so designedly, and, at all events, to have intended that it should no longer be incumbent on the opposite party to prove that the non-observance of the regulations in fact contributed to the collision.

Nor does it appear to their Lordships that the 17th section of the Act of 1873 can be taken merely to shift the burthen of proof by raising a presumption of culpability, to be rebutted by proof that the non-observance of the rule did not in fact contribute to the collision, because the preceding (the 16th) section clearly shows that where the Legislature intended only to raise a presumption capable of being rebutted by such proof it used apt words to express that intention.

Their Lordships therefore conceive that, whatever be the true construction of the enactment in question that which would take the case out of its operation by mere proof that the infringement of the regulation did not, in point of fact, contribute to the collision, is inadmissible. They conceive that the Legislature intended at least to obviate the necessity for the determination of this question of fact (often a very nice one) upon conflicting evidence.

There remain, however, two other possible constructions. The first is that, on proof of an infringement of any of the regulations for preventing collisions, there arises, subject only to the qualification contained in the final clause of the section, an absolute presumption of culpability against the vessel guilty of such infringement, to which the court is bound to give effect, whatever the nature of the infringement may be. The other is that the infringement must be one having some possible connection with the collision; or, in other words that the presumption of culpability may be met by proof that the infringement could not by any possibility have contributed to the collision. The former of these constructions, though possibly the more consistent with the literal meaning of the words of the section, seems to their Lordships to be the less reasonable of the two. It not only tends to the extravagant consequences pointed out by the learned judge of the Admiralty Court; it implies an intention which, without the plainest language, can hardly be imputed to the Legislature. For it is one thing to say that when the circumstances show that the infringement of the regulations might have contributed to the collision, the court shall conclusively infer that it did so. It is another, and very different thing to say, that the court shall draw the same inference, when the circumstances show that the infringe-

ment, from its nature, could not possibly have contributed to the collision. In the latter case the Legislature would entirely alter the nature of the shipowner's liability. As the law stood, he was civilly liable in damages for the consequences of his act or omission. The new law, so far as it enacts that the consequences which might have flowed from that act or omission, shall be presumed to have flowed from it, does not affect the nature of that civil liability. But on the supposed construction it would virtually substitute for a civil liability which the shipowner could not have incurred, a penalty for the infringement of the regulations irrespective of the nature or possible consequences of that infringement—a penalty, moreover, of uncertain application, since it is dependent on a collision, and varying in severity with the injury done by the collision. It would, in effect, make the vessel guilty of the infringement, a sort of outlaw of the seas, by depriving her of the right to recover, under any circumstances, more than half the damages to which, by the general law maritime, she might become entitled.

Again, it can hardly be denied, though the words perhaps admit of such a contention, that the infringement proved must be one existing at the time of the collision. And if this be so, it seems but reasonable to infer that it must also be one that has some possible connection with the accident.

Their Lordships are of opinion that the second construction, which is not absolutely inconsistent with the phraseology of the enactment, and is by far the more reasonable of the two, ought to be adopted. It gives effect to the statute by excluding proof that an infringement, which might have contributed to a collision, did not in fact do so; and by throwing on the party guilty of the infringement the burden of showing that it could not possibly have done so.

Applying this construction of the statute to the facts found, their Lordships are of opinion that if, in this case, both vessels had been British ships, the *Pera* could not have been pronounced in fault.

This conclusion renders it unnecessary to consider whether this particular clause in the statute is applicable to foreign vessels; whether, in other words, it falls within the principle enforced in the *Awalia* (B. & Lush, 150) or that enforced in the *Saxonia* (Lush, 410). That this question, which is not free from difficulty, will have to be determined at no distant date is highly probable. But their Lordships abstain the more willingly from considering it at present, because it was not very fully argued before them.

Their Lordships will humbly advise Her Majesty to affirm the judgment of the Court of Admiralty, and to dismiss this appeal with costs.

Solicitors for the appellants, *Stokes, Saunders, and Stokes*.

Solicitors for the respondents, *Thom & Cooper*.

[CHAN.]

Re ARTHUR AVERAGE ASSOCIATION; *Es parte* CORY AND HAWKESLEY.

[CHAN.]

COURT OF APPEAL IN CHANCERY.Reported by E. STEWART ROOKE and H. FRANK, Esqrs.,
Barristers-at-Law.

Monday, June 28, 1875.

(Before the LORDS JUSTICES.)

Re ARTHUR AVERAGE ASSOCIATION; *Es parte* CORY
AND HAWKESLEY.

Mutual marine insurance association—Unincorporated and unregistered body—Winding-up—Association for acquisition of gain—Names of underwriters specified in policy—30 Vict. c. 23, s. 7—Companies Act 1862, ss. 4, 198.

By the rules of a mutual insurance association it was provided that the members should severally and respectively and not jointly or in partnership, nor the one for the other, but each only in his own name, insure each other's ships for one year, from noon of any day named as the commencement of risk, subject to the conditions indorsed on the form of policy, and to the rules and regulations, which should be binding on all the members of the association. The managers of the association were James Jackson and William Sheppard, and either of them might sign their firm name of Jackson and Sheppard to all policies of insurance in the name of the association, as managers thereof, and the signature thus given by either of them should be binding and conclusive on all the members of the association, and should have on all and each of the members the same effect as if each and every member had personally signed such policy. The annual rates on the sums insured were payable in advance by quarterly proportions by members' acceptance of the manager's draft at three months' date; or if paid in cash, discount of 5l. per cent. per annum was to be allowed, which was to be placed to the credit of each respective member, and if such amount exceeded the claims for losses or damage sustained by the members, such excess was to stand to the credit of each mutual member proportionately as he might have contributed, and if such contributions were not sufficient to meet the claims of the members for loss or damage sustained within any respective year, then such credited amounts should be applied to meet such deficiency, and if there should still be a deficiency, such sum as might be required to meet the same should be drawn for on each respective member in such proportion as they bore to each other. The rules also provided that the managers should have authority to issue policies to members for periods less than a year, or for special risks, either on time or voyage policies, in consideration of special rates of premium, to which the reserve fund should in no way apply, and that the rules might be repealed, altered, or amended by a majority of the members at a general meeting.

Special rate policies were issued to non-members both before and after an invalid alteration of the rules, by which it was attempted to give the managers authority to issue special rate policies to non-members. The policies issued by the association were signed, "Jackson and Sheppard, joint managers of the Arthur Average Association for insuring each other's ships, every member bearing his equal proportion according to the sums mutually insured therein, excepting members paying special rates." In Feb. 1870, the association was ordered to be wound up, and

on the 25th May 1871, Cory and Hawkesley were settled on the list of contributories. By the chief clerk's certificate, dated 20th Dec. 1873, certain sums were found to be due to holders of special policies who were non-members. On a call being made on Cory and Hawkesley, they took out a summons to have the debts admitted by the certificate of certain members expunged.

Held (affirming the decision of the Master of the Rolls), that the signature to the policies was not a specification of the names of the insurers as required by the 7th sect. of 30 Vict. c. 23; and that the policies were, therefore, invalid.

Held, also, that the issuing of special rate policies to non-members was *ultra vires*, and notwithstanding the delay in applying to vary the chief clerk's certificate, the amounts found due to non-members must be expunged.

This was an appeal from an order of the Master of the Rolls (reported *ante* p. 530). The facts were shortly as follows:—The Arthur Average Association for British, Foreign and Colonial-built Ships, was a mutual shipping insurance association, formed in 1867, not incorporated under any Act of Parliament, and not registered under the Companies Act 1862. By the Rules of the association it was provided that the members of the association should severally and respectively, and not jointly or in partnership, nor the one for the other, but each only in his own name, insure each other's ships for one year from noon of any day named, at the commencement of the risk, subject to the conditions indorsed on the form of policy, and to the rules and regulations which should be binding on all the members of the association. The managers of the association were to be James Jackson and William Sheppard, and either of them might sign their firm name of Jackson and Sheppard to all policies of insurance in the name of the association as managers thereof, and the signature thus given by either of the managers should be binding and conclusive on all the members of the association, and should have on each and all of the said members the same legal effect as if each and every member had personally signed such policy. Special rate policies were issued to non-members, both before and after an attempted, but invalid, alteration of the rules, by which it was proposed to authorise the managers to issue policies to non-members for special risks as on voyage policies. The policies issued by the association were signed "Jackson and Sheppard, joint managers, per procuration of the several members of the Arthur Average Association for insuring each other's ships, every member bearing his equal proportion according to the sums mutually insured therein, excepting members paying special rates." In Feb. 1870 the association was ordered to be wound up, and a sum of 17,332l. 11s. 8d. having been found by the chief clerk's certificate to be due to holders of special policies, many of whom were non-members, the question was raised whether the sums due in respect of special policies to non-members were valid debts as against the association. The case was argued at great length before the Master of the Rolls, it being contended on behalf of the members of the association, upon whom a call had been made, that the association had no power to issue policies to persons who were not members, and did not become so by having special rate policies granted to them; and further, that, being

Q. B.] NORTH OF ENGLAND PURE OILCAKE CO. v. ARCHANGEL MARITIME, &c., Co.

[Q. B.]

policies for marine insurance, they were invalid from non-compliance with the provisions of the 30 & 31 Vict. c. 23, s. 7, according to which every marine policy should specify the particular risk or adventure, the names of the subscribers or underwriters, and the sum or sums insured, and in case any of such particulars should be omitted in any policy, such policy should be null and void. In the court below it was held that the signature to the policies of "Jackson and Sheppard," &c., was not a specification of the names of the insurers as required by sect. 7 of 30 & 31 Vict. c. 23, and that the policies were accordingly invalid. The holders of special policies who were not members of the association appealed from that decision. Other questions as to the validity of the winding-up under the Companies' Act 1862, of this unincorporated and unregistered association arose in the court below, but were not discussed on the appeal.

Chitty, Q.C. and *W. F. Robinson* in support of the appeal.

Fry, Q.C., North, and Hilbery for the respondents, and *Waller, Q.C.*, for the official liquidator, were not called on.

The following cases were referred to:

Dovell v. Moss, 4 Camp. 169;
Reid v. Allan, 4 Ex. Rep. 328;
Re London Marine Insurance Association, 21 L. T. Rep. N. S. 97; L. Rep. 4 Ch. 611;
Re Mexican and South American Company, 16 L. T. Rep. N. S. 194; L. Rep. 2 Ch. 367;
Ternbull v. Woolfe, 1 Jar. N. S. 57;
Bromley v. Williams, 32 Beav. 177;
Watson v. Watson, 11 O. B., N. S. 736.

Lord Justice MELLISH was clearly of opinion that the view taken by the Master of the Rolls was correct, and that these policies were invalid, inasmuch as they did not specify the names of the subscribers or underwriters in the manner required by the Act of Parliament, and it was impossible to ascertain from the policy itself who were to be liable upon it, and who were to be the insurers. The appeal must be dismissed, but, although no costs would be given to the unsuccessful appellants, they would not, having regard to the nature and importance of the case, be ordered to pay any. The costs of the respondents and of the official liquidator would come out of the estate.

Lord Justice JAMES concurred.

Solicitors: *F. W. Hilbery, W. W. Wynne, Westall, Roberts, and Barlow.*

COURT OF QUEEN'S BENCH.

Reported by J. SHORT and M. W. McKELLAR, Esqrs.,
 Barristers-at-Law.

Friday April 30, 1875.

THE NORTH OF ENGLAND PURE OILCAKE COMPANY (LIMITED) v. THE ARCHANGEL MARITIME BANK AND INSURANCE COMPANY (LIMITED).

Marine insurance—Sale of cargo—Shipping documents—Assignment of policy after interest of assignor had ceased.

Where the interest of the insured has ceased before loss, a subsequent assignment of the policy is ineffectual.

V. insured a cargo of linseed for a voyage, including risk of lighters; during the voyage V. sold the cargo to the plaintiffs, to be paid for in fourteen days

from being ready for delivery, or at sellers' option on handing shipping documents (which option was not exercised). The cargo was landed in public lighters employed by the plaintiffs, one of which sank. After the loss V. assigned the policy to the plaintiffs.

Held that the policy had not passed to the plaintiffs by the contract of sale, that V.'s interest ceased on delivery into the lighter, and, therefore, that the subsequent assignment was void, and the plaintiffs could not recover on the policy.

THIS was a special case stated after issue had been joined. The parts of the case which are material are as follows:—

3. The plaintiffs carry on the business of seed crushers and oilcake and cattle-food manufacturers at Stockton-on-Tees, one of the ports of the United Kingdom, and having a landing-wharf therein, and the defendants carry on the business, at Athens in the Kingdom of Greece, of marine insurance on ships and cargoes, and have also offices and a local board of direction situate in London for conducting and carrying on such business.

4. On the 24th Nov. 1871, Vagliano Brothers insured with the defendants a cargo of 2950 cwt. of linseed to belong to them of the value of 6200*l.* for the sum of 1500*l.* at a premium of 5*l.*, 10*s.* 0*d.*, which Vagliano Brothers then paid to the defendants, the linseed then being on board the brig *Fanny* at Constantinople, for a voyage from Constantinople to a port of call and discharge in the United Kingdom to be named, including all risks of craft or lighters to and from the brig, each lighter and craft being considered as if separately insured, the policy of insurance being with Vagliano Brothers or their assigns.

5. The linseed had been duly shipped by Vagliano Brothers on board the brig, which then commenced the voyage therewith in conformity with the terms of the policy, under a bill of lading dated the 24th (10th) Nov. 1871, whereby the linseed was to be delivered at a safe port in the United Kingdom unto Vagliano Brothers or their assigns.

6. Whilst the brig was still on her voyage, Edwards and Company who then acted as the agents of Vagliano Brothers in England, on the 17th Feb. 1872 sold to the plaintiffs the cargo of linseed, it being a term of the contract that the vessel should go to any safe floating port in the United Kingdom, and there deliver her cargo to the plaintiffs.

7. The plaintiffs paid Vagliano Brothers through Edwards and Co., the price of the linseed in cash as hereinafter mentioned, less two and a half per cent. discount, in conformity with the said note, and on the 21st Feb. 1872 Vagliano Brothers accordingly endorsed the bill of lading to the order of the agents, Messrs. Edwards and Co., who thereupon duly endorsed the same to the plaintiffs, both which endorsements appear on the said document. The sellers of the cargo did not exercise their option mentioned in the contract note.

8. The plaintiffs duly notified Stockton-on-Tees (the same being a safe floating port within the terms of the above-named policy), as the destined port of discharge of the cargo, and on the 26th Feb. 1872 the brig duly arrived at the said port with her cargo, the same being then intact.

9. The cargo was landed by means of public lighters employed by the plaintiffs to unload the said cargo from the brig, and to land the same at

Q. B.] NORTH OF ENGLAND PURE OILCAKE CO. v. ARCHANGEL MARITIME, &C., CO. [Q. B.]

the plaintiffs' wharf. The employment of the lighters was within the terms of the policy, and was necessary for unloading and right delivery ashore of the cargo.

10. On the 28th Feb. 1872, one of the lighters filled with part of the cargo arrived safely alongside of the plaintiffs' wharf, and was there sunk by perils within the terms of the policy, and thereby the same was partly lost and partly damaged.

11. The above-named loss occurred when a part only of the cargo had been discharged, and before the plaintiffs had paid the price of the cargo, and upon payment being asked for a correspondence ensued between the plaintiffs and Messrs. Edwards and Co., which was to be taken as part of the case.

12. On the 4th March 1872, Vagliano Brothers made a claim on the defendants for the loss of the lineed in the lighter, and on the 5th March 1872, claimed and received from them a sum of money as return of premium on the ground that the brig had arrived at Stockton-on-Tees. They retained the same and no demand for the same has ever been made by the plaintiffs. This return of premium is endorsed on the policy. Such return of premium does not by the usage at Lloyd's, preclude the assured from afterwards claiming a loss upon the policy if any loss has in fact occurred.

13. On the 11th May 1872, a claim for 77l. 4s. 6d. in respect of the loss, was made by Vagliano Brothers and was endorsed on the policy.

14. The policy was in June 1872 handed over to the plaintiffs by Vagliano Brothers, and on the 17th Oct. 1872, Vagliano Brothers endorsed on the policy what purported to be an assignment of it by them to the plaintiffs.

15. The court was to have power to draw inferences.

16. The question for the opinion of the court was whether upon the above facts the plaintiffs were entitled to recover from the defendants the loss.

17. If the court should be opinion in the affirmative then judgment was to be entered up for the plaintiffs for 77l. 4s. 6d. with five per cent. interest thereon from the 18th Nov. 1872 to judgment, together with their costs of suit.

18. If the court should be of opinion in the negative then judgment with costs of defence was to be entered up for the defendants.

The pleadings, policy of insurance, bill of lading, sold note, correspondence, and assignment of the policy from Vagliano Brothers to the plaintiffs were to be taken as part of the case. The sold note dated 17th Feb. 1872, contained the following terms.

Sold this day to the North of England Pure Oilcake Company the following Taganrog lineed, viz.: the cargo per *Fanny* consisting of about 2168 quarters, and now at Seilly at 42s. 3d. per £100. The a-d is to be delivered at destined port in sound merchantable condition, and to be worked in thirteen days, and paid for in fourteen days from being ready for delivery by cash less 2½ per cent. discount, or at sellers' option on handing shipping documents less interest at five per cent. per annum. If any cargo amount to or exceed 650 tons seven extra days to be allowed for payment, and receivers to have the privilege of using any unexpired lay days. . . . The vessel to go to any safe floating port in the United Kingdom.

Bell, Q.C. (Bohn with him) for the plaintiffs.—The plaintiffs are entitled to sue on the policy by 31 & 32 Vict. c. 86, s. 1, notwithstanding it was assigned after loss: (*Lloyd v. Fleming and Lloyd v. Spence*, ante, vol. 1, p. 192; 25 L. T. Rep. N. S. 824; L. Rep. 7 Q. B. 299) The policy is to insure

arrival on shore, and covers risk of lighters: (see *Hurry v. Royal Exchange Assurance Company*, 2 B. & P. 430.) There are two periods at which it may be said that Vagliano Brothers' interest in the policy ceased; first on the making of the contract of sale, or secondly on delivery at the home port. If the former view is correct the policy passed to the plaintiffs under the words "shipping documents." In *Arnould on Marine Insurance* p. 106 (3rd and 4th edis.) the law on the subject is thus stated: "Where a policy is assigned to the purchaser of the insured property, it is usual to indorse on it a memorandum to the effect that the interest in this policy is transferred to the purchaser. When a floating cargo (i.e. a cargo at sea) is sold in London, it is generally on what are called 'The London Floating Conditions,' which comprise the delivery over to the purchaser for his benefit of the policies which have been effected on the cargo, the understanding being that it is insured to the full value, the price paid being all the higher, to include the amount paid by the vendor for insurance. If upon such a transaction it be objected by the buyer that the vendor has not performed the conditions of the contract in consequence of delivering over policies apparently short of the full value of the cargo, the question is one depending so much upon fact that it ought to go to the jury." (see *Tanquer v. Lucas*, 1 Mar. Law Cas. O. S. 60, 231; 1 B. & S. 185; 30 L. J. 234, Q. B.; affirmed 3 B. & S. 89; 31 L. J. 296, Q. B.; *Ralli v. The Universal Marine Insurance Company*, 1 Mar. Law Cas. O. S. 160, 194; 31 L. J. 207, Ch. reversed ib. 313.) The present case is within the above rule, being a sale in London of a floating cargo. It is *prima facie* unreasonable to suppose that it was intended to allow the policy to drop before the arrival of the cargo: but this result would ensue if the interest of the vendors ceased on the contract of sale, and the policy did not pass: (*Forbes v. Jones*, 11 M. & W. 10.) But secondly it is submitted that on the true construction of the contract of sale, looking to the terms of payment contained in the sold note, the property in the cargo did not pass until delivery at the home port. The interest would then remain in Vagliano Brothers up to the time of the loss. Even if it was intended to pass the property, it was not intended to let the policy drop, for, even if the legal property had passed, if the vendors had any interest in the safe arrival of the cargo they could have sued on the policy:

Ebenworth v. The Alliance Marine Insurance Company, ante, p. 125; 23 L. T. Rep. N. S. 479; L. Rep. 8 C. P. 506;

Anderson v. Morice, ante, p. 425; 31 L. T. Rep. N. S. 605; L. Rep. 10 C. P. 59; 44 L. J. 10, C. P.

Watkin Williams, Q.C. (C. Crompton with him) for the defendants.—If Vagliano Brothers could have recovered on this policy it must be admitted that the plaintiffs can recover, but the defendants are not liable at all. It was no part of the contract that the policy of insurance should form part of the subject matter of the sale. The passage cited from *Arnould on Marine Insurance* (*ubi sup.*) is an authority in the defendants' favour, for the London Floating Conditions apply only where the cargo is sold at sea and sold out and out; here, according to the terms of the contract, the whole interest remained in the vendors, and the goods were at their risk. If the ship had come alongside a quay the vendors' risk would have ended with the delivery, and the same is the case here, for "floating

[Q. B.]

HADGRAFT (app.) v. HEWTH (resp.).

[Q. B.]

port" only means a port where the cargo does not take the ground. The vendors' interest in the cargo ceased before the policy was transferred, and no one can sue, because there is no stipulation that the policy is to cover the vendees' interest. Suppose a case where there is an inland clause in the policy; would the policy revive after the interest had ceased, so as to give effect to it? Such a clause is common in wool policies.

Butt, Q.C. replied.

Cockburn, C.J.—We are all agreed on one point in this case, which renders it unnecessary to decide the other. The policy here not having been assigned until after the interest of the assignors had ceased, the assignment could pass no interest, and, therefore the plaintiffs are not entitled to recover. Here the assignors had the policy at the time of the sale of the cargo, and if by the terms of the contract it had been agreed to sell the policy, then no doubt the policy would have been assigned so far as it was co-extensive with the interest transferred to the vendees. But there are no terms to that effect in the contract of sale, and the facts are such as to lead to the opposite conclusion. This is not like the case of a floating cargo sold subject to all risks, where it is a part of the contract that the policy shall be assigned over to the purchaser; in such a case there is no hardship on the insurers, and it is a great convenience to the buyer, for there is no necessity for him to take out a fresh policy where it is expressly stipulated, or must be taken to be part of the contract of sale that the conditions of the existing policy are to ensure for the benefit of the vendee. But here there was not an absolute sale of the cargo to the plaintiffs in the same sense as in the case I have just referred to; it is true that there was a sale to them, and, I think, a transfer of the property, but it is an essential part of the contract that payment was to be made fourteen days after the cargo was ready for delivery, and until the cargo was delivered the real substantial interest would remain in the sellers, who, therefore, would not be likely to wish to part with the policy. The policy then ceases to be operative as soon as the sellers cease to have any interest. After the loss they assign the policy to the plaintiffs, but, inasmuch as before the loss their interest had entirely ceased, it is clear that before the assignment the policy had dropped. It follows that the assignment was ineffectual, and the policy is of no avail in the hands of the plaintiffs. Our judgment must, therefore, be for the defendants.

Lush, J.—I am of the same opinion. It is clear to my mind that the contract of sale did not transfer the interest in the policy to the plaintiffs. It is perfectly clear that there are no words to which that effect could possibly be ascribed except the words "shipping documents," and I am of opinion that the words "shipping documents" in this contract could not be taken to include the policy of insurance. When the insured was delivered to the plaintiffs on board the lighter the policy expired, and the assignment could not afterwards create an interest.

Quain, J.—I am of the same opinion. I have always understood it to be settled since the decision in *Fowler v. James* (11 M. & W. 10) that where the property insured was transferred the policy would lapse unless it were kept alive for the benefit of the transferee. I cannot here find any words showing that the policy was expressly assigned by the contract of sale, nor does it appear from the

terms of the contract that any such assignment was contemplated. There was no agreement to that effect express or implied, and the law is clear that after the interest of the holder of the policy has come to an end a subsequent assignment cannot give an interest to the assignee.

Judgment for the defendants.

Attorneys for the plaintiffs, *Sharp and Ullithorne.*

Attorneys for the defendants, *Courtenay and Croome.*

Thursday, May 27, 1875.

HADGRAFT (app.) v. HEWTH (resp.)

Compulsory pilotage—Exemptions—Trinity House outport district—Particular provision—Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), ss. 353, 370, and 379.

By the Merchant Shipping Act 1854, sect. 353, the employment of pilots shall continue to be compulsory in all districts in which the same was by law compulsory before. By sect. 379 ships, not carrying passengers, employed in the coasting trade, shall be exempted from compulsory pilotage in the Trinity House outport districts, which, by sect. 370, comprises any pilotage district for the appointment of pilots, within which no particular provision is made by any Act of Parliament or charter.

By 6 Geo. 4, c. 125, s. 5, the Corporation of Trinity House were required to appoint sub-commissioners at such ports or places as they might think requisite, to examine and certify pilots.

By 15 Vict. c. cxi. (The Ipswich Dock Act 1852), s. 91, the Corporation of Trinity House were required to appoint sub-commissioners, resident within the port of Ipswich, to examine and certify pilots; the sub-commissioners to take the oath prescribed, and the corporation to give the notice directed in 6 Geo. 4, c. 125.

The respondent, the master of a ship not carrying passengers, employed in the coasting trade, refused a pilot within the Ipswich district, for which, before the Merchant Shipping Act 1854, he would have been liable to summary conviction.

Held, upon a case stated, that previous compulsory pilotage did not overrule the exemptions in sect. 379; that the Ipswich Dock Act 1852 did not make a particular provision for the appointment of pilots; and that the justices were right in refusing to convict the respondent (a).

THIS was a case stated by two of her Majesty's justices of the peace for the borough of Ipswich, under 20 & 21 Vict. c. 43, for the purpose of obtaining the opinion of this court on questions of law which arose before them, as hereinafter stated.

At a petty sessions holden at the Town Hall, in and for the said borough, on the 22nd June 1874, an information or complaint preferred by Charles Hadgraft (hereinafter called the appellant) against Robert Hewth (hereinafter called the respon-

(a) It would appear to follow from this decision that wherever the appointment of pilots is by the Trinity House all exemptions and compulsion arising before the Merchant Shipping Act 1854 are continued, and that the existence of an Act of Parliament or charter under which the Trinity House appoint is not a "particular provision" within the meaning of the Merchant Shipping Act 1854, or the 6 Geo. 4, c. 125, s. 59, so as to continue the exemption or compulsion.—Ed.]

Q. B.]

HADGRAFT (app.) v. HEWITH (resp.).

[Q. B.]

dent, under sect. 353 of 17 & 18 Vict. c. 104 (Merchant Shipping Act 1854), charging that he the said respondent, on the 6th June then instant, at the parish of St. Peter, in the said borough, being the master of the steamship *Eider*, unexempted from pilotage and navigating within the pilotage district between the Ipswich Quays and Downham Reach, to wit, at the lock gates of the Ipswich Wet Dock, unlawfully, after a qualified pilot had offered to take charge of such ship, did himself pilot such ship without possessing a pilotage certificate enabling him so to do, contrary to the form of the statute in that case made and provided, was heard by the said justices (the said parties and their attorneys respectively being then present), and their determination of the said case having been duly adjourned by them until the 9th July 1874, they on the last-mentioned day dismissed the said information or complaint.

The said justices, in compliance with the application of the appellant and the provisions of the said Act, and by consent of the said parties, stated and signed the following case:

The following facts were either proved before them upon the hearing of the said information or complaint or were admitted by both parties for the purposes of this case:

The respondent was on the 6th June 1874 master of the said steamship *Eider*, the said ship having a British register, and being of the burthen of upwards of sixty tons by her certificate of registry, and employed in the regular coasting trade of the kingdom, and laden with divers iron ware and other articles, and belonging to the port or place within the limits whereof the said ship was at the time of the commission of the alleged offence, that is to say, to the port of Ipswich, which is a pilotage district, and not then carrying passengers, and then navigating within the district for which the appellant was then licensed to act as a pilot, as hereinafter mentioned.

The respondent did not at the time of the commission of the alleged offence possess a pilotage certificate enabling him to pilot his said ship.

The appellant was at the date of the commission of the alleged offence duly licensed to act as a pilot within certain limits, which comprised the place where the said alleged offence was committed, under the provisions of the Ipswich Dock Act 1852 (hereinafter referred to), and notice of such licence had been duly published, pursuant to the said Act, and the period prescribed by such Act had expired before the date of the commission of the said alleged offence.

The appellant produced before the justices his said licence, which was in the words and figures following:

Ipswich. No. 107. 1st class.
Stamp: 20th June 1855. Fr. Freshfield, Thos. B. Leath,
35/. } H. G. Bristo.

To all to whom these presents shall come:

We, the master, wardens, and assistants of the guild, fraternity, or brotherhood of the Most Glorious and Undivided Trinity, and of St. Clement, in the parish of Deptford Street, in the county of Kent, commonly called the Corporation of Trinity House of Deptford Street, send greeting: know ye, that in pursuance of an Act of Parliament, made and passed in the 6th year of Geo. 4, intitled "An Act for the amendment of the law respecting pilots and pilotage, and also for the better preservation of floating lights, buoys, and beacons," we, the said master, wardens, and assistants, having received a satisfactory certificate under the hands of Fredk. Freshfield, John Cobbold, Chas. Bolton, Thos. B. Leath, and H. G.

Bristo, esquires, the sub-commissioners of pilotage by us appointed for the port of Ipswich, that they have examined into the qualifications of Charles Hadgraft, mariner, the bearer hereof, and whose description is indorsed on the back of these presents, to act as a pilot for the said port and the adjoining coasts thereof, and that he is duly qualified to act for such port and coasts. Do hereby appoint and license the said Charles Hadgraft to act as a pilot within the limits hereinafter mentioned, that is to say, from Ipswich Quays to Harwich Harbour, and vice versa, and this licence is to continue in force from henceforth up to and until the 31st Jan. next ensuing the date hereof, but no longer, unless the same shall be renewed by indorsement, to be from time to time made thereon, according to the provisions of the said Act of Parliament in that behalf.

In testimony whereof we have caused our common seal to be hereunto affixed this 26th Nov. 1850.

(Signed) J. H. PELLY, Dep.-Master.

[The common seal of the said Corporation of Trinity House]

Endorsed upon the said licence were a description of the appellant, and a memorandum of the said licence having been duly registered at the Custom House, Ipswich, "pursuant to the 66th section of the said statute 6 Geo. 4, c. 125," and also memoranda of renewal of the said licence, from time to time, the last of such renewals (which is identical in form with those of former years), being as follows:

Renewed and confirmed, pursuant to the Act 6 Geo. 4, c. 125, this 16th Feb. 1874.

(Signed) G. M. DOUGLAS, } Sub-Commissioners
ALFRED COBBOLD, } of Pilotage.

One of the said sub-commissioners by whom such last renewal is signed (viz., Geo. M. Douglas), who was called as a witness in support of the respondent's contention (hereinafter mentioned), that Ipswich is a Trinity House outport district, produced his appointment, which was as follows:

Stamp: To all whom these presents shall come, We, the 10/. } Trinity House send greeting:

Whereas, by an Act of Parliament made and passed in 17 & 18 Vict. called The Merchant Shipping Act 1854, it is amongst other things enacted, that the Trinity House shall appoint sub-commissioners, not being more than five nor less than three in number, for the purpose of examining pilots in all districts in which they have been used to make such appointments. And it is by the said Act further enacted that, subject to any alteration to be made by the Trinity House, no licence granted by them shall continue in force beyond the 31st Jan. then next ensuing the date of such licence, but that the same may, upon the application of the pilot holding such licence, be renewed on such 31st Jan. in every year, or any subsequent day by indorsement on the hand of the Secretary of Trinity House, or such other person as may be appointed for that purpose. And whereas the Trinity House has been used to appoint sub-commissioners in the Ipswich district, now know ye that we, the Trinity House, do hereby, in pursuance of the said Act of Parliament, appoint Geo. M. Douglas, Henry Gallant Bristo, and Alfred Cobbold, esquires, being proper and competent persons in that behalf, to be sub-commissioners for the purpose of examining pilots at and for the port of Ipswich, which is comprised within the Ipswich district; and they, the said Geo. M. Douglas, Henry Gallant Bristo, and Alfred Cobbold are respectfully authorised, so long as this appointment shall not be revoked or superseded by the appointment of other persons in their places, to examine into the qualifications of persons to act as pilots for the said port of Ipswich and the adjoining coasts, that is to say, from Ipswich Quays to Harwich Harbour and vice versa, and upon such examination to certify the same, as under the hands of the said G. M. Douglas, Henry Gallant Bristo, and Alfred Cobbold; and further to renew from year to year, up to and until the 31st Jan. in every year at our discretion, all and every the licences to be granted under the authority of the said Act; such renewal to be by indorsement on such licences respectively, signed by any one of them, the said Geo. M. Douglas, H. G. Bristo, and A. Cobbold.

Q. B.]

HADGRAFT (app.) v. HEWITT (resp.).

[Q. B.]

In testimony whereof, we have caused our common seal to be hereunto affixed the 18th Oct. 1872.

(Signed) G. T. REAMAN.

[The common seal
of Trinity House.]

The appellant did, on the said 6th June 1874, within the district for which he was so licensed as aforesaid, offer to take charge of the said ship then navigating within such district as above stated, and the respondent after such offer did himself pilot the said ship as in the said information or complaint is charged.

By sect. 91 of a local Act of Parliament, viz., The Ipswich Dock Act 1852 (15 Vict. c. xvi.), "It shall be lawful for the Corporation of Trinity House of Deptford Stroud, and they are hereby required to appoint" . . . "sub-commissioners of pilotage for the said port" (of Ipswich), and who "shall take the oath prescribed by the Act of Parliament passed in" 6 Geo. 4, c. 125, and to examine into the qualification of persons to act as pilots for the said port; and the said Corporation of Trinity House were empowered upon the certificate of such sub-commissioners to license such persons to act as pilots accordingly, and to publish such notice thereof, as is prescribed by the said Act of Parliament of 6 Geo. 4, c. 125. And by the same section it is enacted that, after the time limited in such notice, "All vessels, sailing, navigating, or passing into or out of the said port, or upon the coasts thereof, save and except under such circumstances as are saved and excepted in and by the said Act of Parliament, shall be conducted and piloted by such pilots only as shall be so licensed as aforesaid, and by no other pilots or persons whomsoever."

Sect. 92 of the said local Act enacted that the licences to be granted as aforesaid should be granted in such form, and for such period, and subject to such power of renewal and suspension, amendment or revocation, as licences granted under the said Act of Parliament so passed in 6 Geo. 4, and such pilots when so licensed should for all purposes and to all intents be deemed and taken to be pilots licensed under the said Act so passed as last aforesaid; and all enactments, protections, provisions, forfeitures, penalties, matters, and things contained in such last-named Act, or conferred or imposed thereby, except as therein-after provided, and all bye-laws made by the said corporation, in pursuance thereof, should be deemed and taken to apply to pilots so to be licensed as aforesaid under the authority of that (the said Ipswich Dock) Act, and to all masters, owners, and others, in the same manner and to the same extent; and the forfeitures and penalties should be recovered and applied as if such pilots had been licensed under the said Act of Geo. 4.

Sect. 93 of the same local Act provides that the master of any vessel, inward or outward bound, refusing to employ a pilot licensed as aforesaid and offering his services (except such vessel be under the burthen of fifty tons registered tonnage), shall pay full pilotage to such pilot as if such pilot had been employed.

Sect. 94 of the same local Act provides that such Act shall not extend to prevent the master of any vessel under the burthen of fifty tons by the certificate of registry, in the coasting trade, from conducting or piloting his vessel into or out of the said port, nor hinder any person from assisting any vessel in distress, nor subject such person to the penalties of the said Act.

The said Ipswich Dock Act prescribes the rates of pilotage to be charged, and makes provision for altering same with the consent of the Corporation of Trinity House.

Sect. 111 of the same last-mentioned Act saves all rights, estates, powers, jurisdictions, immunities, exceptions, advantages, and privileges belonging or appertaining to the mayor, aldermen, burgesses, and freemen of the borough of Ipswich, or any other person whomsoever, except as thereby expressly taken away or altered.

It was contended on the part of the appellant that the effect of the 93rd section of the said Ipswich Dock Act was to render pilotage compulsory in respect of all vessels navigating within the said Ipswich district, except in the excepted cases specified in that and the following section (sect. 94), and that the *Eider* not being within those exceptions, was subject to compulsory pilotage, and that the respondent was therefore liable to conviction under the Merchant Shipping Act 1854, which came into operation after the said local Act (viz., on the 1st May 1855); and the 353rd section of which said Merchant Shipping Act enacts that, subject to alteration to be made by any pilotage authority, the employment of pilots shall continue compulsory in all districts in which the same was by law compulsory immediately before the said Merchant Shipping Act came into operation; and that every master of any unexcepted vessel navigating within any such district who after a qualified pilot has offered to take charge of such ship, shall himself pilot such ship without possessing a pilotage certificate enabling him so to do, shall incur a penalty of double the amount of pilotage demandable for the conduct of such ship.

It was further contended on the part of the appellant, that although the appointment and control of pilots at Ipswich were vested in the Trinity House by the said local Act, Ipswich is not a Trinity House outport district within the meaning of sect. 370 (sub-sect. 3) of the Merchant Shipping Act 1854, inasmuch as Trinity House outport districts are therein described as "comprising any pilotage district for the appointment of pilots within which no particular provision is made by any Act of Parliament or charter;" and inasmuch as in the Ipswich district particular provision has been made by Act of Parliament, viz., by the said Ipswich Dock Act 1852, and that, therefore, the exemptions relating to Trinity House outport districts, under sect. 379 of the said Merchant Shipping Act (which exemptions extend, *inter alia*, to all ships employed in the coasting trade of the United Kingdom, when not carrying passengers), do not extend to the present case.

It was contended on the part of the respondent, that the *Eider* was exempted from compulsory pilotage by virtue of sect. 111 and the latter part of sect. 91 of the said Ipswich Dock Act, which last-mentioned section, as above mentioned, exempts vessels navigating under such circumstances as are excepted by the said Act of 6 Geo. 4, c. 125, from the obligation to employ a pilot, and which said Act of Geo. 4, exempts, by its 59th section, the master of any ship employed in the regular coasting trade of the United Kingdom from any penalty for piloting his own ship, and that the words, "save and except under such circumstances as are saved and excepted in and by the said Act of Parliament," could mean no other than the exceptions contained in the said 59th section of 6

Q. B.]

HARGRAFF (app.) v. HEWITT (resp.).

[Q. B.]

Geo. 4; and that, notwithstanding the repeal of the said Act of 6 Geo. 4, by 17 & 18 Vict. c. 120 (which came into operation at the same time as the Merchant Shipping Act 1854), all the exemptions of the said Act of Geo. 4 are preserved by virtue of the 353rd section of the said Merchant Shipping Act; in support of which view the cases of *The Enri of Auckland* (1 Mar. Law Cas. O. S. 27, 177; 30 L. J. 121, Adm.), affirmed by the Privy Council (*ib.* 387; *Reg. v. Stanton* (8 E. & B. 445); and *The Stettin* (1 Mar. Law Cas. O. S. 229; 31 L. J., 208, Adm.), were cited by the respondent's attorney.

It was further contended on the part of the respondent that Ipswich is a Trinity House outport district, within the meaning of the said sect. 370 (subsect. 3), of the said Merchant Shipping Act, inasmuch as the provision for appointing pilots contained in the said Ipswich Dock Act places the appointment of such pilots upon the same footing as in Trinity House outport districts, and it is not, therefore, such a "particular provision" as was contemplated by or is within the true meaning of the said sub-section, and that, therefore, the *Eider* was further exempted from compulsory pilotage by virtue of the exemptions relating to Trinity House outport districts contained in the said 370th section of the said Merchant Shipping Act, of all ships (not carrying passengers) employed in the coasting trade of the United Kingdom, or navigating within the limits of the port to which they belong.

It was further contended on behalf of the respondent that the expression "any vessel" in clause 93 of the Ipswich Dock Act, must be qualified by the expressions contained in the concluding part of sect. 91 of the same Act, and must be construed to mean "any vessel sailing, navigating, or passing into or out of the said port or upon the coasts thereof, save and except under such circumstances as are saved and excepted in and by the said Act of Parliament," and that in the same manner sect. 94 must be qualified by the exception contained in sect. 93; otherwise only vessels under the burden of fifty tons, by the certificate of registry, in the coasting trade, would be exempted from compulsory pilotage, whereas, by sect. 93, all vessels under the burden of fifty tons register tonnage are exempted.

The justices were of opinion that the *Eider* was, under the circumstances above detailed, exempted from compulsory pilotage, by virtue of the above-mentioned provisions, both of the Ipswich Dock Act and the Merchant Shipping Act; but feeling there was room for reasonable doubt, both as to the true construction of the said Dock Act (the terms of the 93rd section thereof appearing to them contradictory to the exceptions contained in the latter part of the 91st section), and as to the true construction of the expression "particular provision" in the said 370th section of the Merchant Shipping Act, the justices, in dismissing the said information or complaint, consented, as before stated, to submit the above case for the opinion of this honourable court.

If the court shall be of opinion that the *Eider* was exempted from compulsory pilotage, by virtue of the provisions either of the said Ipswich Dock Act, or of the said Merchant Shipping Act, their decision will stand.

If the court should be of opinion that the *Eider* was not exempted from compulsory pilotage by

virtue of the provisions either of the said Ipswich Dock Act or of the said Merchant Shipping Act, the justices begged that this case might be remitted to them with an expression of such opinion that they might thereupon make such order in the premises as should be lawful and just.

Sutton argued for appellant, the complainant.

Graham appeared for the respondent.

BLACKBURN, J.—We need not trouble the counsel for the respondent. When we understand the point, we see the magistrates were quite right. Sect. 379 of the Merchant Shipping Act 1854, exempts from compulsory pilotage ships not carrying passengers employed in the coasting trade of the United Kingdom, in the Trinity House outport districts. This ship was employed in the coasting trade, and was not carrying passengers; the only question left, therefore, on that section is, whether this was a Trinity House outport district?

Sect. 353 had continued the compulsory employment of pilots in all districts in which the same was by law compulsory; and all exemptions for compulsory pilotage then existing within such districts were also thereby continued in force. Mr. Sutton argues upon these two provisions, that the exemptions of sect. 379 cannot go beyond those which existed at the passing of the Act in the districts where compulsory pilotage was the law before. It has been held in *Reg. v. Stanton* (8 E. & B. 445), that a previously existing exemption is not limited by the express words of sect. 379, but it does not follow that sect. 353, although it continues an exemption beyond sect. 379, should continue a liability in opposition to the later section. Probably the words of the former of these two sections were forgotten by the Legislature when the latter was passed, but it is clear that the effect of sect. 353 cannot take away any of the express exemptions in sect. 379. The question, therefore, already mentioned, comes to be considered, viz., whether this is one of the Trinity House outport districts?

The expression is defined in sect. 370 as "comprising any pilotage district for the appointment of pilots within which no particular provision is made by any Act of Parliament or charter." The general provision of law with respect to the appointment of pilots, which was in existence at the passing of the Act of 1854, was that contained in sect. 5 of 6 Geo. 4, c. 125. By that section the Corporation of Trinity House were "required to appoint proper and competent persons at such places or ports in England as they may think requisite (except within the liberty of the Cinque Ports, and all such other ports and places within or for which particular provision shall have been made by any Act or Acts of Parliament, or by any charter or charters for the appointment of pilots)," as sub-commissioners to examine and certify pilots. At that time, no doubt, a particular provision for appointing pilots at this port of Ipswich had been made by 45 Geo. 3, c. 41. That statute, however, was subsequently repealed, and the enactment concerning the appointment of pilots at this port in force at the time of the Merchant Shipping Act 1854, was sect. 91 of the Ipswich Dock Act 1852. That section adopts the very words of the general provision of law with respect to the appointment of pilots contained in 6 Geo. 4, c. 125, n. 5, and applies them to the particular port of Ipswich, with the exception only that the local Act requires the persons appointed sub-commissioners

Q. B.] PREVITE AND ANOTHER v. THE ADELAIDE FIRE AND MARINE INSURANCE COMPANY. [Q. B.]

sioners to be "resident within the port of Ipswich," instead of the words used in the public Act, "at each port or place for which any such appointment shall be made." That is the only difference between the general provision and the particular provision for Ipswich at the time of the Merchant Shipping Act 1854, and I do not think the definition in sect. 370 of that Act could have been intended to refer to such an adoption of the general law by the words "particular provision," . . . "by any Act of Parliament." The essence of the provision is the mode of appointment of sub-commissioners and pilots, and that is exactly the same in the local as the public Acts. The provision for the appointment of pilots in the Ipswich district was, therefore, the general law, and that district is, according to the 370th section, a Trinity House out-port district.

I think the justices were right in holding this to be a case of exemption from compulsory pilotage.

MELLOE, J.—I am of the same opinion. I think the words "particular provision" must relate to something which has a greater distinction from the general law than this has.

QUAIN, J.—I am of the same opinion. I think the description, "particular provision," applies only to some mode of appointment of pilots different from any by the Trinity House and their sub-commissioners.

Judgment for respondent.

Attorney for appellant, W. H. Farnfield, for A. A. Watts, Ipswich; attorney for respondent, Edward Bromley, for Jackman and Son, Ipswich.

Friday, June, 11 1875.

PREVITE AND ANOTHER v. THE ADELAIDE FIRE AND MARINE INSURANCE COMPANY.

Reg. Gen. H. T. 1853, R. 12—Cost of witnesses examined before the master.

In an action on a marine insurance policy, owing to plaintiffs' delay in complying with an order for production of papers, defendants did not plead until a year after declaration. Meanwhile, to save expense, defendants examined witnesses before the master, under 1 Will. 4, c. 22, s. 4. Defendants pleaded unseaworthiness, &c., and paid 25l. into court on the money counts for the premium. Plaintiffs took the money out of court, and joined issue on the other plea, but afterwards discontinued.

Held, that defendants were entitled to the costs of the witnesses examined before the master, such costs not being costs incurred before instructions for plea, within the meaning of Reg. Gen. H. T. 1853, R. 12, and a rule to review taxation was made absolute.

This was an action on a policy of insurance on the ship *Balaclava*, claiming for a total loss; there was also a count for money received.

The action was commenced on the 1st Dec. 1871; the declaration was delivered on the 17th Jan. 1872, and on the same day the defendants obtained an order for the production of the ship's papers, which was not complied with until Jan. 1873.

On the 13th Feb. 1873 the defendants delivered pleas, including pleas of unseaworthiness, concealment, and deviation to the first count, and payment of 25l., the amount of the premium, into court, on the count for money received.

Plaintiffs replied the same day, taking the money out of court, and taking issue on the other plea,

and gave notice of trial for the next London Sittings. The cause was not reached, and, ultimately, on the 2nd Dec. 1874, the plaintiffs served a rule to discontinue.

Some of the crew of the *Balaclava*, who were material and necessary witnesses for the defendants, were detained in this country for the purpose of being examined in the cause, and in consequence of the plaintiffs' delay in complying with the order for the production of the ship's papers, and to avoid further expense, they were examined before the master, under 1 Will. 4, c. 22, s. 4, in Aug. and Sept. 1872.

On taxing the defendants' costs on the rule to discontinue, the master refused to allow the costs of these witnesses, on the ground that they were costs incurred before instructions for plea.

By 1 Will. 4, c. 22, s. 4: "It shall be lawful to and for each of the said courts at Westminster . . . and the several judges thereof, in every action depending in such court, upon the application of any of the parties to such suit, to order the examination on oath . . . before the master . . . of the said court . . . of any witnesses within the jurisdiction of the court where the action shall be depending." . . .

By sect. 9: "The costs of every rule or order to be made for the examination of witnesses . . . by virtue of this Act, and of the proceedings thereupon, shall . . . be costs in the cause, unless otherwise directed." . . .

Rule 12. *Regula Generales* of Hilary Term 1853, is as follows:

When money is paid into court in respect of any particular sum or cause of action in the declaration, and the plaintiff accepts the same in satisfaction, the plaintiff, when the costs of the cause are taxed, shall be entitled to the costs of the cause in respect of that part of his claim so satisfied, up to the time the money is so paid in and taken out, whatever may be the result of any issue or issues in respect of other causes of action; and if the defendant succeeds in defeating the residue of the claim, he will be entitled to the costs of the cause in respect of such defence, commencing at "instructions for plea," but not before.

J. C. Mathew moved for a rule calling on the plaintiffs to show cause why the costs of the witnesses examined before the master, as above mentioned, should not be allowed to the defendants, or why the master's taxation should not be reviewed. The court granted a rule nisi to review the taxation.

Lawson showed cause in the first instance.—The case depends entirely on the construction of Rule 12, and according to the plain meaning of the words of that rule, the defendants are not entitled to be allowed the costs of these witnesses, for the examination having taken place before instructions for plea, the costs were incurred before instructions for plea. [COCKBURN, C.J.—The witnesses were examined for the purpose of their depositions being made use of by being read in court on the trial.] The plaintiffs, having had a cause of action, are entitled to their costs until their claim was satisfied. The taxation is in accordance with the usual practice in Rule 12.

J. C. Mathew was not called on to support the rule.

COCKBURN, C.J.—I quite agree that the question turns entirely on the construction of Rule 12. When that rule is looked at it is plain that it contemplates different stages of procedure. When money is paid into court, and the plaintiff accepts

Q. B.]

BROWN AND OTHERS v. POWELL, DUFFRYN STEAMSHIP COMPANY.

[C. P.]

the same in satisfaction, he is entitled to the costs of the cause in respect to the part of his claim satisfied up to the time when the money is paid in and taken out, whatever may be the result of the other issues. That contemplates the case where money is paid in in the ordinary course. Then the rule goes on, "and if the defendant succeeds in defeating the residue of the claim, he will be entitled to the costs of the cause in respect of such defence, commencing at 'instructions for plea,' but not before." Mr. Lanyon contends that, taking the latter part of the rule, inasmuch as these costs were incurred before instructions for plea, they cannot be recovered as costs in the cause by the defendants. But the rule is framed with regard to the different stages of procedure, and the examination took place in anticipation of the trial, and if these witnesses had been examined on the trial they would have been the defendants' witnesses. Assuming that no money had been paid in, if the plaintiffs' case had been made out on the money counts, yet they would have been the defendants' witnesses, and the master would have taxed their costs for the benefit of the defendants, as these costs would have been incurred in establishing the defendants' case; *à fortiori*, this would have been so if they had been called on the trial after money had been paid in. Does it then make any substantial difference that the witnesses were examined before the trial, and before instructions for plea? The rule is intended to meet the case of what is done for the purpose of preliminary proceedings, but these witnesses were examined for the purpose of the trial, and the costs, therefore, were costs in the cause, and were not incurred at such a stage of the proceedings as to bring them within this rule.

QUAIN, J.—I am entirely of the same opinion. The costs here were incurred by the plaintiffs' act and default in not complying with the order for production of the ship's papers, in consequence of which the witnesses were kept in this country when it was doubtful if the plaintiffs would go on. The plaintiffs cannot take advantage of their own default. I also agree with my Lord that these costs were not costs incurred before instructions for plea, within the meaning of Rule 12. The witnesses were examined *de bene esse*, and the costs must be considered as having been incurred as if they had been examined at the trial in the ordinary course. The mere fact of the examination having taken place at an earlier date does not make any difference. The costs should be considered as incurred at the proper stage at which they would come in, and therefore should be allowed among the general costs in the cause. I think the rule ought to be made absolute.

FIELD, J.—I am of opinion that the rule should be made absolute, on the ground stated by my Lord. The declaration contains two counts, one on the policy and one for money received. As to the special count, there were pleas of nonassessability, concealment, and deviation, and as to the *indebitatus* count, 2*d*, was paid into court. In point of fact, the defendants succeeded, and the costs of these witnesses were a part of the costs of their defence. But it has been objected that they were incurred before instructions for plea, according to the construction of the last words of Rule 12, and the master held himself bound by the last words of the rule, if the costs came into existence before instructions for plea. I think that con-

struction is too narrow. Here the costs were incurred in respect of a defence on which the defendants succeeded; if the cause had been tried, and no money paid into court, they would have been taxed as the defendants' costs. In point of time they were before instructions for plea; in fact, they were incurred for a defence after.

Rule absolute to revise the master's taxation.

Attorneys for the plaintiffs, Westall, Roberts, and Barlow; attorneys for the defendants, Holmes, Son, and Coeard.

COURT OF COMMON PLEAS.

Reported by EVERINGTON SMITH and J. M. LELY, Esqrs., Barristers-at-Law.

Monday, April 26, 1875.

BROWN AND OTHERS v. POWELL, DUFFRYN STEAMSHIP COMPANY.

Charter-party—Contract for master's signature to bill of lading—Signature by master for more tons than delivered—Payment by shipowner to consignees of sum of money in respect of difference—Whether sum so paid recoverable by shipowner from charterer—Bills of Lading Act (18 & 19 Vict. c. 111).

The signature of the master to the bill of lading does not estop the shipowner.

Declaration that it was agreed between the plaintiffs and the defendants by charter-party that the plaintiffs' ship should take on board, at Cardiff, a full cargo of coal, to be provided by the defendants, and proceed therewith to Buenos Ayres, "the master of the ship to sign bills of lading for weight of the said cargo put on board as presented to him by the defendants without prejudice to the tenor of the charter-party," and that the ship was loaded by the defendants with a cargo of 574 tons.

Breach, that the defendants presented to the master bills of lading for a weight of 605 tons, whereby the plaintiffs were rendered liable and forced to pay the consignees of the cargo a certain sum in respect of the difference between the cargo as indicated in the bill of lading and as actually shipped; *Held*, on demurrer to the breach, a bad declaration, inasmuch as the plaintiffs were not bound to pay the consignees such difference, and there was no warranty on the part of the defendants that the bill of lading was indisputably correct.

There was a demurrer to such part of a declaration as alleged a breach by the defendants of a charter party.

The declaration stated that it was agreed by the charter-party that the plaintiffs' ship, called the *Chigford*, then at Newry, should proceed to Cardiff and there take on board as tendered a full and complete cargo of Powell's Duffryn steam coal, which the charterers bound themselves to provide for shipment, not exceeding what the said vessel could reasonably stow and carry, and being so loaded, should therewith proceed to Buenos Ayres or Rosario, as ordered on signing bills of lading, and deliver the cargo on being paid freight on the quantity delivered at the rate of 37*s*. per ton of 20*cwt*., if for Buenos Ayres, or of 42*s*. per like ton if for Rosario, with 6*d*. gratuity in either case, the master paying dock and harbour dues, trimming, wharfage, and keelage on cargo, consalages, lights, pilotages, and other port charges whatsoever, certain perils and casualties excepted,

C. P.]

BROWN AND OTHERS v. POWELL DUFFRYN STEAMSHIP COMPANY.

[C. P.]

the said freight to be paid as hereinafter mentioned on unloading and right delivery of the said cargo, sufficient cash for the ship's ordinary disbursements, not exceeding one-third of the amount to be advanced on signing bills of lading, less six per cent. for interest and insurance, sufficient cash for ship's disbursements to be advanced at the port of discharge, not exceeding one-third of the freight, and the remainder by approved bill upon London, at three months' date from the right delivery of cargo, the master of the said ship to sign bills of lading for weight of the said cargo put on board as presented to him by the defendants without prejudice to the tenor of the said charter-party, within twenty-four hours after the said coals should have been put on board, or pay 4d. per registered ton per day for each day's delay; that the ship sailed to Cardiff and was there loaded by the defendants with a cargo, consisting of a certain quantity, that is to say, 573 tons of Powell's Duffryn steam coal.

Averment of performance of conditions precedent.

Breach, that the defendants presented to the master of the said ship for his signature, and caused and procured him to sign certain bills of lading for the said cargo for a weight greatly exceeding the said weight so put on board as aforesaid, that is to say, for 605 tons, whereby the plaintiff was rendered liable to pay, and was forced to pay to the consignees of the said cargo at Buenos Ayres 31l., as and for the value of the difference between the said 605 tons mentioned in the said bills of lading, and the said 573 tons so shipped as aforesaid, and a further sum of 13l. for dock and other dues and charges in respect of the same difference. And although the said ship was ordered to carry and carried the said agreed cargo in the said ship to Buenos Ayres aforesaid, and there unloaded and made right delivery of the said cargo according to the terms of the said charter-party, and although the said freight amounted in the whole to 111s., whereof a certain part was advanced according to the terms of the said charter-party, yet the remainder of the said freight was not paid by such bills as in the charter-party mentioned nor at all, and the same is wholly due and unpaid.

Demurrer, on the ground that it was not a breach of the terms of the charter-party.

Joinder in demurrer.

Lumley Smith, for the defendants, argued that the plaintiffs were under no obligation to pay the consignees damages for delivering a less amount than that specified in the bill of lading, inasmuch as the master could not bind the plaintiffs by his signature. This is so at common law, and the Bills of Lading Act (18 & 19 Vict. c. 111), (a) makes no difference:

(a) Sect. 3 of 18 & 19 Vict. c. 111 is as follows: "Every bill of lading in the hands of a consignee or endorsed for valuable consideration representing goods to have been shipped on board a vessel shall be conclusive evidence of such shipment as against the master or other persons signing the same, notwithstanding that such goods, or some parts thereof, may not have been so shipped unless such holder of the bill of lading shall have had actual notice at the time of receiving the same that the goods had not been in fact lading on board. Provided that the master or other person so signing may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder, or some person under whom the holder claims."

Grant v. Norway, 10 C.B. 665;

Jessel v. Bath, L. Rep. 2 Ex. 207;

McLean v. Fleming, ante, vol. 1, p. 100; L. Rep. 2 Ss. App. 128.

"We are called upon for the first time," said Kelly, C.B., in *Jessel v. Bath* (*ubi sup.*), "to put a construction on this statute (18 & 19 Vict. c. 111), and it is fit that we should state our opinion as to its effect with reference to the character of the party signing the bill of lading where an action is brought against the owner or charterer. . . . Here the master has not signed, but other persons, the Messrs. Barchi, have; are, then, the defendants within the second branch of the alternative of the statute? They cannot be so, unless Messrs. Barchi's signature is equivalent to their own, that is, unless Messrs. Barchi have signed in their place. It appears that these gentlemen, the defendant's agents, have signed in conformity with a practice arising out of circumstances which would make it not merely inconvenient, but impossible, for the agents to weigh the goods, and that the weight is accordingly taken from the shipper. It appears that, under such circumstances, the agent signs instead of the master, and that no difference is recognised, as any matter of trade usage or understanding between the efficacy of a signature by the master. Messrs. Barchi signed instead of the master, and not instead of the defendants; and if this action had been against the master the point raised by the plaintiff might have been material, but being neither against the master nor against the person actually signing the bill of lading, it entirely fails."

F. Meadows White, for the plaintiffs, argued that the breach assigned in the declaration was a good breach of the charter-party; inasmuch as there was an express if not an implied warranty by the defendants that they would present bills of lading for the correct weight.

Lumley Smith in reply.

Lord COLERIDGE, C.J.—I am of opinion that our judgment ought to be for the defendants.

The declaration is on a charter-party made between the plaintiffs as shipowners, and the defendants as charterers, and containing a stipulation on the part of the plaintiffs that the master of the ship chartered should sign bills of lading for weight of the cargo put on board as presented to him by the defendants without prejudice to the tenor of the charter-party. There is an averment that the defendants presented and the master signed bills for an amount exceeding that actually shipped by thirty-two tons, and that the plaintiffs paid the consignees of the cargo two sums of 31l. and 13l. in respect of the difference; and the breach is that the defendants have not repaid those sums to the plaintiffs. The defendants have demurred on the ground that the plaintiffs were under no obligation to pay to the consignees the sums which the plaintiffs now seek to recover from the defendants.

Now it is plain from the authorities, especially from *McLean v. Fleming* (*ubi sup.*) that the master of a ship, by signing bills of lading, does not bind the owner to deliver the amount of goods specified in the bills, but only the amount which has been actually put on board. But it is said that although such may be the general principle of law, the charterers have by this particular charter-party avoided the application of that principle, so that the shipowners were obliged either to deliver to the consignees the exact quantity named in the bill

C. P.]

WELLS v. THE MAYOR, &c., OF KINGSTON-UPON-HULL.

[C. P.]

of lading, or else to make good to them the money payment which they have made. But I take the true construction of the clause relied on for the plaintiffs to be this, that it stipulates only that the master shall sign as such; that it empowers the master to bind himself only, and that it leaves the shipowners to dispute all that was testified by his signature, if the testimony of such signature should be contrary to the fact.

There is nothing in this charter-party to alter the ordinary rule to that effect. The demurrer therefore must be allowed.

BRETT, J.—This is an action by shipowners for breach of warranty on the part of charterers, the alleged warranty being that the defendants would present absolutely correct bills of lading for the master of the plaintiffs' ship to sign. No fraud whatever is alleged, and the alleged warranty amounts to an engagement not to make a mistake.

Now each a warranty must be either expressed in the charter-party or to be implied from it, and as it is admitted there was no express warranty, we have only to see whether or not there was an implied one. It is suggested that there must be such a warranty because it is said to be obvious from the terms of the charter-party that the plaintiffs would be liable to the consignees. But it appears from *Maclean v. Fleming* (*sub sup.*), that a bill of lading does not bind the master to deliver a larger amount of cargo than that actually shipped.

But Mr. White contends that this would be different abroad. The consignees abroad might, he says, have different rights from the rights of consignees in England. But their rights would depend on the true construction of the bill of lading, which by the comity of nations would govern the contract, whatever might be the law of the country in which the consignees might reside. This we must assume to be the law in the absence of any authority to the contrary.

There is, therefore, nothing on which to ground an implied warranty. I was, I confess, much struck by the argument that the absence of liability on the part of the shipowner is in ordinary cases founded upon the absence of authority to the master, whereas by the present charter-party there is an express authority to the master to sign the bill of lading. Now I agree, that as between the plaintiffs and the defendants, the master was authorised to sign. And the obvious reason for this is that the obligation to deliver a certain quantity was not to depend on the bill of lading, but on what the quantity might turn out to be at the port of delivery. But even if the bill of lading had been signed by the plaintiffs themselves, at common law there would have been no estoppel, for they would not have been bound to deliver more than the amount actually shipped.

Then the Bill of Lading Act (18 & 19 Vict. c. 111), provides by sect. 3, "that every bill of lading shall be conclusive evidence of a shipment as against the master or other person signing the same." And as the master here had no doubt authority to sign this unusual bill of lading, it is argued that this signature was the signature of the plaintiffs. Now where it is said in *Jessel v. Bath* (*sub sup.*), that no person is to be bound except the person actually signing, the court does not mean that there must be a manual signature, but it would be enough if the signature were an authorised signature; at the same time, however, the signature must be that of the person who is

to be bound by it. But whatever might be the authority of the master, there was no estoppel.

Therefore, on the true construction of the charter-party, there was no express or implied warranty, and our judgment must be for the defendants.

DENMAN, J.—I am not at all sure that the point which has been most argued is the point which was intended 'to be argued upon this demurrer, which is a demurrer not to the whole declaration, but to that part of it which sets out the first breach. (a) Now, the first breach is founded on the words "the master to sign bills of lading for weight of the said cargo put on board as presented to him by the defendants," and the breach laid is that the defendants presented for the master's signature certain bills of lading for a weight greatly exceeding the weight put on board. The agreement, I take it, was that the master should sign only for the cargo actually shipped, whereas the breach is framed as if his signature was intended to be conclusive as to the amount. The demurrer hits the discrepancy between the agreement and the breach, the declaration having charged the defendant with not having done that which he had never promised that he would do.

Judgment for the defendants.

Attorneys for plaintiffs, Webb and Pearson, for *Oliver and Botterill*, Sunderland.

Attorneys for defendants, Ingledew, Ince, and Greening.

Wednesday, May 5, 1875.

WELLS v. THE MAYOR, &c., OF KINGSTON-UPON-HULL.

Contract—Interest in land within sect. 4 of the Statute of Frauds—Licence to use graving dock—Corporation—Contract with—When it may be not under seal.

A municipal corporation being the owners of a graving dock, permitted the use of it to shipowners for the purpose of repairing their ships upon certain terms specified in a series of regulations. Under these it was necessary for the shipowner to enter the name of his vessel in a book kept by the Borough Treasurer and pay an entrance fee, and the use of the dock was granted in the order, of priority of application, and each vessel was required to take her turn at the time of which notice was given to the owner. Certain charges were made for dockage, and it was required that they be paid before the vessel left the dock. The gates of the dock were under the control of an officer of the corporation who opened and closed them for the docking and undocking of the vessels. The use of blocks and shores the property of the corporation was permitted to the vessels in the dock, but the shipowners were made responsible for them, and also for cleaning out the dock daily to the satisfaction of the officer of the corporation. The plaintiff duly entered a vessel and paid the entrance fee, but the defendants admitted another vessel in the turn which properly belonged to the plaintiff. Upon an action for damages in respect of the breach of contract in not giving the plaintiff's ship her turn in order, a verdict was returned for the plaintiff.

Held, first, that the contract was not intended to be and was not concerning an interest in land, and therefore need not be in writing under the 4th section of

(a) The other breaches were not demurred to.

C. P.]

WELLS v. THE MAYOR, &c., OF KINGSTON-UPON-HULL.

[C. P.]

the Statute of Frauds, and secondly, that being a matter of frequent occurrence and of daily necessity, the case came within the recognised exceptions to the rule that a corporation can only contract under its common seal, and that this contract, though not under seal, was nevertheless binding on the defendants.

This was an action tried before Archibald, J., at the Spring Assizes for the West Riding of Yorkshire at Leeds in 1874.

The plaintiff was a shipowner at Kingston-upon-Hull, and the owner of a steamship called the *Wells*. The defendants, who are the Municipal Corporation of Hull are proprietors of a graving dock, built upon and which they hold as part of the old corporate property. They are an ancient corporation appointed by Royal Charter originally, and came under the Municipal Corporations Act on the passing of that measure. This graving dock the defendants are accustomed to let to persons requiring the same for the purpose of repairing their ships, and they let it subject to and in accordance with certain regulations, which are of importance in this case, and are as follows:

Regulations for the Corporation Graving Dock.

1. The dock will be let to parties requiring the same for the repair of vessels, at such rates as the council of the borough shall from time to time sanction.

2. With a view to secure to parties as far as possible the use of the dock, in the order of priority of application, a book is kept by the borough treasurer at the Town Hall, in which the names of all vessels intended for repair in the dock must be entered, and as far as practicable priority will be given to vessels in the order of entry, subject nevertheless to these regulations; and also in case of any question as to priority of any vessels, such question shall be determined by the borough treasurer in such manner as he shall see fit, and his decision shall be final.

3. No changing of turns shall be allowed.

4. No vessel is to be entered in the book except by a written order from the owner or master.

5. On entering each vessel a sum of 3*l.* 3*s.* shall be paid to the borough treasurer as entrance money.

6. The entrance money will be allowed as part of the dockage if the account for such dockage and moneys payable in respect of the vessel shall be paid within ten days after the same is sent in. If the account is not so paid, the entrance money will be absolutely forfeited. The entrance money and the right of turn for the use of the dock will also be absolutely forfeited if the vessel does not take her turn at the time specified at the time of entry, or subsequently fixed by notice (written or verbal) given to the owner, master, or other person in charge, or having the docking of the vessel.

7. The treasurer may on behalf of the corporation, notwithstanding the preceding regulation require the payment of all dockage or other moneys payable in respect of any vessel before such vessel is allowed to leave the dock, and to preserve the lien of the corporation may detain such vessel, and dockage in respect of the vessel will be chargeable during such time as she may be so detained in the dock.

8. The corporation foreman will open and close the dock gates for the docking and undocking of vessels as may be required.

9. The ground blocks and horizontal shores of the corporation may be used for vessels in the dock, but the parties using the same must take all risks and responsibility in respect thereof and of selecting and placing the same.

10. If any injury or damage shall be done to the dock, dock gates, engines, machine, blocks, shores, stores, or any other property of the corporation, by any vessel, or by any person employed thereon or connected therewith, or if any of the blocks or shores are left adrift or lost, full compensation, to be assessed and fixed by the corporation surveyor, shall be paid by the occupier of the dock or owner of the vessel, and the compensation when so fixed shall be like manner as dockage be deemed moneys payable in respect of the vessel, and shall be paid and recoverable accordingly.

11. The dock must be cleaned out each day at the expense of the vessel occupying it, to the satisfaction of the corporation foreman or other person in charge of the dock, and in the event of the occupier of the dock not fulfilling this regulation the corporation will do the work, and all charges or expenses in respect thereof shall be charged to the occupier of the dock or owner of the vessel and deemed moneys payable in respect of the vessel, and be paid and recoverable accordingly.

12. The corporation will for the convenience of parties occupying the dock, afford the usual facilities for using the same, but on this distinct stipulation, that the dock will in all cases be let subject to the parties occupying the same undertaking all risks and responsibilities whatsoever, as the corporation not being a trading body will not be responsible for any injury, damage, or detention however caused, occurring to any vessel docking or undocking, or being in the dock, or for any damage whatever resulting to the owner of such vessel or any other person connected therewith.

13. The corporation will not guarantee the depth of water shown by the scale at the entrance of the dock, or any other depth of water over the approaches to the dock.

By order of the Town Council.

Hull, 3rd Jan. 1873.

In March 1873 the plaintiff wanted to repair his steamship *Wells*, and on March 15th his clerk engaged the graving dock for the *Wells*, by going to the Treasurer's office paying the entrance fee, and having her name entered in the book. Her turn was to be next after the *St. Petersburg*. When, however, the *St. Petersburg* came out of the dock the defendants allowed another steamship called the *Aberdenshire* to take the turn which belonged to the *Wells*, and the latter was consequently delayed, and the plaintiff put to considerable expense in having his ship repaired at another place. It was to recover damages for this delay, and for the expenses so incurred by the breach of contract by the defendants in not giving the *Wells* her turn, that the plaintiff sued in this action. The declaration contained three special counts, and a money count, one setting out the above regulations. The defendants' pleas traversed the agreement, and further alleged that it was made subject to its being practicable to dock the *Wells*, and that it was not practicable. The amount of the entrance money was paid into court.

At the trial the learned judge ruled that the contract was not a contract of an interest in land, but a mere licence of the dock, and was not required to be in writing or to be under seal.

The jury found that the plaintiff was ready to avail himself of the turn as soon as the *St. Petersburg* left the dock, and that there was no default on the part of the defendants to give the plaintiff his turn. Upon this the learned judge ruled that the defendants were answerable for the want of care and caution, and directed a verdict for the plaintiff, and reserving leave to the defendants to move to enter a verdict for them upon the ground that to render the defendants liable the contract in question ought to have been in writing, and that it ought to have been under the seal of the corporation.

Accordingly, in Easter Term 1874, *Field, Q.C.*, moved for and obtained a rule nisi in the above term, against which

Wells, Q.C. and *Mellor* now showed cause.—The first point raised by the defendants is that this contract was concerning an interest in land. But the fair inference from the regulations and the course of business, is that there was no intention to let land, when a ship was allowed to use the

C. P.]

WELLS v. THE MAYOR, &C., OF KINGSTON-UPON-HULL.

[C. P.]

graving dock. The employment of the words "let," and "take possession of" does not necessarily mean demise, see

R. v. Smith, 3 E. & E. 385;

Bean v. Hogg, 10 Bing. 345;

Wright v. Starer, 2 E. & E. 731; 2 L. T. Rep. N. S. 175.

It is merely a licence to take the ship into the dock and there repair her. [DENMAN, J.—It would be a test to consider if trespass could be brought by the occupier against anyone interfering with his occupation, especially against one of the corporation's servants.] The regulations provide for the presence of the corporation foreman; the occupier cannot get into or out of the dock without him. The words in regulations 2, 6, and 12, "use of the dock," and "using the dock," show what was really contemplated. The case of *Watkins v. Overseers of Milton-next-Gravesend* (18 L. T. Rep. N. S. 601; L. Rep. 3 Q. B. 350), is in point as showing that a licence to use moorings fixed to the soil is not a demise so as to make the licensee an occupier. The question is fully discussed also in *Roads v. Overseers of Trustrington* (23 L. T. Rep. N. S. 821; L. Rep. 6 Q. B. 56). If the dock here were let to each successive person who uses it, the occupier would be liable to be rated, and would be rated in respect of his occupation. This could not be in such a case as the present. There is only a permission to come on the land for a particular purpose and for a time. Just as a person in an inn may have a right to a room, but not to any particular room. [LORD COLERIDGE, C. J.—The judgment of Hill, J., in *Wright v. Starer* (ubi sup.) instances a governance to whom a room is assigned. DENMAN, J.—If this was a mere licence, was it not revocable? See *Wood v. Leadbitter* (13 M. & W. at p. 844).] That case decides that a right to come and remain for a certain time on the land of another can be granted only by deed; but a licence coupled with a grant of an interest in the land which would be irrevocable is not to be assumed here. The second point is that the defendants, being a corporation, could only have entered into this contract under their common seal. But to the general rule as to corporations contracting under seal, there are well recognised exceptions, one of which is that the formality may be dispensed with where the matter is of necessity or urgency. Now here the corporation cannot hold a meeting without three days' notice being given, and yet the very object of this dock like this is to admit ships immediately. As a fact the *Aberden-shire*, which was admitted instead of the *Wells*, was in a sinking state. It would defeat the very object of the work of the corporation as owners of the dock. *The South of Ireland Colliery Company v. Waddle* (18 L. T. Rep. N. S. 405; L. Rep. 3 C. P. 463), shows that where the contract is for a purpose connected with the objects of the corporation, the seal is dispensed with. [LORD COLERIDGE, C. J.—That is a case of a trading corporation. What do you say to *Ludlow v. The Mayor of Charlton* (6 M. & W. 815)?] That decision was on the ground that there was no paramount convenience so great as to amount to necessity; if there had been it would have come within the exceptions to the rule stated in the judgment as applicable to municipal as well as to trading corporations. [DENMAN, J.—Referred to *Austin v. The Guardians of St. Matthews Bethnal Green* (29 L. T. Rep. N. S. 807; L. Rep. 3 C. P. 91).] In

that case the duties of the appointee were too important to admit of an informal appointment, and another late case *The Mayor, &c., of Kidderminster v. Hardwick* (29 L. T. Rep. N. S. 611; L. Rep. 9 Ex. 13) was where it was a question of letting tolls, and there was no hurry. Having regard to the facts of this case it is almost a *reductio ad absurdum* to suppose that the admission of disabled ships into this dock could be done in any other way than it was. In *Church v. The Imperial Gas Company* (6 A. & E. 846), the rules and its exceptions are fully stated by Lord Denman as they are applicable to municipal corporations, and this case comes within those exceptions.

Mauld, Q.C. and *Case* in support of the rule.—On the point as to the necessity of the seal, there has been throughout an assumption of urgency which did not exist. It was rather a deliberate proceeding in reality, as there were the formalities of going to the office, assenting to the rules, and having the priority registered on payment of the fee. That shows that there was in contemplation time during which the ship would be waiting her turn. It would not be any difficulty so great as suggested to affix the seal to these contracts because the corporation might appoint an officer for the purpose to do this by rule. Pollock, B. says, in *The Mayor of Kidderminster v. Hardwick* (ubi sup.) "It is open to every corporation to get rid of the whole difficulty by appointing an agent to act for them under seal." All exceptions which have been made are in favour of trading corporations, and the last case is that of the *South of Ireland Colliery Company v. Waddle* (ubi sup.), where the exception is expressly put on that ground, as it was said that the contract was for a purpose connected with the objects of the corporation. This is not so here, this is an ancient corporation, and the letting of this dock is in no sense one of the objects of its existence, the dock is built on corporate land and the corporation might have made any other use of it if they pleased. *Lyde v. The St. Pancras Board of Guardians* (27 L. T. Rep. N. S. 342), where there was a non-trading corporation decided, that the appointment of a medical officer to an infirmary must be made under seal. The exceptions then are in the case of trading corporations and in trading matters. *The London Dock Company v. Simmott* (8 E. & B. 347) is even stronger in our favour because there the plaintiffs, though a trading corporation, were held not bound by a parol agreement to execute a contract for scavenging the docks. Again *The Copper Miner's Company v. Fox* (16 Q. B. 229), where the contract was relating to a purpose for which the plaintiffs were not incorporated, it was held not binding on them. The other point is that this contract ought to have been in writing because it was within the 4th section of the Statute of Frauds. On this point *Wood v. Leadbitter* is a direct authority. That was where a ticket of admission to the grand stand at Doncaster, was held to be a grant of an interest in land, and not being by deed was revocable as a mere parol licence. This is an *à fortiori* case because here the possession must be an exclusive one. It is said that the 8th Rule negatives exclusive possession, but it is clear that the corporation foreman is only present as a porter or concierge, and does not interfere with the occupation by the shipowner. It was asked if trespass could be maintained against the foreman, but it is to meet that possibility that there is the special provision

C. P.]

WELLS v. THE MAYOR, &c., OF KINGSTON-UPON-HULL.

[C. P.]

inserted admitting him. The contention must therefore be either that we gave a licence to the plaintiff to come upon our land, in which case it was revocable, and so no action will lie, which brings the case within *Wood v. Leadbitter* (*ubi sup.*) or that we gave an irrevocable licence, and that this was a contract to grant an irrevocable licence. Now a licence only becomes irrevocable when it is accompanied by an interest, and such an interest must be either a chattel interest or an interest in land; here, however, it cannot be a chattel interest but it must be an interest in the graving dock which is an interest in land. If the action therefore is maintainable, it must be on the ground that this contract conveyed an interest in land. It seems plain that if a stranger broke down the dock gates the occupier could maintain trespass against him, and it would seem that such a license as there was here would amount to a demise. *R. v. Winter* (2 Salk. 588). And if the rating be a test, such an occupier as the plaintiff might be rated, as has been held in cases where there was no such exclusive possession as the shipowners here have. *R. v. The Inhabitants of St. Martin's* (3 Q.B. 204), and *Roads v. The Overseers of Trumpington* (23 L.T. Rep. N.S. 821; L. Rep. 6, Q.B. 56). We are not obliged indeed to go so far here as to show that the occupiers of the dock would be entitled to be rated, but they are as much tenants as tenants of furnished lodgings, and an agreement to occupy then is an interest in land within the statute. *Imman v. Stamp* (1 Stark. 12). Occupying a stall in a market under an agreement would give a settlement. *R. v. Caversham* (4 B. & C. 683); and *Bastard v. Capel* (8 B. & C. 141), shows that where the exclusive use is demised the land is demised. *Nelby v. Groves* (19 L.T. Rep. N.S. 186; L. Rep. 3 C. P. 594), and *Mayor of Yarmouth v. Groom* (7 L.T. Rep. N.S. 161; 1 H. & C. 102), show that the contract here amounted to a demise. But if the plaintiff here had an interest in land not amounting to a demise, it would still be sufficient to bring the case within the statute (*Evans v. Roberts* (5 B. & C. 829); *Smart v. Jones* (33 L.J. 154, C. P.). *Wood v. Lake* (8ayer 3), which is referred to in *Wood v. Leadbitter* (*ubi sup.*), and would seem to be rather against the defendants' contention has been questioned by Lord St. Leonard, who thought that the agreement there amounted to a lease; and the case cannot therefore be upheld as an authority. [HUNTER, J.—The case is cited in Chitty on Contracts, p. 280, without any suggestion that it has been overruled.] It is further distinguishable as there there was only a licence to stack coals on part of a close, and here we say that the contract was for the whole use of the dock, and so was a demise; and that is what Lord St. Leonard's thinks that the licence in *Wood v. Lake* (*ubi sup.*), really was, in which case the decision must be wrong; (Sngden Vendors and Purchasers, 14th edit., p. 124). He says, "Wood v. Lake was not considered an authority."

Lord COLERIDGE, C.J.—This case has been argued at some length before us, and a number of cases cited and arguments used more or less relevant to the points raised for our consideration, but disembarrassed of most of these, I am of opinion that the case is in reality a simple one, and admits of an easy decision.

It was an action brought by a shipowner against the defendants for an alleged breach of contract, and to recover damages for the injury

to the plaintiff arising from that breach. As I understand the facts they are these. A contract in the terms of the regulations which are before us was entered into, and upon the payment of three guineas it was agreed that the plaintiff's ship should in her turn be allowed to go into the defendants' graving dock. That contract was broken by the defendants permitting another ship to go in instead of the plaintiff's ship, and for the damage consequent on the delay the action was brought and a verdict obtained.

A rule to set aside that verdict was granted, and it has been endeavoured to be supported upon two grounds. First, that the contract, if it was a contract at all, was one relating to an interest in land within the 4th section of the Statute of Frauds, and must have been in writing, and that this was not; and secondly, that the defendants being a corporation, and not a trading but a municipal corporation, could only contract under their corporate seal, and they had not here done so.

There are thus only two points to be discussed, and they may be, as I have said, in my opinion, easily disposed of.

First, was it an interest in land that this contract dealt with? This may depend on two considerations, was it intended by the parties to deal with an interest in land, and again, apart from intention, have they nevertheless dealt with such an interest? In either of these cases the contract would be brought within the 4th section of the Statute of Frauds, and it must be in writing for the plaintiff to be held responsible for a breach of it; but if neither of these suggestions be answered in the affirmative, then it is unnecessary that the contract should be in writing, and the parties to it will be bound by its terms. Now, *prima facie*, no one would think that such an arrangement as took place here was to be a grant of an interest in land. It was, as we know, an arrangement for the use of the graving dock by the plaintiff, but if there was such an intention as has been suggested, then it must have been the exclusive possession for a certain time of the land and the dock that was attempted to be conveyed to the plaintiff. I however am clearly of opinion that there was no intention to pass any interest in the land. It is incredible that the framers of the regulations or the shipowners, indeed, that either of the parties intended to deal with the land at all. They intended to deal with the use of the dock and the appliances for the repairing of the ships. It is equally clear that no interest was attempted to be created irrespective of intention, and intention must be gathered from the language of the regulations. Now look at that for a moment; the words "let," and "occupier" do not necessarily mean the creation of an interest in land by way of tenancy, and they are not words of art, but must be read by the light thrown upon them by the whole document. The heading speaks of the "occupation of the Corporation Graving Dock." The first no doubt says the dock will be let; and the second is a provision somewhat in favour of the defendants in so far as it says, though there is a contract, it is to be fulfilled only so far as is practicable, and the borough treasurer is to decide any question that may arise. The fifth regulation however shows that the payment of the entrance money constitutes part of the consideration, and the forfeiture of the entrance

C. P.]

WELLS v. THE MAYOR, &c., OF KINGSTON-UPON-HULL.

[C. P.]

money shows that no right is given to the ship-owners even to go into the dock. So far, therefore, as it seems to me, there is nothing inconsistent with the intention on the part of the defendants of keeping the dock in the possession and under the control of the corporation. That being so, what shall be said as to the 7th rule? (His Lordship then read the rule.) "Before the ship shall leave the dock"—that is before she shall leave the ground which they say is the shipowner's exclusive property. This contemplates locking the gate, for which they say the shipowner might maintain trespass against the corporation. I can scarcely conceive language stronger than this is indicative of a retention of the possession of the dock, coupled as it is with the notice of a lien being held on the ship while she is on the land said to be exclusively in possession of her owner. The 8th rule shows that the alleged tenant cannot open and shut his own door. The 9th and 10th make provision how corporation property is to be used by the ship using the corporation dock; that surely is a fair intendment that the corporation meant to keep the dock and everything belonging to it in their own possession, for they treat the owner of the ship and the occupier of the dock as synonymous terms, and hold them liable for the use of corporation property. The 11th speaks of the "corporation foreman, or other person in charge of the dock," and in the 12th they contract that the persons who use the dock shall have certain advantages which the corporation as owners can give. These, then, are the terms of the instrument from which it is said that a demise is to be inferred. It would be startling if the language in that instrument had said something so different from what we know must have been the intention of the framers of it; but the language is not, as I have shown contrary to the intention, it is to my mind quite plain, and it lays down on behalf of the corporation the terms on which this property is to be used. If the question of intention be raised, I decide against the corporation on the words which intimate no such intention; if the words are to be looked at apart from any question of intention I decide in the same way that they do not convey any interest in land.

We are well within decided cases in so holding, and the judgment of Hill, J., in the case I first referred to, *Smith v. The Overseers, &c., of St. Michael's, Cambridge* (3 L.T. Rep. N. S. 687; 30 L. J. 74, M. C.), is expressly in point as to the principle. He says, "We think we must look not so much to the words as to the substance of the agreement, and taking the whole together we think it must be construed not as a demise of the five rooms, but as an agreement by which the appellant came into possession of those rooms, and keeping a servant there for himself; and certainly the exclusive enjoyment of the rooms was to be given in the same way as the guest at the inn, or a lodger in a house, has a separate apartment, or the master of a ship has a separate cabin, in which case the possession remains in the innkeeper, the lodging-house keeper, and the shipowner." It is true as has been pointed out that this is a rating case, and that there may be an occupation sufficient to constitute an interest in land within the Statute of Frauds, which would not be sufficient to entitle (as it is somewhat ironically expressed) the occupier to be rated. The incidents

may not indeed be the same in the two cases, but looking here at the clear words of the instrument, I say that there was no intention to demise an interest in land, and that none has been by those words demise. *Wright v. Stasert* (*ubi sup.*) is also in point, and the language of Hill, J., is again lucid and clear. He says, "the defendant's position here is directly analogous to that of a domestic servant, or a governess, or a person employed to build a house upon another's land, all of whom have a right, incidental to their respective contracts, to go upon land in order to carry out their contracts; but none of whom take under their contracts any interest in the land upon which they are thus entitled to go." That hits the distinction to be taken between the cases. There was no intention to convey any interest in the land, but a leave given to go upon the land to do certain work.

I do not feel called upon to go into the nine points that have been argued upon *Wood v. Leadbitter* (*ubi sup.*). They do not seem to me fairly to arise, and the dilemma ingeniously put by Mr. Cave upon either horn of which he invited Mr. Wills to take his seat, does not really arise. This is not on the one hand a mere licence, and therefore revocable, nor on the other a licence coupled with an interest in land so as to be within the statute, but it is a contract to allow the plaintiff the use of the corporation property for a time, they keeping possession all the time by means of their servants, and only allowing the use of it under stringent regulations.

Next as to the question whether this contract should have been under seal. There is a distinction, and it is a sound distinction, between trading and municipal corporations. Therefore, the cases which have been decided on the capacity of trading corporations to contract without the formality of a seal are not applicable. There are no cases to show that municipal corporations when engaged in business which is in the nature of trading, are to be allowed the immunities which are given to professedly trading corporations. This, therefore, being a municipal corporation, is subject to the rules affecting those bodies. I find in *Comyn and Salkeld* the rule laid down, but also that it is subject to an exception, and that exception is well put in the judgments in *Church v. The Imperial Gas Company and Ludlow v. The Mayor of Charlton* (*ubi sup.*), in the latter of which Lord Denman's judgment in the former is set out at length. We have, therefore, the authority of the Courts of Queen's Bench and Exchequer in laying down this exception to the rule: "Wherever to hold the rule applicable would occasion very great inconvenience or tend to defeat the very object for which the Corporation was created the exception has prevailed; hence the retainer by parol of an inferior servant, the doing of acts very frequently recurring, or too insignificant to be worth the trouble of affixing the common seal, are established exceptions." To this Rolfe, B. agrees in the considered judgment in *Ludlow v. the Mayor of Charlton* (*ubi sup.*). Now I can hardly conceive any matter more exactly coming under this description of "acts very frequently occurring," than that of letting a ship into dock. It comes therefore most obviously within the exceptions to the rule as to the necessity of a corporation contracting under its common seal, exceptions which have been engrafted on it from the earliest times, and which have been

C. P.]

WELLS v. THE MAYOR, &c., OF KINGSTON-UPON-HULL.

[C. P.]

applied to municipal corporations. It is enough to say generally that in Williams', Saunders, in Comyn's Digest, and in Brooke's Abridgment, the exception has been recognised from the earliest time as having been engrained on the rule; that the facts of this case bring it within the exceptions, and that upon this second point also, I am of opinion that the defendants have failed, and the rule must be discharged.

DEKMAN, J.—I am of the same opinion.

On the first point upon which the rule was granted, viz., that to render the defendants liable the contract in question ought to have been in writing, of course that turns on the question whether a writing was necessary under the Statute of Frauds. I agree that it is not the duty of the court to take any single words occurring in the documents which constitute the contract, as being conclusive of the rights between the parties, on the simple meaning of such words alone; as here I am of opinion that it entirely depends upon what the court may think is the real nature of the contract entered into by the payment of the three guineas on the one side and the grant of the use of the dock on the other, both being in accordance with the printed regulations. The mere use of the expression, "the dock will be let," is not conclusive of a demise, as the Lord Chief Justice has said; and if it were to be held so, it would give rise to the strange anomaly that we should treat the parties as using words in one direction as conclusive, when in the very same document other expressions might be found as strong the other way, which we should be obliged to disregard. For example, the word "let" occurs, but "rent" is never mentioned, it is "rate," and so, in like manner, on every clause similar observations might be made. I will not go through them all again, as my Lord has done so at length and in detail, and I could add nothing. It is not anything amounting to a demise of the land to a shipowner when he pays the entrance fee of three guineas. What he acquires is a right to have his vessel repaired there, but not of taking the dock for a moment out of the possession of the corporation. It is, I think, idle to say that a liability to rating could arise in the occupier, or that he could maintain trespass against the corporation. It is not, therefore, such an agreement as to give any right to or interest in the land, for many of the terms are wholly inconsistent with that construction of it. It is a complex contract, no doubt, and under it the corporation by their servants retain full control over the dock, subject only to such use of it as is shown by the regulations to be granted to the plaintiff. I need not go through all the cases decided on the statute; if there is one which is nearer than another to this, it is *Wood v. Lake* (*ubi sup.*), nor can I find that upon the point on which it is here applicable, it has been overruled. It is true that in reference to a question decided upon another matter in it, there is the great authority of Lord St. Leonards against it. It is, however, very like this case, but to my mind the present is even stronger than it is, against there being an interest in land dealt with by the contract.

On the other point, as to whether the contract ought to have been under seal or not, I think that there was no necessity for it. The grounds on which a corporate seal is required to documents binding the corporation, are that as a

general rule a corporation has no other means of expressing its will. Here, however, the case does not turn on the rule, but on the exceptions to it, and those exceptions are well set out in Chitty on Contracts, quoted from the judgment of Best, C.J., in the *East London Waterworks v. Bailey* (4 Bing. 283): "The first exception is where the contract is executed, in that case the law implies a promise and a deed under seal is not necessary. The next exception is where the acts done are of daily necessity to the corporation, or too insignificant to be worth the trouble of affixing the common seal." Now, I think that in this case this is a thing which falls within the description of daily necessity. I cannot conceive that business of this kind could be carried on, if it could be done only by affixing the seal on every occasion when a shipowner wanted to put his ship into dock. I think it also falls within the doctrine where a thing is said to be too insignificant to be worth having the seal affixed. "A fourth exception is where the acts to be done must be done immediately, and it would be impossible to wait for the formality of the corporation seal." Surely this is a case where the act must be done immediately. It would not be business-like to wait for the corporation seal when a vessel, perhaps in a sinking state, was wanting to be admitted to the graving dock. It has been said truly that there is a wide distinction between trading and municipal corporations, but these exceptions which I have read are all applicable to the latter class, and it is as so applicable that Best, C.J. points them out. He proceeds further to show how the principle of necessity applies to and is carried still further in the case of trading corporations, and therefore the result of his judgment in this respect comes to this, that he recognises the distinction between the two classes of corporations on this ground, that, in the case of trading corporations, the rule of necessity authorises things to be done without a seal which municipal corporations could not do without that formality, but, nevertheless, the rule of necessity is applicable in general terms to both, to municipal as well as trading corporations. I have said that I think this is a case of necessity, and as it is my opinion that the exceptions to which I have referred apply.

I think that this rule must be discharged.

HIDDLESTON, J.—I am of the same opinion. My judgment is governed by a view of the facts before us.

On the first question was it intended to create the relationship of landlord and tenant, by this contract, and give the exclusive possession of the dock to the plaintiff. It is to me quite clear that there was no intention that the graving dock should be exclusively handed over to the occupation of the plaintiff as tenant, and looking at the regulations and for the reasons given by the Lord Chief Justice, it is obvious that those regulations do not create an interest in and in the shipowner who uses the dock. Mr. Wills said that it was proved that some one was always present on behalf of the corporation in charge of the dock, and this not being denied would alone go far to show that the possession remained in the defendants. The case cited of *Watkins v. The Overseers of Milton-vest Gravesend* (*ubi sup.*), supports the view of the facts where Mellor, J., says: "The agreement only amounts to this, I give you liberty to moor the bulk there, and I will not give the liberty to any-

ADM.]

THE MOSELLE.

[ADM.]

body else." So as I read it, the only intention here was, you may come in in your turn, pay a certain sum when you have finished the repairs, and go out; if you do not pay we will keep you in and charge you also for the time during which we so detain you. So much for the intention; there was certainly none to demise the exclusive possession, and it was not in fact demised, therefore there was no necessity that this contract should be in writing.

On the second point, as to the seal, I agree with the rest of the court. I referred during the argument to *Church v. The Imperial Gas Company* (ubi sup.), and the general rule laid down by Lord Denman, which has been read. I quite agree that in this case the exceptions are as they have been stated by my Lord and my brother Denman, and the facts bring the case within them. The point was considered again in the *South of Ireland Colliery Company v. Waddle* (ubi sup.), and though there it was a case of a trading corporation, yet Montague Smith, J., says that the exceptions on which we rely here still apply to municipal and ecclesiastical corporations.

I think, therefore, that this rule ought to be discharged.

Rule discharged.

Attorneys for plaintiff, Pritchard and Sons, for J. and T. W. Hearfield, of Hull.

Attorneys for defendants, Collyer, Collyer-Bristow, and Co., for Roberts and Leak, of Hull.

COURT OF ADMIRALTY.

Reported by J. F. ASHALL, Esq., Barrister-at-Law.

Wednesday, Nov. 4, 1874.

THE MOSELLE.

Collision — Compulsory pilotage — Ship carrying cargo and passengers from Boulogne to London.

A steamship carrying cargo and passengers from Boulogne to London is not bound under the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), to employ a pilot whilst navigating the river Thames, the general exemption continued from 6 Geo. 4 c. 125, sect. 59, and the order in council of 18th Feb. 1854, by the Merchant Shipping Act 1854, sect. 353, not being overridden by sect. 379, relating to Trinity House pilotage and exempting such a ship only when not carrying passengers. Reg. v. Stanton (8 Ell. & Bl. 445), and The Earl of Auckland (*Lush*, 184, 387), followed.

THIS was a case of collision instituted on behalf of the owner of the dumb barge *Alice* against the steamship *Moselle*, her owners the General Steam Navigation Company intervening. The cause was originally instituted in the City of London Court, and was transferred into the High Court by order of the latter court.

At the time of the collision the barge was moored alongside a sailing ship called the *Elizabeth*, in the Cherry Garden Tier, Rotherhithe, in the River Thames. This tier is a usual place for vessels to lie and unload into barges, and the *Alice* was wholly out of the usual course of navigation and was properly moored. The *Moselle* was charged by the plaintiff with neglecting to keep out of the way of the barge.

The collision was admitted by the defendants, and it was alleged in their answer that the *Moselle* was proceeding up the River Thames in charge of

a duly licensed Trinity House pilot, at the rate of about 6 knots an hour; that just before the collision the helm of the *Moselle* was, by order of her pilot, starboarded to pass to the southward of a sailing barge which was driving up ahead of the *Moselle*; that by order of the pilot the helm of the *Moselle* was then put hard a port and her engines stopped, but that she with her stem and port sponson struck the barge *Alice*, lying in the Cherry Garden Pier. The answer then contained the following allegation:

4. The said collision was caused by the fault or incapacity of the said pilot, and not by any neglect or default on the part of the master and crew of the *Moselle*; and the said pilot was a qualified pilot, who, at the time of the said collision, was acting in charge of the *Moselle* within a district where the employment of such pilot was compulsory by law; and under and by virtue of sect. 398 of the Merchant Shipping Act 1854, the defendants are not liable to the plaintiff in respect of the said collision.

The plaintiffs' reply denied the statements of the answer generally, and that the employment of the pilot was compulsory by law.

By agreement between the parties, it was taken as admitted at the hearing of the cause:

1. That the collision was occasioned solely by the negligence or fault of the duly licensed Trinity House pilot in charge of the *Moselle*.

2. That at the time of the collision the *Moselle* was bound upon a voyage from Boulogne to London, laden with cargo and passengers, and at such time neither master, mate, nor other member of the crew of the *Moselle* held a pilotage certificate for that part of the River Thames, or pilotage district within which the collision happened.

3. That there was no neglect or default on the part of the master and crew of the *Moselle*.

In consequence of these admissions the sole question in the case was whether the employment of the pilot at the time of the collision was compulsory upon the owners of the *Moselle*.

Cohen, Q.C. (R. E. Webster with him), for the plaintiff.—This case is governed by Reg. v. Stanton (8 Ell. & Bl. 445), which was a decision upon the Acts now in question. By the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), sect. 353, it is provided that "subject to any alteration to be made by any pilotage authority, in pursuance of the power hereinbefore in that behalf given, the employment of pilots shall continue to be compulsory in all districts in which the same was by law compulsory immediately before the time when this Act comes into operation; and all exemptions from compulsory pilotage then existing within such districts shall also continue in force." Immediately before that Act came into force, the General Pilot Act (6 Geo. 4, c. 125), was in force, as it was repealed by the Merchant Shipping Repeal Act 1854 (17 & 18 Vict. c. 120) on the same day only as the Merchant Shipping Act came into operation. By 6 Geo. 4, c. 125, s. 59, it is enacted that "the master of any collier, or of any ship trading to Norway, or to the Cattegat or Baltic, or round the North Cape, or into the White Sea, on their inward or outward voyages, or of any constant trader inwards, from the ports between Boulogne inclusive and the Baltic (all such ships and vessels having British registers, and coming up either by the North Channel, but not otherwise) . . . or of any other ship or vessel whatever, whilst the same is within the limits of

ADM.]

THE ZUFALL.

[ADM.]

the port or place to which she belongs, the same not being a port or place in relation to which particular provision hath heretofore been made by any Act or Acts of Parliament, or by any charter or charters for the appointment of pilots, shall and may lawfully, and without being subject to any of the penalties by this Act imposed, conduct or pilot his own ship or vessel so long as he shall conduct the same without the aid or assistance of any unlicensed pilot, or other person or persons than the ordinary crew of the said ship or vessel." By a regulation made under 16 & 17 Vict. c. 129, s. 21, and approved by order in council of 18th Feb., 1854 (see for regulation *Lush. Adm.*, Rep. p. 167), the exemption was extended to ships trading to ports between Hongkong (inclusive) and the Baltic on their outward passages, and when coming up by the south passages, so that such vessels entering the Thames were exempt in all cases. This regulation was also in force when the Merchant Shipping Act 1854 came into operation on May 1st 1855. In *Reg. v. Stanton* (*ubi sup.*) it was held that under the Act of 6 Geo. 4, c. 125, s. 59, a ship going down the Thames and bound for the Baltic and carrying cargo and passengers, was exempt from compulsory pilotage in the Thames; this decision was given in 1857, after the Merchant Shipping Act came into operation. It follows from this decision that all the exemptions in sect. 59 of that Act are preserved by the Merchant Shipping Act 1854, sect. 353. But if there were any doubt in the matter, this case has been confirmed by this court and by the Privy Council in *The Earl of Auckland* (*Lush.* 164, 387; 1 Mar. Law Cas. 27, 177), which decided that a steamer trading between London and Rotterdam and carrying cargo and passengers was exempt from compulsory pilotage under those same enactments. In the present case the *Moelle* was carrying cargo and passengers from Boulogne to London, and, that being her usual employment, she was trading from Boulogne within the meaning of the Order in Council. The fact that ships are carrying passengers does not, upon the authority of the above case, affect the question. The general exemption of sect. 353 importing the exemptions given by former Acts, overrides sect. 396, applying only to Trinity House pilotage, and exempting vessels upon certain voyages "when not carrying passengers." He cited also:

The Hannah, L. Rep. 1 Adm. 283;
The Temora, *Lush.* 17.

Butt, Q.C. (*E. C. Clarkson* with him), for the defendants.—In *Reg. v. Stanton* (*ubi sup.*) Lord Campbell says that the counsel in support of the conviction "properly allows that sect. 353 continues the exemption of Stat. 6 Geo. 4, c. 125, sect. 59," and it is upon this admission that the whole of that case and the subsequent case of *The Earl of Auckland* (*ubi sup.*) proceeds. The real point was never properly argued in either of those cases, that point being whether sect. 353 continues any exemptions which are expressly or impliedly repealed by the Merchant Shipping Act 1854. I submit that sect. 379 puts an end to any exemption in respect of vessels carrying passengers from Boulogne to London.

Sir R. PHILLIMORE.—It is impossible to distinguish this case from the cases cited, *Reg. v. Stanton* and *The Earl of Auckland*, which latter case was decided both here and in the Privy

Council, and I therefore pronounce against the compulsory pilotage in this case.

Solicitors for the plaintiff, Farnfield.

Solicitors for the defendants, Cattara and Co.

Tuesday, Jan. 19, 1875.

THE ZUFALL.

Wages—Foreign plaintiffs—Security for costs.

Where a cause of wages was instituted against a foreign ship by her master and crew, who were also foreigners, and it appeared that, although they were at the time in this country, their only place of residence there was on board the ship, and that the master had stated that he had no means and intended to leave England, the High Court of Admiralty ordered the plaintiffs to give a security for costs in the sum of 130*l*.

This was a cause of wages, instituted on behalf of the master and crew of the German barque *Zufall* against that vessel in the sum of 450*l*. The ship having been arrested on the 28th Dec. 1874, an appearance was entered on behalf of Gustav Hermann Otto, of Colberg, in Prussia, the sole owner of the said ship. The cause was now brought before the court on a motion on behalf of the defendant to dismiss the suit with costs and to direct the release of the *Zufall*, on the ground that the ship was a German ship, and the plaintiffs were German subjects and had no residence in England, and that by German law such German subjects were prohibited from taking proceedings in any other country than Germany for the recovery of any claim they might have against the vessel or the defendant, and on the ground that nothing was due to the plaintiffs; and the notice of motion further gave notice that the defendant would, in the event of the judge deciding to retain the suit, ask the judge to order that the plaintiffs should give a sufficient security to answer costs within a week, and in default that the suit be dismissed with costs and the vessel released from arrest.

In support of the motion an affidavit of the defendant's agent in this country was filed, in which it was sworn that all the plaintiffs in the suit were subjects of the Emperor of Germany, and none of them had any place of abode in this country except on board of the said ship; and that the master of the *Zufall* had informed the said agent that he was without means either in this country or in Germany, and that he intended to leave England as soon as possible.

W. G. F. PHILLIMORE, for the defendant, in support of the motion.—The ship is German and the crew are German, and the contract between the crew and shipowners is consequently governed by German law. Now, by the German General Mercantile Code, sect. 537 (See Weendt's Maritime Legislation, p. 218) no German seaman can sue for his wages before a foreign court, nor until he has returned to Germany; these wages are, therefore, not at present due. In these circumstances I submit that the court will not take jurisdiction over a suit by foreign seamen, and that it will follow *The Nina* (L. Rep. 2 Adm. & Ecc. 44; L. Rep. 2 P. C. 38; 3 Mar. Law Cas. O. S. 47), and refuse to entertain the suit in the exercise of its judicial discretion. [Sir R. PHILLIMORE.—I am not disposed, except by the consent of both parties, to decide on a matter with respect to foreign law, and involving such important legal questions on

[ADM.]

THE NAOMI.

[ADM.]

motion. I think that a case like the present the plaintiffs have a right to pray a petition.] The plaintiffs must, at any rate, give security for costs. The rule as to security for costs in this court is given in *Williams and Bruce's Admiralty Practice*, p. 295, note (y), where it is said that the former practice was to require security for costs from seamen in all cases of wages, and that "The modern practice with reference to security for costs in suits for wages, instituted by masters or seamen, is the same as in other suits. It is submitted that masters or seamen suing for wages are entitled to the same privileges as other suitors, and that no security for costs can be required from seamen who are British subjects suing for wages earned on board a British ship, unless they are permanently resident out of the jurisdiction. Where the seamen are foreigners, or are suing for wages earned on board a foreign ship, it seems that it is in the discretion of the court to entertain their suit, and that it may impose whatever terms it thinks fit." Thus the rule as to foreigners suing has not been relaxed, and the plaintiffs must give security.

The Franz et Elise, Lash. 577, 1 Mar. Law Cas. O. S. 155;

Nylander v. Barnes, 6 H & N. 508.

[Sir R. PHILLIMORE.—Permanent residence out of the jurisdiction seems to be the foundation of the rule as to giving security for costs]. But the court has a discretion, and can order the security, if there is any chance of the plaintiffs leaving the jurisdiction and so evading payment of costs. The rule to be gathered from the cases cited in *Pritchard's Admiralty Digest*, p. 125, is that a foreigner having no residence in this country must give security for costs.

Webster, for the plaintiffs.—The question of jurisdiction ought not to be decided on this motion, and the plaintiffs ask that the motion should be dismissed with costs on the ground that they are not bound to give security for costs. In *The Franz et Elise* (*ubi sup.*) it is laid down that this court will follow the practice of the common law courts. In *Nylander v. Barnes* (*ubi sup.*) the plaintiff was actually abroad when the order for security was made, and it is therefore not in point. On the other hand, it has been expressly ruled that the courts will not order security for costs if the plaintiff, although a foreigner, is actually living in this country, and there is no supposition that he intends to leave. The mere fact that the plaintiff has only a temporary place of abode here, and may be compelled to go away as soon as his present means of existence are exhausted, is not enough:

Crispian v. Doghlong, 1 Swab. & Trist. 522;

Drummond v. Tillinghurst, 16 C. B. 740.

It must be distinctly shown, in order to obtain such an order, that the plaintiff is about to or intends to leave England. There is nothing to show such an intention on the part of the plaintiffs here, and, in fact, they do not so intend. They must remain to prove their case.

W. G. F. Phillimore in reply.

Sir R. PHILLIMORE.—I think this is a case in which a moderate security for costs should be given. I shall follow the case of *The Franz et Elise*, and order that the plaintiffs give security for costs in the sum of 130*l*.

Solicitors: For the plaintiffs, *Stokes, Saunders, and Stokes*; for the defendants, *Oliver and Betterill*.

Wednesday, Feb. 3, 1875.

THE NAOMI.

*Collision—Costs—Damage under 300*l*.—County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71) sect. 9—Certificate—Costs of Reference.*

A ship was damaged by another outward bound, and the owners of the injured vessel, in the bona fide belief that their damage was greater than it actually was, instituted a suit in the High Court of Admiralty and arrested the ship for a large amount, but accepted bail and released the ship at once on ascertaining their actual damage; the defendants admitted liability, and the damage was referred to the Registrar; the claim made by the plaintiffs was a little over 300*l*., but the Registrar reduced the amount claimed by more than one-third, and made no report as to costs. On application by the plaintiffs, the court certified for the costs of suit under the County Courts Admiralty Jurisdiction Act 1868, but condemned the plaintiffs in the costs of the reference.

THIS was a cause of damage instituted on behalf of the owners of the ship *Aberdeenshire* against the ship *Naomi*, to recover for damage sustained in a collision between the two vessels, which happened on August 5, off Dungeness. The *Aberdeenshire* was so much damaged that she was compelled to put into Dover for repairs. The *Naomi* was outward bound, and the agents of the *Aberdeenshire*, on August 6, before the amount of injury sustained by that vessel could be accurately ascertained, gave orders for proceedings to be taken in the High Court of Admiralty against the *Naomi*, and accordingly this cause was at once instituted against the *Naomi* and her freight in the sum of 2400*l*., and the vessel and her freight were arrested in the Downs under a warrant of the court. An appearance was entered in the cause by the owners of the *Naomi* on Aug. 7, and at the same time their solicitors gave an undertaking for bail, which was accepted by the plaintiffs, and the vessel and her freight were released from arrest.

After negotiations had taken place with a view of settling the plaintiff's claim, the defendants admitted liability on Nov. 4, and the amount of damage was by the court referred to the Registrar and Merchants. At the reference the plaintiffs brought in a claim for damage done amounting to 326*l*. 18*s*. 6*d*. On Jan. 3 the report of the Assistant Registrar was filed, showing that there was due to the plaintiffs for the damage proceeded for, 186*l*. 19*s*. 9*d*., with interest. The report entirely disallowed a sum of 83*l*. 1*s*. 6*d*. claimed for loss of freight, the ground of disallowance being that there was no sufficient proof that such freight would have been earned, even if there had been no collision. The other items of claim were reduced. The report of the Assistant Registrar made no mention of the costs of the reference.

The cause now came before the court upon motion to certify under the County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71, sect. 9), that the cause was a proper admiralty case to be tried in the High Court of Admiralty. Affidavits were filed in support of the motion stating that at the time of the institution of the suit the master of the *Aberdeenshire* believed the loss occasioned to the owners of that vessel would considerably exceed 300*l*., and that the costs actu-

ADM.]

THE FREIR—THE SISTERS.

[ADM.]

ally incurred were much less than those which would have been incurred if the proceedings had been taken in a County Court having Admiralty Jurisdiction.

W. G. F. Phillimore in support of the motion contended that where a suit is instituted in the *bona fide* belief that the damage done is greater than 300*l.*, and no injury is done to the defendants by the institution of the suit in this court it was a fit case for a certificate.

E. C. Clarkson for the defendants submitted that the plaintiffs were bound to know that their damage was under 300*l.* before they instituted the suit. The claim for loss of freight was clearly put in to swell up the amount of their claim so as to make it over 300*l.* But the real claim is the amount to which the plaintiff is *bona fide* entitled, and he cannot get his costs if he does not recover more than 300*l.* without a certificate.

Hewitt v. Cory, L. Rep. 5, Q. B. 418; 22 L. T. Rep. N. S. 666; 3 Mar. Law Cas. O. S. 425;

Purkie v. Flower, ante, p. 226; 30 L. T. Rep. N. S. 40; L. Rep. 9 Q. B. 114.

There is nothing to distinguish this case from any other, and the court should not encourage small causes being brought here by a too easy granting of certificates.

W. G. F. Phillimore in reply.

Sir R. PHILLIMORE.—In this case the screw steamship *Aberdenshire* was run into on Ang. 5, by a vessel called the *Naomi*, and was so much damaged that it was necessary for her to put into Dover for repairs, and she arrived there on Ang. 6. On the same day the owners of the *Aberdenshire* instituted a cause of damage against the *Naomi*, in the sum of 2400*l.*, but having discovered that her damage was not what it was expected to be, they accepted an undertaking to give bail, and the *Naomi* was released on Ang. 7th. No injury was inflicted upon the defendants by the mistake thus made. The damage was admitted, and the matter was referred to the Registrar, who reduced the sum claimed, 326*l.* 18*s.* 6*d.* by 139*l.* 18*s.* 9*d.*, leaving 186*l.* 1*s.* 9*d.*, allowed to be done. One of the items which was struck out at the reference was a claim for loss of freight, 83*l.* 1*s.* 6*d.* I am of opinion that this item was properly disallowed by the Registrar. In these circumstances I think I shall do justice by certifying under the statute, and allowing the plaintiffs the costs of the institution of the suit here, but condemning them in the costs of the reference.

Solicitors for the plaintiffs, *Deacon and Co.*

Solicitor for the defendants, *Cooper*.

Tuesday, March 2, 1875.

THE FREIR.

County Court appeal.—Arrest of ship—Foreign ship—Practice.

In an appeal by plaintiffs from a County Court in a cause *in rem*, in which there was a decree for the defendants, and the ship had in consequence been released, the High Court of Admiralty, on an *ex parte* application of the plaintiffs, ordered a warrant to issue for the detention of the ship, and, as the ship proceeded against was a foreign one, did not require notice of the intention to arrest to be given to the defendants.

THIS was an appeal from a decree of the judge of

the County Court of Devonshire, holden at East Stonehouse, in a cause of damage instituted on behalf of the owners of the British brigantine *Albert* against the Danish brigantine *Freir*. The *Freir* was arrested in this cause, on an affidavit that she was likely to leave England, and no bail was given. The cause came on for hearing in the County Court on Feb. 23rd 1875, and resulted in a decree for the defendants. The ship was released from arrest on Feb. 24th by order of County Court. On March 1st the plaintiffs asserted an appeal against the decree of the County Court Judge, and applied to the registrar of the County Court to detain the ship, which he declined to do.

James P. Aspinall, for the appellants, now moved for a warrant to issue out of the registry of the High Court to arrest the ship and detain her till bail was given or the appeal decided. The vessel having been released, the plaintiff has lost his security and cannot procure bail. In *The Miriam* (30 L. T. Rep., N. S. 537; 2 Asp. Mar. Law Cas. 259) a warrant was issued subject to notice being given to the other side so that they might have an opportunity. In that case the defendant vessel was British and her owners were resident within the jurisdiction. If such notice is given in this case, the only effect will be that the *Freir* will leave the country before she can be arrested and the plaintiff will lose all security.

Sir R. PHILLIMORE ordered a warrant to issue without notice to the respondents.

Solicitors for the appellants, *Ingledeu, Ince, and Greening*.

Tuesday, March 2, 1875.

THE SISTERS.

Collision—Limitation of liability—Admission of liability.

Defendants in a collision case, in which their ship was under arrest, having instituted a suit for limitation of liability, the court, upon the motion of the plaintiffs in the limitation suit, ordered the ship to be released, on payment into court in that suit of the aggregate amount of 15*l.* per ton of the registered tonnage of the ship, and of a sum to cover interest and costs, and did not require that the plaintiffs in the limitation suit should admit liability before ordering the release.

THIS was a cause of limitation of liability instituted on behalf of the owners of the sailing barge *Sisters* (No. 7217).

A cause of damage (No. 7186) had been instituted *in rem* against the *Sisters*, on behalf of the owners of the sailing barge *Chatter*, and at the time of the institution of the suit for limitation of liability, the *Sisters* was still under the arrest of the court in that cause (No. 7186), no bail having been given by her owners.

The owners of the *Sisters* did not admit liability for the collision, and intended to defend cause No. 7186. The owners of the *Sisters* now moved in accordance with the subjoined notice of motion:

We, Deacon, Son, and Rogers, proctors for the plaintiffs in this cause, give notice that we shall by counsel, on the 2nd March 1875, move the judge in court to give leave to the plaintiffs to give bail in this cause in the sum of 900*l.*, being the aggregate amount of 15*l.* for each ton of the registered tonnage of the sailing barge or vessel *Sisters*, now under arrest in cause No. 7186, and the sum

ADM.]

MAYBO v. THE OCEAN MARINE INSURANCE COMPANY.

[EX. CH.]

of 3254. 8s., to cover interest on the said amount and costs, and to direct that on such bail being given the said sailing barge or vessel be released.

The damage complained of in cause No. 7186, was alleged to have been occasioned by the negligence of the *Sisters*, which occasioned the steamship *Thames* to run into and sink the barges *Volunteer* and *Alfreda*, and it was in respect of the claims arising out of these collisions that limitation of liability was sought.

A cause was originally instituted by the owners of the *Volunteer* against the *Thames*, but it was dismissed with costs: (see *ante*, p. 512; 32 L. T. Rep. N. S. 343.) An affidavit was filed in support of the motion, in which it was stated that the registered tonnage of the *Sisters* was 42³/₁₀₀ tons; that none of the owners of the *Sisters* were on board of the *Sisters* at the time of the several collisions aforesaid, and that the collisions respectively occurred without the actual fault or privity of the owners of the *Sisters* or any of them.

R. E. Webster, in support of the motion, submitted that the court would not require, before the owners of the *Sisters* could claim a limitation of their liability, that they should acknowledge that their vessel was to blame (*The Amalia*, Brown, & Lush, 151); and, consequently, that on giving bail for the full amount for which they could be liable, they were entitled to a release of the ship.

James P. Aspinall, for the owners of the *Volunteer*, *contra*.—This motion is practically an application for a decree that the plaintiffs in cause No. 7217, are entitled to limitation of liability without filing their petition or admitting liability. The authority of *The Amalia* (*ubi sup.*) is considerably shaken by the case of *James v. The London and South-Western Railway* (*ante*, vol. 1, p. 226; 26 L. T. Rep. N. S. 87; L. Rep. 7 Ex. 187), where it is distinctly laid down that before there can be a decree for limitation of liability there must be an unqualified admission of liability on the part of the persons seeking the limitation. [Sir R. PHILLIMORE.—The ruling cited is only a dictum, and *The Amalia* has never been overruled. I must therefore follow it.] I must ask for leave to appeal upon this point. Secondly, by the practice of the court the plaintiffs are only entitled to have their ship released on paying into court the aggregate amount of 15*l.* per ton for the registered tonnage, and a sum for interest and costs.

Sir R. PHILLIMORE.—I shall order that the *Sisters* be released from arrest in cause No. 7186, on the payment into court by her owners of the sum of 960*l.* 7*s.*, the aggregate amount of 15*l.* for each ton of the *Sisters*, together with the sum of 3254. 8*s.*, to cover interest and costs. I must refuse the application for leave to appeal; I do not think I should be doing right to give leave to appeal on so small a point, when it is clear that ultimately the plaintiffs would be able to obtain limitation of liability.

Proctors for the plaintiffs, Deacon, Son, and Rogers.

Solicitors for the defendants, ^{Allen}Imboden, Jones, and Gunning, Marseilles.

EXCHEQUER CHAMBER.

Reported by ETHELINGTON SMITH, Esq., Barrister-at-Law.

Wednesday, May 12, 1875.

MAYBO v. THE OCEAN MARINE INSURANCE COMPANY.

Marine insurance—General average as per foreign statement—Termination of voyage at an intermediate port—Place where average adjustment to be made.

The plaintiff owner, of a cargo of wheat to be carried in a certain vessel from Varna to Marseilles, insured the same by a policy containing the words "General average as per foreign statement," and a warranty that corn was to be free from average unless general. The ship was injured by straining in a storm, being obliged to carry a press of canvas to avoid a lee shore; she sprang a leak and part of the cargo was damaged by the sea water. On reaching Constantinople the vessel was surveyed under an order of the Supreme Consular Court, and as she needed repair the damaged cargo was sold, and the sound portion transhipped and forwarded to Marseilles. An adjustment was made also by order of the Supreme Consular Court, at Constantinople, and the damage to the wheat was by the adjusters treated as general average, according to the law of France, which was in conformity also with the law and usages prevailing at Constantinople. The vessel was repaired in rather more than two months.

Held (affirming the judgment of the Court of Common Pleas), that the plaintiffs were entitled to recover from the underwriters for a general average loss. That the true construction of the policy made the underwriters liable for general average as determined by foreign and not English law, and the loss in this case though particular average by English law was general average foreign law, and so came within the terms of the policy.

Secondly, the voyage was properly terminated at Constantinople, and the adjustment properly made there.

ERROR from the judgment of the Court of Common Pleas in favour of the plaintiff in the action upon a policy of insurance. The facts and questions for the court were set out in the form of a special case, which will be found in the report of the case in the court below (*ante*, p. 361).

Butt, Q.C. (*J. C. Mathew* with him), for the defendants below, the plaintiffs in error.—The words in the policy "general average as per foreign statement," are those upon the construction of which the decision of the case depends. They mean, as we say, an undertaking on the part of the underwriters to pay to the assured any loss he may have sustained by the mode of stating the average shroud. The words only apply to the money the assured has to pay, and he cannot claim for the contribution he would make to himself. [COCKBURN, C. J.—You must admit that according to French law a contribution is to be made.] Yes, but the question is whether French or English law is to prevail. There is a distinct warranty against particular average in the memorandum clause, and they have no right to make us liable for particular average, yet this is what has been done, if the judgment of the court below be right. That is an absolute warranty, and is not to be rendered nugatory by giving such a construction to the former clause as

EX. CH.]

MAYRO v. THE OCEAN MARINE INSURANCE COMPANY.

[EX. CH.]

the court below have done. It is true that we insure the owner against any loss which is put upon him by the foreign adjusters; but he cannot recover also from us the contribution which they would find was due to himself as owner of the cargo. That is a loss he must bear, for it is a particular average, and we are warranted free from it. The two clauses are to be read apart, and certainly the memorandum is a substantive engagement which cannot be abrogated by implication merely. [COCKBURN, C.J., referred to *Harris v. Scaramanga*, ante, vol. 1, p. 339; 26 L. T. Rep. N. S. 697; L. Rep. 7 C. P. 481.]—That case is not binding on this court, even if it were directly against the defendants' contention; but here it is to be observed that originally the loss was one which occurred to the assured quite independently of any statement at all, and it was a particular average loss by English law, and therefore not to be charged on the underwriters. Then we say that there ought not to have been an average adjustment at Constantinople. The matters taken into contribution would be different at Constantinople and Marseilles, and the statement was therefore improperly made. The voyage was not necessarily terminated there; the vessel was repaired in about two months, and could have carried the sound part of the cargo. A voyage is not properly terminated at an intermediate port unless there be a necessary separation of the ship and cargo. [COCKBURN, C.J.—The master surely has a discretion to act for the best, and is an agent for the owners of the cargo as well as for the owner of the ship.] Yes, but the state of facts must be such as to necessitate the termination of the voyage, and here they show that there was no necessity. [BLACKBURN, J.—What is your authority for that?] I do not put it upon physical necessity, but it must be very strong to overcome the general proposition that the port of destination is the place at which to adjust general average: (*Sinmonds v. White*, 7 B. & C. 805).

Watkin Williams, Q.C. and McLeod, for the plaintiff below, were not called on.

COCKBURN, C.J.—I think that this judgment ought to be affirmed.

There were two questions raised in the court below, and both decided against the appellants, and the same two questions have been argued before us to-day. Of these the first is the more important, and it is whether or not according to the terms of the policy of insurance the loss sustained by the plaintiff was within those terms, and was one which he was entitled to recover back from the underwriters. The second question is whether the adjustment made at Constantinople was properly made there, or whether it ought to have been made at Marseilles.

As to the first question, it seems to me to turn entirely upon the 3rd paragraph of the special case, which is this: "On the 22nd Nov. 1867, the plaintiffs effected with the defendants a policy of insurance for 1000*l*. (a copy of which marked A. is annexed to and is to form part of this case). This insurance is declared to be "upon 29,150 Constantinople kilos wheat, and advances valued at 1200*l*., general average as per foreign statement, on the ship *General Chasse* at and from Varna to Marseilles," and it is also declared to be warranted free from average, unless general." How is that to be construed? Mr. Butt puts a

construction upon it according to which the question whether this was general average as distinguished from particular, is to be determined according to English law, and merely the statement to be made by foreign law or custom. That, when one looks at what would have necessarily to be done at the foreign ports where an adjustment might take place, is so unsatisfactory that I cannot think it is the true construction, nor one which expresses what was really meant by the parties. It would call on the foreign average stater to state his adjustment according to English law, a law which in this respect is different from, I believe, all foreign laws, and of which he might well be ignorant. Now how could that be in any sense a foreign statement? But the meaning must be this, that the underwriters are to be liable for general average, but not for particular average, only there is this extension or limitation of the term, that what is general average is to be determined, not by English, but by foreign statement. Then we ask is the loss in this case a general average loss, and the answer is that it is not so by English, but is by foreign law.

Next we must consider, being general average, how far does the liability of the underwriters extend. Now, at first I thought that Mr. Butt meant to contend that it extended only so far as the owner of the cargo was liable to contribute to the ship, but he now admits that where the case is brought within the definition of general average, then the underwriter has to pay not only what the loser has to contribute to the general fund, but also what he loses beyond what he receives contribution for. The loss sustained here by the plaintiff was in excess of the indemnity, and it is a matter for which the insurer is liable; and as I think, so I decide this point against the defendants.

Next, was the adjustment properly made at Constantinople? And that depends on whether the voyage was properly terminated there. Now the rule is that a voyage is properly terminated if the destination of the ship be reached, or if it be interrupted at an intermediate place by some intervening cause which justifies or necessitates its termination there. In the present case the vessel had to put into Constantinople for repairs, which were absolutely necessary before she could proceed, and which would take some time to execute, not less, we may say, than two months. The damaged part of the cargo was at once sold and it is admitted that it was properly sold; but Mr. Butt says that the rest, the undamaged corn, might have been carried on in the ship to its destination at Marseilles, but we must remember that it would have been delayed two months before it could have been so forwarded. Now it is laid down by very high authorities that the duty of the master of a ship is to earn freight, and otherwise consider his owner's interest; but that he has also another duty, and that is as agent for the owners of the cargo, in the event of an emergency arising, to do the best for them that he can; and applying this rule, and looking here at the fact that the corn must have remained two months at Constantinople, the question is: Did the master of the *General Chasse* exercise a prudent discretion in favour of the owners of the cargo in sending on the undamaged portion of it at once in another ship to Marseilles? I think he did.

[EX. CH.]

MAVRO V. THE OCEAN MARINE INSURANCE COMPANY.

[EX. CH.]

I did not rest my judgment on what the Consular Court did, nor do I depend in any way on its decision. I have serious doubts as to whether it was right; but as to the course pursued by the master being wise, I have no doubt whatever. If I saw clearly that it might have been more favourable to the cargo owners to have had the adjustment made at Marseilles, and that he would distinctly have gained by the statement being made there rather than at Constantinople, there might, perhaps, have been some foundation for Mr. Butt's argument on this point. But there is nothing in the case at all to show this, and I am, therefore, of opinion that the adjustment was properly made at Constantinople, and that the judgment of the Court of Common Pleas was right, and must be affirmed.

BRAMWELL, B.—I am of the same opinion.

As I understand the suggested meanings of the clause in the policy are these: the plaintiff says that "per foreign statement" is equivalent to, "You must find out what the foreign law says is included under general average, and state the loss accordingly." The defendant says "No. General average is by English law, but subject to this exception, that where there is a difference in stating the average between English and foreign custom then the foreign custom is to prevail." Upon this contention Mr. Butt founds his argument, that as corn is declared warranted free from particular average by an express term in the policy, if he is not right in his interpretation, the result would be that the corn would, in effect, get compensation for what is, by our law, particular average, notwithstanding the warranty. But I think that it is not correct to say that, and for the reason that they will not even by that arrangement get the whole of a particular average, but only a part; and it may turn out, it is quite possible, actually to be to the advantage of the underwriters that this mode of computation should be adopted; because upon a consideration of figures, I see that they might be gainers by the system. The true construction, however, is that the clause "general average as per foreign statement" is not abrogated by the later clause directed against particular average. The words are most general, and, therefore, the sentence means general average, as a foreigner would state it. The difficulties in the way of the rule suggested by Mr. Butt are to me insuperable, and I think it cannot be the true one.

As to the other question whether the average was to be taken at Constantinople, I treat the case as if not a word was said as to who stated the average, or where it was stated, for it is immaterial on my distinct view of the meaning of the clause in the policy. I agree, however, that the voyage was properly terminated.

BLACKBURN, J.—I also think that the judgment of the court below ought to be affirmed.

Long before a policy of insurance was ever dreamt of the Rhodian law laid down that where there was a common adventure, and it became necessary, by the occurrence of perils in the course of it threatening the safety of the whole adventure, to sacrifice part of the cargo, or whatever constituted the subject of the adventure, for the benefit of the rest, then that merchandise which was thus saved by another's sacrifice should contribute in proportion to make compensation for the loss by which the general safety had been secured. This decree existing among the Rhodians was so just

and proper, that it has been adopted in principle into the code of every civilised country since. Unfortunately, however, a different consideration prevails in different countries as to what things shall be considered a wilful sacrifice. The English law considers that where, to escape a lee shore, a great press of sail is carried, and a straining of the ship consequently ensues, and the cargo is damaged, the damage so sustained by the cargo is not in the nature of a wilful sacrifice; but other countries, and as is important for this case, the laws of France, say that as the press of sail is wilfully, that is purposely, carried to save the ship, and the injury to the cargo is the immediate result, it shall be considered a wilful sacrifice so as to entitle the owner of the damaged cargo to contribution. We have nothing to do here with any consideration as to which is the best rule, it is enough here to recognise the fact that in one foreign country it is different from ours.

Now what is the policy sued on in this case. Ordinarily in English policies there is what is called the memorandum, and here it runs thus: "It is declared and agreed that corn, &c., shall be and are warranted free from average, unless general, or the ship be stranded." This clause is inserted to avoid disputes, as to what articles shall be subject to average. I understand general average to mean, where the particular loss sustained was occasioned by a sacrifice for the benefit of the whole. That is the meaning as I think, and consequently it is not for the underwriters to make a contribution, but for them to make good the loss.

In an English contract I should say that "general average" means things which the English law calls general, but this becomes somewhat inconvenient when ships go abroad, as they are made to obey the orders of a foreign court of admiralty, and they are, when adjustments take place under foreign jurisdictions, made to pay according to their views of the law applicable to the case. If owners of cargo are thus compelled to pay, and there be no provision in their policies, it is not, I believe, settled whether the English underwriters have to pay or not. To avoid this doubt, therefore, it is that clauses have been put in, such as if the ship be caught in a foreign country and compelled to pay, the underwriters will indemnify, &c. But that is not the meaning of the clause here. "General average as per foreign statement," means such sacrifices as the French laws regard as wilful sacrifices, and so as general average shall be so reckoned for the purposes of this policy. Putting this construction upon the clause, most of the other questions raised become immaterial.

It is quite immaterial whether the Consular Court at Constantinople had jurisdiction or not; and if material whether the voyage was properly terminated, for the reasons given by the Lord Chief Justice, I think it was so: but it does not matter who stated the average, whether a Turk or a Frenchman, or the arbitrator in England.

I think, therefore, that the judgment of the court below was right and must be affirmed.

POLLOCK, B.—I am of the same opinion.

After giving all due weight to the clear argument of Mr. Butt, I nevertheless come round to the opinion that the true construction of the policy is against him. He said that if the court below was right, the effect was to make the clause "General average as per foreign statement," override the memo-

Ex. Ch.]

KISH v. CORY.

[Ex. Ch.]

random clause, "Corn warranted free from average unless general;" and no doubt, if the effect of our construction was to obliterate the latter clause altogether, it would be against the well known canon. But it is not so, as I read it, for the object of the former proviso was to settle small questions that arise at foreign ports, which should then most obviously and easily be settled by foreign law and custom. And the words "unless general," being an exception to what is declared free from average, in that clause, are to be read with the former. So that they bring into the other the limitation or extension, "as per foreign statement," which would not otherwise be in it. It is this in effect: foreign and not English principles are to govern the statement of the general average excepted from the memorandum. In my judgment, therefore, the Court of Common Pleas was right, and their decision is to be affirmed.

ARFILLIST, B.—I am of the same opinion.

Mr. Butt's ingenious argument did not venture to go the length of saying this, that under the words general average as per foreign statement, any additional burden was thrown upon the owners of cargo. Therefore he could not resist the proposition that if a contribution had to be made by cargo to ship, it would be within the policy; but he says that as to the loss to cargo, that is a loss which would have fallen on the owner of the cargo if determined by English law as a particular average loss, and is not a loss cast on the underwriters. But looking more closely into the matter it cannot be so. Suppose a second cargo aboard, and a loss occurring to that other cargo, then by the French law the cargo in question (the original one) would have to contribute to the other cargo, and would be paying such contribution as being in respect of general average. In such case it would be impossible to resist the claim made on the underwriters of this policy to pay that contribution as well as the contribution to the ship. The policy might have been so worded as to give rise to Mr. Butt's argument, but these words before me do not support it. The parties have stipulated that no average is to be payable unless general, and then "as per foreign statement" is merely a declaration that what would not be a general average loss by English law but is so by foreign is to be so construed here. I do not think it necessary to add anything as to the other questions in the case. I think the court below was right, and their judgment should be affirmed.

Judgment affirmed.

Attorney for the plaintiff, W. Nash,
Attorneys for the defendants, Waltons, Bubb, and Walton.

Reported by M. W. McKellar, Esq., Barrister-at-Law.
Wednesday, June 16, 1875.

KISH v. CORY.

Charter-party—Demurrage—Damages for delay—Charterer's liability.

A charter-party between plaintiff, the shipowner, and defendants, the charterers, provided the number of loading days, and the rate of discharge per working day; ten days on demurrage for all like days above the said days to be paid at the rate of fourpence per register ton per day; and charterer's liability to cease when the ship was loaded, the captain or owner having a lien on cargo for freight and demurrage.

VOL. II., N. S.

Held by the Exchequer Chamber (affirming the Queen's Bench) in an action for demurrage and for damages caused by detention at the port of loading (upon demurrage to a plea alleging both claims to be for demurrage under the charter-party) that the demurrage days related to the port of loading as well as to the port of discharge; and that the charterer's liability for all such demurrage ceased when the ship was loaded.

Semble, the shipowner's lien for demurrage would include a claim for damages caused by detention beyond the demurrage days.

This was error from the Queen's Bench upon demurrage to a plea.

The action was brought by shipowner against charterers for five days' demurrage at port of loading beyond the thirteen clear working days allowed by the charter-party for loading.

The declaration contained two counts both alleging the same default on the defendants' part in not loading, and in detaining the ship: the first count claimed damages because the plaintiff lost the use and profits of the ship, and was put to expenses in consequence; the second count claimed payment by the defendants, as by alleged agreement upon default in loading the cargo, at the rate of fourpence per register ton of the said ship per day.

By the third plea the defendants, as to the said first and second counts, said that the agreement in the second count alleged was and is contained in the charter-party mentioned in the said first count, that it was not otherwise agreed between the plaintiff and the defendants; which said charter-party is as follows, that is to say:

CHARTER PARTY.

Cardiff, 17th Oct. 1872.

It is this day mutually agreed between Mr. Thomas Kish of the good ship or vessel called the Spring of 377 tons register measurement or thereabouts now en route from Falmouth to Hull, and Cory Brothers and Company, merchants, that the said ship being tight staunch and strong, and every way fitted for the voyage, shall, with all practical dispatch, sail and proceed to the usual safe loading berth at Hull, as ordered by shippers in the regular and customary manner, and there take on board as tendered a full and complete cargo of coal which the said merchants bind themselves to provide for shipment, not exceeding what she can reasonably stow and carry, over and above her tackle, apparel, provisions, and furniture. Stiffening coal if required to be supplied at the rate of twenty tons per clear working day after written notice is given of it being required, and that the ship is ready to receive the same, each working day the ship may be detained beyond that time to be deducted from the loading days, hereinafter mentioned cargo to be loaded in thirteen clear working days from the day written notice is given that all ballast or inward cargo is discharged and the stiffening coals (if any) are on board, and of the vessel being ready to receive remainder of her cargo (any time lost through riots, strikes, or stoppage of said agents, pilmen, or other hands connected with the working or delivery of the said coal, or by reason of accidents to mines or machinery, obstruction on the railway and in the docks, or by reason of floods, frosts, storms, or any cause beyond the personal control of the shippers not to be computed as part of the aforesaid loading), and being so loaded the vessel shall, with all practical dispatch proceed to Alexandria or so near thereto as she may safely get, and deliver the same, as customary alongside steamer, or depot ship, or into craft as ordered, on being paid freight at the rate of 31l. sterling per keel of 21. One-fifth tons delivered or taken on board at charterer's option with 5l. gratuity; (the set of God, the Queen's enemies, fire, frosts, and all and every other dangers and accidents of the sea, rivers, and navigation of whatever nature or kind cover during the said voyage always excepted). The ship to pay consualage, lights, pilotage, and other port charges whatsoever. Freight to be paid, one-third if required in cash on

2 Q

EX. CH.]

KISH V. CORY.

[EX. CH.]

signing bills of lading less five per cent. for all charges, balance at port of discharge in cash at current rate of exchange for ship's disbursements, and the remainder by an approved bill upon London at three months date or all cash equal thereto at captain's option, on the right and true delivery of the whole cargo. Cargo to be discharged whether permitting at not less than thirty-five tons per working day, time to commence on the ship's being ready to deliver. Ten days on demurrage for all like days above the said days to be paid at the rate of four pence per register ton per day. The ship to discharge as directed by consignee alongside steamer or depot ship or into craft, or at any wharf, pier, or arsenal, or at such safe place of anchorage or moorage where she can safely lie. Cargo to be brought to and taken from alongside at merchant's risk and expense. Sufficient coal to be taken on board for ship's use, the same to be endorsed on bills of lading which are to be signed as presented without prejudice to this charter-party. The ship to be addressed to charterer's agent at port of discharge, free of commission, paying the usual commission of two per cent. when loaded. Trimming cargo to be done by merchant's trimmer at market price. Any duty which may be levied in consequence of the vessel not being British to be borne by the owner. Charterer's liability to cease when the ship is loaded, the captain or owner having a lien on cargo for freight and demurrage.

And the defendants further said that the plaintiff was not ready and willing to take, and did not take the agreed cargo on board as tendered in the regular and customary manner.

For a fifth plea the defendants as to the said first and second counts repeated all the allegations contained in the third plea, except those which followed the setting out of the charter-party. And the defendants further said that the said ship was loaded by the defendants, with the agreed cargo within the ten days on demurrage stipulated in the said charter-party, and that thereupon the defendants' liabilities as charterers upon and under the said charter-party ceased.

This fifth plea was demurred to on the grounds, amongst others, that the charter-party did not provide for demurrage at the port of loading, nor did it absolve the charterers from such liability on loading the cargo.

The demurrer was argued in the court below on the 5th June 1874 before Lush and Archibald, JJ., who considered the case identical with *Francesco v. Massey* (a), and in accordance with that authority gave judgment for the defendants.

(a) Nov. 25, 1872, and Jan. 30, 1873.

FRANCESCO V. MASSEY.

THIS was an action brought in the Liverpool Court of Passage to recover four days' demurrage at 8s. a day, and damages for eight days' detention of the plaintiff's ship beyond the lay days at the port of loading, under a charter-party dated Jan. 17, 1873, by which Francesco, as master of the plaintiff's ship *Trident*, agreed with the defendant as charterer that the ship then lying in the Birkenhead docks should proceed alongside a certain dock and there load "in fifteen working days" (subject to the usual exceptions of frost, &c.) a full and complete cargo of steam coal, and being so loaded should proceed therewith to Genoa. "and discharge the cargo upon being paid freight at the rate of 12s. 6d. British sterling per ton (of 2000lb.) on the entire quantity discharged; the freight to be paid one-third in Liverpool on signing bills of lading, and the remainder on right delivery of cargo; the vessel to be discharged, weather permitting, at the rate of not less than thirty-five tons of coal per working day from the time of her being ready to unload. And ten days on demurrage over and above her said laying days at 8s. per day, the vessel to be consigned to the charterer's agent at the port of discharge, paying the usual commission of 2 per cent., charterer's liability to cease when the ship is loaded, the captain having a lien on the cargo for freight and demurrage."

A. J. Smith now argued for plaintiff, the appellant. —There is a distinction between this charter-party and that in *Francesco v. Massey*; the words there are "ten days on demurrage over and above her

The defendant pleaded that his alleged liability for demurrage and detention was such liability as was provided for in the last clause of the charter-party, and that before action brought the ship was loaded, and that thereupon his alleged liability ceased. Upon this plea issue was joined.

At the trial before the assessor of the Court of Passage, it appeared that the ship arrived at her loading dock on Feb. 12, but the charterer did not commence loading her till March 13, and did not complete the loading till March 23. The defendant had already been compelled in an action brought by the master before the demurrage days had expired, and before the ship was loaded, to pay five days' demurrage. This action was brought to recover the remaining five days' demurrage and damages for the further time the ship was detained. A verdict was given for the plaintiff for 127l. 10s., leave being reserved to the defendant to move to reduce the verdict by the amount claimed for demurrage.

A rule having been obtained,

T. H. James and Kirby, for the plaintiff, showed cause, contending that the last clause of the charter-party did not put an end to liabilities already incurred, and that the lien for demurrage applied only to demurrage at the port of discharge.

Pederson v. Loftings, 23 L. T. Rep. 267;

Christoffersen v. Hansen, ante, vol. 1, p. 305; L. Rep. 7 Q. B. 360;

Engeström v. Brunsauer, L. Rep. 2 C. P. 497; 2 Mar. Law Cas. O.S. 430;

Guy v. Carr, ante, vol. 1, p. 115; L. Rep. 8 Q. B. 532.

Goldney in support of the rule.—A lien for demurrage extends to both port of loading and discharge.

Bonstetter v. Brunsauer (nisi exp.);

Guy v. Carr (nisi exp.).

Pederson v. Loftings is distinguishable, as there were in that case two distinct provisions for demurrage, and it was upon that ground that the lien was held to apply to the port of discharge. The lien is given expressly to compensate for the loss of right of action.

Cur. adv. vult.

Jan. 30, 1873.—The following judgments were delivered:—

CLEARY, B.—After stating the facts and reading the concluding clause of the charter-party, the learned judge proceeded: It has been for some time not unusual to have a similar clause in charter-parties. Such a clause was probably introduced at first in cases where it appeared upon the charter-party that the charterer was only an agent, and in such cases it has been held that the charterer could not be sued for any delay in loading the cargo which was afterwards provided. In *Oglethorpe v. Yuleston* (E. B. & E. 930; 27 L. J. 356, Q. B.); and *Milner v. Perez* (3 E. & E. 488; 38 L. J. 90, Q. B.) the language of the clause no doubt expressly excluded liability for default before and in shipping the cargo. There was no provision in those cases giving the shipowner any corresponding lien for demurrage, or anything in the nature of demurrage, but the Court of Queen's Bench held the owner bound by the clause as a part of the bargain. The words of discharge in the cases were the same as in the present, viz., that upon the loading of the complete cargo the "liability should cease." Mr. Justice Mill says in his judgment in the latter case, "In the present case, according to the pleadings, the defendants have shipped the cargo; the plaintiffs say that this has been done too late, for that they were bound to do it in regular turn; but the defendants by express terms, to which the plaintiffs have agreed, have stipulated that their liability shall cease as soon as they have shipped the cargo. We must give the plain effect to these plain terms, and hold that their liability does not attach." In those cases the language was express that the liability should cease in respect of default as well before as after the shipping of the cargo; and the only bearing of the cases upon the present is, that it was considered that the plain meaning of the words "liability to cease" was, not that the liability should cease to accrue, but that the liability should cease to be enforced. It further appeared in those cases that the charterer was acting as agent

EX. CH.]

KIRK V. CONT.

[EX. CH.]

said laying days," which naturally refer to days both of loading and discharging. Here the words are "cargo to be discharged weather permitting at not less than thirty-five tons per working day, time

only, but this distinction is not so material, since it may be assumed that there was some reason for this stipulation, and unless the person interested in the goods to be delivered was a different person from the charterer there would be no object in it. In the present case the language is general, that the charterer's liability should cease, and for the cessation of liability a corresponding benefit is obtained by the shipowner in having a lien upon a full cargo for demurrage, which he would not have unless expressly agreed. If then the words "liability to cease" are to be read in the same sense as in the cases referred to, the agreement discharges the charterer from demurrage at Liverpool, unless there be something in the charter-party to show that demurrage at Liverpool could not be contemplated, which is certainly not the case. The case of *Bannister v. Breslauser* (ubi sup.) is very like the present one. In that case it did not appear upon the charter-party that the defendant was acting as agent, and there was no precise provision as to the breaches before and after loading, but the provision was general, that "the charterer's liability was to cease" (the same words as the previous case and the present one) "when the cargo was shipped, provided that the same was worth the freight at the port of discharge, and the captain was to have an absolute lien on the cargo for freight, dead freight, and demurrage, which he or owner should be bound to exercise." The last words ("which he should be bound to exercise") bore no bearing upon the question to which breaches the discharge is to be applicable. It was held that the discharge extended to demurrage at the port of loading as well as the port of discharge, and reliance is placed in the judgments on the word "demurrage" being used in the clause giving the lien, and there being nothing to limit it to demurrage at the port of discharge. The reasons given for the conclusions arrived at apply to the present case, and we should adopt the authority of that case unless there be some other decision inconsistent with it. We were referred to two cases on behalf of the defendant, *Pedersen v. Lotings* (ubi sup.) and *Christoffersen v. Hansen* (ubi sup.). The first of these cases was decided in the year 1857. The charter-party provided that at the port of loading, after the agreed days for loading, the captain was to receive 5*l.* a day for demurrage, day by day. For the port of discharge the language was different. There was to be demurrage after the laying days at 5*l.* a day. It was considered that the express agreement that the charterer should pay 5*l.* a day, day by day, showed that the clause providing that the owners should rest on their lien for freight and demurrage, must apply to the demurrage at the port of discharge. The judgments are founded upon the use of the words "day by day" in connection with the payment of demurrage at the port of loading, and there is nothing of that sort in the present case. In the other case of *Christoffersen v. Hansen* (ubi sup.) the words were general, that all liability of the charterer should cease as soon as he had loaded the cargo; and it was held that those words did not relieve the charterer from liability for delay in loading. But in that case no lien was given for demurrage or delay in loading, and this forms a main ground of the judgment of Blackburn and Lush, J. Mr. Justice Lush says pointedly, "If there were any provision giving the shipowner an equivalent advantage, that would be a very good reason for his absolving the defendant altogether. But there is no such provision." And he goes on to say that if he gave up the liability of the defendant for past breaches, he would have no remedy except against the foreign principal not named and perhaps not known. The claim now in question is not for detention but for demurrage, and the charter-party clearly gives a lien upon the complete cargo for all demurrage, both at the port of loading and of discharge. Neither of the cases last referred to are at variance with the case of *Bannister v. Breslauser* (ubi sup.), and we can give effect to the plain meaning of the words, viz., that upon the shipowner acquiring a lien upon the full cargo for freight and demurrage all liability of the charterer for both shall cease.

BRAMWELL, B.—I think this rule should be made absolute. By the charter-party the charterer was entitled

to commence on the ship's being ready to deliver. Ten days on demurrage for all like days." This would seem to refer to the days of discharge only. [BARR, J.—Surely there is nothing in that to prevent the demurrage from applying to the loading as well as discharging days.] If that be so, I must rely on my contention that the decision in *Francesco v. Massey* is wrong. The *prima facie* meaning of the words "charterer's liability to cease when the ship is loaded" gives protection to the charterer only from liabilities incurred after the completion of the loading; the charterer continues liable for his own delay at the port of loading, but for all that occurs after the cargo is on board, the shipowner can obtain his remedy by the lien which the charter-party gives him: this is the reasonable interpretation of the clause as well as that which the words import. In *Pedersen v. Lotings* (23 L. T. Rep. N. S. 207; 5 W. R. 200), this was the construction put upon a similar charter-party by the Court of Queen's Bench: Coleridge, J. said in his judgment "the reasonable interpretation of the words, all liability of the former shall cease as soon as he has shipped off the cargo, is that the broker (of the charterer) shall not be liable personally for anything that happens after that time, although his liability for demurrage already incurred is to remain as before." I admit that the case of *Bannister v. Breslauser* (L. Rep. 2 C. P. 497; 2 Mar. Law Cas. O. S. 490), was

to a certain number of days on demurrage. Some of these days were consumed at the port of loading, and for a portion of them the defendant paid. The provision is for the residue of the days so consumed at the port of loading. The charter contained a clause that on loading the cargo the charterer's responsibility should cease, the captain having a lien for freight and demurrage. It is impossible to say that this would not give a lien for demurrage incurred as well at the port of loading as at the port of discharge, and so for the demurrage used for, and it seems impossible to hold that the matters as to which the liability was to cease were not the same as the matters as to which the lien was given. If so the defendant is discharged, and his action is not maintainable. *Bannister v. Breslauser* (ubi sup.) is in point, or more than in point if the action there was one, not for an agreed sum for demurrage, but for unliquidated damages for delay in loading; and though that case has been questioned, it has not been overruled, and is binding on us. Nor is *Christoffersen v. Hansen* (ubi sup.) opposed to this view. On the contrary, the Lord Chief Justice and Mr. Justice Blackburn rely on the absence of a lien for the matter as to which the right against the charterer is supposed to be given up. And Mr. Justice Lush's reasoning is very striking. He says: "If there were any provision giving the shipowner an equivalent advantage, that would be a good reason for absolving the defendant altogether." And so he holds liability for freight is given up, but not liability for damages for delay in loading, because there was a lien for freight but none for such damages. Mr. Justice Lush, for the plaintiff, suggested that this demurrage was payable *de die in diem*, and that therefore a vested cause of action accrued which it could not be supposed it was intended to give up. The demurrage is not in terms payable *de die in diem*, and it may be in point of law that none is due till it is known how much will be due. Here, however, all the days were consumed. But in order to give effect to clear words we must hold that the charterer's liability was contingent on his not loading a cargo, or that if a cause of action vested, it was defeasible, and directed on the loading of the cargo.

Rule absolute.

Attorney for the plaintiff, J. B. Wilson.

Attorney for the defendant, Forshaw and Hawkins.

[The judgment of Cleave, B., was originally read as the judgment of the court, that of Bramwell, B., having been mislaid; on the latter being found it was handed to the reporters, and is here given as if read at the time.—Ed.]

[Ex. Ch.]

KISH v. COYT.

[Ex. Ch.]

n decision of the Court of Common Pleas adverse to the plaintiff in this case; there it was held that a plea setting out a similar condition in a charter-party was a good answer to an action by the shipowner against the charterers for delay in loading the vessel; but that case was discussed by the Court of Exchequer Chamber in *Gray v. Carr* (ante, vol. 1, p. 115; 25 L. T. Rep. N. S. 215; L. Rep. 6 Q. B. 523), and the following was said by Brett, J. in his judgment at p. 536, n judgment in which Willes, J. entirely concurred and to which he declined to add anything: "With all respect for the judges, who decided *Bannister v. Breslau*, I think that their interpretation of the charter-party was too severe. The case was decided on demurrer. The judges relied much on the lien given in respect of demurrage, which they assumed was for delay at the port of loading. But, if by other terms of the charter-party than those which were before the court, demurrage was stipulated for in respect of delay in unloading at the port of discharge, the chief ground on which they based their interpretation would be cut away. I cannot but think that the safer and juster, and more correct construction of the clause then and now under discussion (a clause like that in the present case exempting the charterers from liability after the ship was loaded) is that it absolves the charterer, when once cargo of sufficient value is on board, from all liabilities which but for it he might incur in respect of anything happening after the sailing of the ship, or, more properly speaking, after the bill of lading is given, as it were, to replace the charter-party." Moreover, the case of *Christoffersen v. Hansen* (ante, vol. 1, p. 305; 25 L. T. Rep. N. S. 547; L. Rep. 7 Q. B. 569) recognised and followed the decision of *Pedersen v. Luttinga*; the clause there certainly differed from this in that it gave no lien for demurrage, it being agreed that "the charter being concluded by defendant on behalf of another party resident abroad, all liability of defendant should cease as soon as he had shipped the cargo." It was held that this clause only exempted defendant from liability accruing after the loading of the cargo; and that he, therefore, remained liable for delay in loading, although he had ultimately loaded a full cargo. In *Lockhart v. Fulk* (L. Rep. 10 Ex. 132), it was held that the clause for lien and for exemption of the charterer in that charter-party applied only to demurrage at the port of discharge, not to damages for delay at the port of loading; upon that authority, unless the exemption clause differed, this plea is no answer to the first count. I submit that the proper construction of the clause in this charter-party is to apply this exemption to the charterer from breaches of the charter-party *in futuro*, not from vested causes of action.

Wood Hill, for the defendants.—There is no possible distinction to be drawn between this charter-party and that in *Francisco v. Massey*, and I desire to adopt the judgment of Bramwell, B. in that case, as my argument on behalf of the defendants. [BRETT, J.—If this clause exempts the charterers from liability for what has occurred before the ship is loaded, from whom can the owner obtain a remedy for detention beyond demurrage?] It may be that the word "demurrage" should receive its usual mercantile sense, which includes damages for delay as well as the agreed rate of payment for the agreed days of detention; in that case the shipowner would have a lien for

damages caused by such detention (*McLean v. Fleming*, ante, vol. 1, p. 160; 25 L. T. Rep. N. S. 317; L. Rep. 2 Sc. App. 128); it is sufficient, however, for me to contend that the charterer is exempted after the completion of the loading from that for which a lien is given to the shipowner. Clearly, B., in the judgment delivered in *Francisco v. Massey* distinguished from a case like this all the authorities upon which the plaintiff relies. The reason for enforcing in full such an exemption as this is that the charterer is merely the agent of the consignee, and he should have no liability beyond the performance of his duty to the principal. As soon as the cargo is completed, the shipowner has a remedy by his lien against the consignee himself, and the charterer is altogether absolved.

A. L. Smith in reply.—The only authority on this point in a court of error, *Gray v. Carr* (ubi sup.), has questioned the decisions of the courts below, which are adverse to the plaintiff's construction of this clause. [BRETT, J.—Those decisions, however, are of long standing, and it was probably with knowledge of them and intention to abide by them that this contract was made.] The charter-party is dated just after the decision of *Gray v. Carr*, which threw doubt upon *Bannister v. Breslau*, the only previous authority on which the defendant can rely.

LORD COLERIDGE, C.J.—I am of opinion that this judgment for the defendants should be affirmed.

We have to construe a charter-party in which certain days are given for loading the ship, and certain days for unloading at the port of discharge. Immediately after the clause concerning the rate and time for discharging the cargo, come the words "Ten days on demurrage for all like days above the said day to be paid at the rate of four pence per register ton per day." At the end of the charter-party is the clause "Charterer's liability to cease when the ship is loaded, the captain or owner having a lien on cargo for freight and demurrage." The action is brought for demurrage at the rate mentioned for the days in excess of those allowed at the port of loading, and also for damages in consequence of detention beyond the demurrage days. The question we have to determine is whether in a charter-party containing these stipulations, the exemption clause covers the demurrage incurred at the port of loading as well as all liability under the charter-party which arises after the ship is loaded.

Certainly if this were *res integra*, and we had to interpret the contract without the assistance of decided cases, much might be said against our conclusion. Two things, however, have been clearly held up to this time: first that general words in a charter-party allowing and ascertaining demurrage, apply equally to the days employed in loading and discharging the cargo; and secondly, which apart from authority might have been doubtful, that against a claim for demurrage the liability of the charterer is protected by a clause of this kind with respect to demurrage incurred either at the loading or discharging port. *Francisco v. Massey* fully discusses all the previous cases on this point, and was determined in accordance with them. It is most important in mercantile cases, where contracts are generally drawn with a knowledge by both parties of points decided concerning them by courts of law, to adhere to such decisions; and in a case of this kind I am prepared to maintain the authority of the decisions which relate to it.

Ex. Ch.]

KISH v. CORY.

[Ex. Ch.]

In *Bannister v. Breslau* there was no provision in the charter-party for demurrage, although a lien for it was given to the captain. The court held that the charterer's protection clause covered a claim for damages by delay in loading, and it may have been so held, on the ground that the lien enabled the owner to enforce such a claim against the ship. Although the authority of that case has been doubted, it seems to me to be good, and to have been well decided on the ground I have suggested. There the lien for demurrage could have had no application unless with respect to such delay as that for which the action is brought; and it has been suggested by my brother Brett that the same reason for extending the lien would not exist upon a charter-party like this when demurrage, strictly and properly so called, is stipulated for. If a claim by the shipowner were to arise upon this charter-party for damages occasioned by delay beyond the days of demurrage stipulated for, it might be a matter of difficulty to determine, consistently with decided cases, whether the liability attached to the charterer or the owner of the cargo, or whether it had not ceased entirely. My own inclination is that to avoid the injustice of the last alternative we should hold the owner's lien on the cargo to be correlative with the charterer's liability, and further that the lien should extend to the wider mercantile meaning of demurrage which includes damages for such delay. This seems to me to have been the view upon which the Queen's Bench decided *Christoffersen v. Hansen*, and I think the judgment of *Lush, J.* in that case will go far to settle that point when it occurs. It is not necessary to decide it now, and I am of opinion that the judgment in this case should, at all events, be affirmed.

BRETT, J.—In this case we are called upon to construe a form of contract which has become somewhat ordinary and usual in mercantile transactions of this kind; and I am not prepared to say that, under such circumstances, although I differ from some of the decided cases in which such form has been interpreted, we ought to overrule those cases. These decisions have become generally known and acted upon, and it would be very undesirable to change the liabilities which the parties meant to undertake.

Now three interpretations have been suggested upon the clauses of this charter-party: First, that as soon as the ship is loaded all liability on the charterer's part should cease, and that the owner's lien should be extended to cover all damage, whether liquidated or unliquidated, past or future; that which occurs by breach of the charter-party before as well as after the loading; secondly, that from the loading of the ship future liability only should cease, and that the charterer should continue liable after the cargo is on board for everything which he has previously incurred. Thirdly, that the charterer's liability should cease for past and future breaches of the contract, but that the shipowner's remedy for only some of those breaches should exist against some other person. If the last were a necessary alternative, I should consider it so unjust that I should be prepared to overrule any number of decisions of courts below rather than enforce it. We have not so far to interpret the extent of the shipowner's lien, but I am inclined to think it is intended to include a full remedy for all breaches of the contract which, but for this clause, would be the liability of the

charterer. I will not be a party to holding that this clause entirely frees the charterer without seeing my way to a remedy by the shipowner for detention at the port of loading beyond demurrage proper. It strikes me that to deprive him of all means of enforcing a claim for such loss would be so unjust that I cannot believe it could have been the intention of parties to such a contract.

There are two ways of getting over the difficulty; one would be by making the charterer's liability in the past as well as for the future cease only in respect of the demurrage days for which the lien is expressly given—but that does not seem to be consistent with decided cases—the other way is that which I adopt in this case, viz. by freeing the charterer as fully as the decisions have gone, from past as well as future liability, but at the same time extending the shipowner's lien not only to demurrage proper as expressed in the clause, but to that which is in the nature of demurrage, and is known in the mercantile sense as demurrage, I mean damages for detention beyond the demurrage days. That point does not arise here, but it is only because I have this decision with regard to that point in my mind that I consent to hold the plaintiff's claim in this action barred by the protection clause.

I think that on this ground alone the judgment below was right and ought to be affirmed.

CLEASBY, B.—I agree with what has been said by my Lord and my brother Brett. I put my reason for this conclusion in the words of *Hill, J.* in *Milena v. Percy* (3 E. & E. at p. 500), "The defendants have, however, by plain words in the charter-party, to be construed according to their plain meaning, protected themselves from all liability on that account, and the only person responsible to the plaintiffs is the defendants' foreign principal." The only question about the principal's responsibility for the claim in this action is as to the meaning of demurrage; and it seems to me that this charter-party was intended by the parties to it to give to the plaintiff a lien upon the cargo for all claims in the nature of demurrage as well as for those which are strictly called demurrage.

GROVE, J.—I am of the same opinion, and I agree with my brother Brett in the hesitation he has expressed concerning the propriety of our conclusion. It seems to me that the normal and grammatical meaning of this clause is only to cover the charterer's future liability after the ship is loaded, but the authorities are too strong to be overruled even in a court of error. I should be inclined to hold that the demurrage for which the shipowner is given a lien includes damages for detention as well as demurrage in the ordinary sense. Indeed, I should think it the natural meaning of the word, but it may have become limited by the decisions; it will be sufficient to determine that hereafter, when the point arises.

POLLOCK, B.—I am of the same opinion. I should be prepared to hold, without reference to the authorities, that these provisions in the charter-party were to be taken correlatively, that is, that the charterer's exemption should occur only when the lien exists. The authorities are strong in applying this exemption to past breaches of the contract, and I think we ought not to disturb them. How far they would justify us in holding that the lien would satisfy a claim for unliquidated damages on account of delay at the port of loading beyond demurrage proper may be a difficult

ADM.]

THE CATHARINE CHALMERS.

[ADM.]

question when it comes to be considered; I say nothing about it now, for it is not necessary in deciding that our judgment should be in favour of the defendant on this demurrer.

AMFILLETT, B. was of the same opinion.

Judgment affirmed.

Attorneys for plaintiff, SHAM, Crossman, and Crossman.

Attorney for defendants, R. B. Lowndes.

COURT OF ADMIRALTY.

Reported by J. F. ASHWALL, Esq., Barrister-at-Law.

Monday, July 27, 1874.

THE CATHARINE CHALMERS.

Damage to cargo—Charter-party—Liability of owner of chartered ship—Perils of the sea—Stowage—Stevordore.

Damage to cargo caused by the caking of wine from casks through straining in bad weather is damage occasioned by perils of the sea, and the ship-owners are, under the usual exceptions, exempt from liability therefor, where the cargo is properly stowed, or is stowed in such a manner that the master is not responsible for bad stowage.

If there a charter-party stipulates that a vessel is "to be stowed by charterers' stevedore, at risk and expense of vessel," and a cargo is supplied by the charterers and is stowed by their stevedore, the shipowner is not responsible for damage occasioned by bad stowage.

Blakin v. Stenbridge (6 C. B., N. S., 874) followed. Sculler, who charterers proceeding in a Court of Admiralty jurisdiction, for damage to cargo carried under a bill of lading, containing no exceptions, but signed by the master in pursuance of a charter-party containing the usual exceptions (perils of the sea, &c.), are bound by those exceptions.

This was an appeal from a decree of the City of London Court (Admiralty Jurisdiction), dismissing a cause of damage to cargo and breach of charter-party, instituted by Messrs. Robert Macdowry and Co., merchants, of the City of London, and of Tarragona, against the barque *Catharine Chalmers* and her owners.

Whilst the barque was lying at Tarragona, in Spain, her managing owner entered into a charter-party with Peter Consul and Co., who were admitted to be the agents of the plaintiffs for that purpose. It was thereby agreed that the barque should load for the charterers "a full and complete cargo of nuts in bags, ^{and} wine in Oporto shaped casks, or other lawful merchandise; the cargo to be loaded as customary, and taken from alongside the vessel, at merchant's risk and expense, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, &c., and being so loaded shall proceed forthwith to a safe port in the United Kingdom." &c. The charter-party contained the usual exceptions, "perils of the seas," &c., and also the following clauses: "The freight to be paid on unloading and right delivery of the cargo . . . Vessel not to be ballasted with anything prejudicial to the cargo, and to be stowed by charterer's stevedore, at risk and expense of vessel . . . The captain is not allowed to open any bag of nuts, or stow same loose, under penalty of forfeiture of freight, and payment of any loss that may arise therefrom."

Under this charter-party the charterers shipped on board the barque a cargo of nuts in bags, and wine in casks, and this cargo was stowed by a stevedore appointed by the charterers, but paid by the shipowner. Several of the bags of nuts were wet when brought on board, and were kept on deck till they were dry, and then stowed; this drying did not remove the stains from the bags. Several of the bags were broken whilst being put on board the ship by the plaintiff's men, and were fastened up again. The bags, which were very full, were brought to the ship by the plaintiff's men, thrown down over the taffrail, and then carried forward to the hold by the ship's crew, where they were stored by the stevedore. They were stowed in the usual way, that is to say, by placing the bags of nuts on top of the wine casks. The master and ship's officers did not in any way interfere with the stowing. When the loading was complete, the master gave bills of lading, by which the casks were consigned to various consignees, but the nuts to the plaintiffs only; these bills contained no exceptions whatsoever.

During the voyage the vessel met with bad weather, and although not materially injured, she strained very heavily. When the barque arrived in the port of London, and was unloaded, many of the bags of nuts were found stained with wine, and some of them had burst open and had let out their contents; this diminished the value of the consignment of nuts by about 50l.

Evidence given at the hearing in the City of London Court showed that severe straining of the ship would cause Tarragona wine, which is shipped new, to leak from the bungs and seams of the casks, and that such leakage had taken place in this case, and had caused the stains to the bags; and that such straining frequently had the effect of chafing the seams of the bags, and that if bags very full got so chafed, they are liable to burst, and that the bags taken out of the barque had the appearance of having been chafed. The claim of the plaintiffs was for damage to the consignment of nuts (namely 2912 bags), by reason of 108 bags being wine stained, and 47 slack or burst.

The learned County Court judge (Mr. Commissioner Kerr), dismissed the suit, saying: "I have considered this case, and I am of opinion that there is no evidence of negligence on the part of the defendants. No doubt the simple fact of the baskets of nuts arriving damaged is a fact from which some kind of negligence may be inferred, but that fact is easily accounted for by the rolling of the vessel in heavy weather, and is in fact accounted for that way. It was proved that the wine had escaped from the casks—from the tops of the casks and the seams, and it was proved that the vessel had been subjected to heavy weather; and I assume that the wine stains were caused by that leakage, and were the result of heavy weather. Then, it was contended that they were not properly stowed. It might have been that the wine might have been kept separate from the nuts. The wine might have been put in one part of the ship, and the nuts in another, and, had that been so, of course it would have been negligence—but it was proved to me that they were stowed in the ordinary way—and if that is the ordinary way of stowage, I must assume it to be a mode of stowage which is approved of, and which is generally found sufficient. That being so, I cannot infer any negligence in the mode of stowage. But, even sup-

ADM.]

THE CATHERINE CHALMERS.

[ADM.]

posing there had been, there is another point which would have been a good answer to any negligence, which is this, that in the express provisions of the charter-party the cargo was to be stowed by the charterers' stevedore, although the owner was to pay for it. I do not think that the simple fact of the owner having to pay the stowing would relieve the charterers from the risk they incurred by undertaking the stowing of them. If, for instance, they had employed a stevedore who knew nothing whatever about his duty, and he insisted upon stowing the goods in a way to which the master objected and failed to prevent, I apprehend that the simple fact that they had been stowed by the charterer in that particular way would have been a very good answer to any objection that they were improperly stowed. The consequence is, that I find as a fact that the mischief complained of—the damage which was complained of—resulted from the perils of the sea."

A decree having been made in accordance with this judgment, the plaintiff appealed to the High Court of Admiralty.

Grantham, for the appellants.—The decision that the damage arose from perils of the sea is erroneous, because it was proved that there were no extraordinary perils affecting the ship and cargo. "Straining" is an ordinary peril which every ship must undergo, and which is contemplated by a shipowner as one of the contingencies of every voyage, and it is a contingency against which the shipowner is bound to provide. In this case the master should have provided proper dunnage to separate the wine from the nuts, and so have taken an ordinary precaution against an ordinary peril. The neglect to provide dunnage is a breach of duty on the part of the shipowner for which he is responsible. Under the charter-party the shipowner is responsible for proper stowage, and if he neglects to provide sufficient dunnage to protect the bags of nuts, he is liable for any damage arising to them by leakage of the casks, "leakage" not being a peril, and excepted either by the charter-party or the bill of lading. There are two questions in the case; first, whether the damage was occasioned by the perils of the sea, and I submit it was not in the real sense of that exception; secondly, whether, even supposing perils of the sea to have been the proximate cause, the injury might not have been avoided by the observance of the shipowner's duty to stow properly; and I submit that the latter question must be answered in my favour. The duty of a master to stow cargo properly is not put an end to because the charterers have power to appoint their own stevedore. There is no demise of the ship, and the master, as agent for the shipowners, remains responsible, and the defendants are consequently liable in this suit.

The Anglo-African Company (Limited) v. Leamed, 2 Mar. Law Cas. O. S. 369;

Sandeman v. Scurry, L. Rep. 2 Q. B. 56; 2 Mar. Law Cas. O. S. 446;

Alston v. Herring, 11 Ex. 822.

R. E. Webster, for the respondents.—There is abundant evidence in the case to show that the damage was such as might, and in all probability was, caused by perils of the sea, and that there were such perils as shown by the log-book put in by the plaintiffs. [Sir R. PHILLIMORE.—You need not press that point. I am satisfied that the finding of the court below on that head is correct.]

Secondly, even if the stowage was improper, the shipowners are not responsible, by reason of the charter-party, which makes the stevedore who stowed the cargo the agent of the charterers, and not of the shipowners: (*Blake v. Steubridge*, 6 C. B., N. S., 874; 28 L. J. 333, C. P.) If, then, the shipowner is not responsible for the stowage, it cannot be said that the shipowner is responsible for damage occasioned by an ordinary peril as distinguished from extraordinary perils. "Straining" may be ordinarily met with in a voyage, but if it occasions injury in consequence of the neglect of a person for whom the master is not responsible, the shipowners are excused:

Davidson v. Burnard, 19 L. T. Rep. N. S. 782; L. Rep. 4 C. P. 117; 3 Mar. Law Cas. O. S. 207.

Grantham, in reply.

Sir R. PHILLIMORE.—This is an appeal from the City of London Court in a cause of damage to cargo. The appellants complain that certain nuts which were put on board the *Catherine Chalmers* at Tarragona arrived in a damaged state in London, at her place of destination, and they contend that the burden of proof lies upon the other side to show that this damage was in consequence of the excepted perils in the charter-party and in the bills of lading, the excepted perils being perils of the sea. Now it has been rightly, as I think, argued by the learned counsel for the respondents, that there are two questions of fact and one of law. I should observe, before I go to that, that the questions argued before the learned judge of the court below were more in number than those which have been submitted to me; for the main question, and in effect the only question of fact which I have to decide, by the consent of both parties, is, whether, within the circumstances proved in the case, the nuts were damaged by the perils of the sea or not, and if they were damaged by the perils of the sea, there still remains the further question—and this is a question of mixed law and fact—whether the nuts were not originally so put on board this vessel as to render them properly liable to such damage as resulted to them? I am quite clear myself upon the questions of fact. I am of opinion, upon the evidence before me—which is really, as is commonly said, all on one side—that the damage in this case was caused by the perils of the sea, and I say so after having looked at the entries in the log book. I have no doubt, taking those entries and the evidence of the witnesses, that the right conclusion to come to is, that the damage was caused by the perils of the sea. I am unable to draw the distinction forced upon me between ordinary and extraordinary perils. In truth, it may be said that the way in which the cargo was stowed was more or less a cause of the damage; but I am of opinion that the evidence shows that the cargo was stowed in the ordinary way, and if the bad weather had not occurred, and the straining had not taken place, the cargo would, I think, have arrived without damage, and, consequently, the proximate cause of the damage must be taken to have been the perils of the sea.

Then there remains the question of law, whether the nuts and the wine were not allowed to be placed in such improper proximity by the master of this vessel as to render him liable for the damage thus caused, from the wine oozing through the bung-holes and the casks leaking and injuring the nuts. I think the case of *Blake v. Steubridge* (6 C. B., N. S., 874; 28 L. J. 329, C. P.), which was referred

ADM.]

THE CHASCA.

[ADM.]

to, was very much in point in this case, if the facts bring it within the proposition of law there laid down. I think the facts of this case do bring it within the case cited. That is an *à fortiori* case, because there the goods were put on board a ship, which although chartered, was put up as a general ship, and the shippers would naturally look to the master as being responsible for proper stowage; but it was held that the master was not liable for negligence, because the goods had been put on board by a stevedore appointed by the charterers. In this case the ship was not a general ship, but carried a cargo wholly belonging to the plaintiffs, who were in effect the charterers, and it is admitted that they, as shippers and charterers, put on board the wine and nuts consigned to the same consignee. The stevedore, who is the agent of the charterer by the terms of the charter-party, had an empty ship, and might have stowed the cargo as he thought fit, subject only to the master's control in matters affecting the safety of the ship; yet with all his knowledge on the subject, the stevedore deliberately placed the wine and nuts in the way that has been proved. The contract may have been such that he could not stow them in any other way, but still it is a fact that he does stow them in a position from which damage ensues. I entertain no doubt in my own mind that, in point of fact and in point of law, the case has been rightly decided in the court below, and I reject the appeal with costs. At the same time, as it has been urged upon me that it is a question of importance upon the principle of law, I will give leave to appeal, in order that the question of law may be raised and decided.

Solicitors for the appellants, *Lowless and Co.*

Solicitors for the respondent, *Ingledew, Ince, and Greening.*

Saturday, April 17, 1875.

THE CHASCA.

Damage to cargo—Bill of lading—Perils of the seas—Barratry.

A shipowner carrying goods under a bill of lading, by which he contracts to deliver in good order and condition, certain perils excepted, is bound to deliver in that condition, unless prevented by those perils, and is responsible for any damage to goods occasioned otherwise than by those perils.

Injury to cargo damaged by sea water during a voyage, in consequence of the barratrous act of the crew in boring holes through the sides of the ship for the purpose of scuttling her, is not a loss by perils of the seas, within the meaning of the usual exception in a bill of lading, such as will exempt the shipowner from his liability for the damage under his contract to deliver in good order and condition.

Even if such a loss would come within the meaning of the words, "perils of the seas," in a policy of insurance, it is not included in those words as used in a bill of lading.

This was an appeal from a decree of the Judge of the County Court of Durham (E. J. Maynell, Esq.), holden at Sunderland.

The suit was instituted in rem against the ship *Chasca*, as "a claim in tort in respect of goods carried in the said ship, and a claim arising out of an agreement made in relation to the use or hire of the said ship." An appearance was entered on behalf of the owners of the ship.

At the hearing before the County Court Judge the following facts were proved:

On the 23rd Jan. 1874, a charter-party was entered into at San Francisco between Henry Pratt, the master of the American barque *Chasca*, and E. E. Morgan and Sons, of San Francisco, by which it was agreed that the ship should proceed to Portland, Oregon, and there load a cargo of wheat and proceed therewith either to Liverpool direct or to Cork, for orders to be given there by the charterers or their agents to discharge at either a safe port in the United Kingdom, between Havre and Hamburgh inclusive, at charterer's option; the master to sign bills of lading, as decided by the charterers or their agents, without prejudice to the charter-party, but at no less rates. The barque, accordingly, proceeded to Portland, Oregon, and there loaded a cargo of wheat from the charterer's agents, and the master gave a bill of lading, by which he acknowledged the wheat to have been shipped in good order by E. E. Morgan and Sons, and undertook to deliver the same "in the like good order and condition at the port of as ordered at Cork, the dangers of the sea and fire only excepted, unto order or to assigns, or to they paying freight for the said wheat." When the wheat was shipped, the barque was perfectly sound, and was certified by a surveyor appointed under the charter-party as "suitable for carrying a dry and perishable cargo to any port in the world."

The barque sailed with the said wheat from Astoria, at the mouth of the Columbia River, on the 21st March 1874, bound for Cork for orders.

On the 2nd April, whilst on the voyage, it was found that the barque was making water rapidly, and on search being made in the forehold it was discovered that holes had been bored through the ship's sides with augers below the water line, and that the water was coming in rapidly. As soon as possible the holes were plugged, but the water came in for several hours. Later in the same month there was a mutiny on board the ship, and the mutineers (three of the crew) were seized and put in irons, and whilst in confinement they confessed that they had bored the holes in the ship's side. The ship arrived safely at Cork, and was thence ordered to West Hartlepool to discharge, and arrived there on the 20th Aug. 1874.

When her cargo was discharged, it was found considerably damaged by salt water. The bill of lading had been indorsed to a Mr. John Kidd, of Manchester, who was admitted to be the owner of the cargo at the time of the institution of the suit, and was the plaintiff therein.

On behalf of the defendants it was shown that the ship had met with very bad weather, and evidence was given to show that the damage was such as might have resulted from straining.

For the plaintiff evidence was given to show that the damaged grain was in such parts of the ship as would naturally be traversed by water coming into the ship by the holes.

On behalf of the plaintiff it was contended that the damage was occasioned by acts done by the crew of the defendants' ship, which acts were not within the excepted perils, and for which acts the defendants were therefore responsible.

On behalf of the defendants it was contended that the cause of the damage was the straining of the ship; but that even if the water coming in through the holes had damaged the cargo, the cause thereof was the water coming into the ship, and this was

[ADM.]

THE CHASCA.

[ADM.]

a peril of the seas, although the original act was a barratrous act of the crew.

The learned County Court judge delivered the following judgment:—"This was a suit in rem for damage to a cargo of wheat. By the bill of lading the cargo, which was stated to be shipped in good order and condition, is to be delivered in like good order and condition, at the port of as ordered at Cork, the dangers of the seas and fire only excepted. The ship sailed on the 22nd March, from the port of Astoria, Oregon, and after having accomplished several hundred miles of her voyage, on the 2nd April it was discovered that the ship was making water. Upon examination it was found that holes had been bored in the ship, through which the water came in. These were plugged, and the ship proceeded on her voyage. The crew appear afterwards to have confessed that they had made the holes, and that that was the fact admitted on both sides. The ship arrived at Cork, and was ordered to Hartlepool, and when the cargo was discharged it was discovered that it had been partially damaged by water, and I am satisfied by water which had got into the ship through the holes made by the crew. The question for me to determine is, whether the owner or the respondent is answerable for this damage. Various arguments were used, and cases cited, upon the duties of bailors and carriers, but I think it is not necessary to consider those cases, as I intimated at the hearing, because the bill of lading is a contract which the parties have entered into and by which they are bound, and we must look to that document to see what the defendant, the shipowner, has undertaken to do. He undertakes to deliver the cargo in good order and condition (the dangers of the seas and fire only excepted); unless then he can bring himself within those exceptions, he is liable. That raises what seems the real question in the case—whether the damage caused by leakage, such leakage being caused by the barratrous act of the crew, is a danger of the seas. There seems much less authority on the point than we would have expected to find. Mr. Young (plaintiff's solicitor) argued it was not a danger or peril of the seas, for that those words meant danger from without the ship. It may be said, however, that the damage was caused from without, viz., from the sea coming against the side of the ship, although it would not have caused the damage but for an act within. Mr. Young instanced the case of *Kay v. Wheeler* (16 L. T. Rep. N. S. 66; L. Rep. 2 C. P. 302; 2 Mar. Law Cas. O. S. 466), in which it was held that an injury to goods on board by rats was not a danger of the seas. There is another case to the same effect, *Laveroni v. Drury* (8 Ex. 166; 22 L. J. 2, Ex.), in which Pollock, C.B., and Alderson, B., seemed to think that if the rats had made a hole in the ship, and water had come in and damaged the cargo, it might have been within the exception. Alderson, B., adding, a rat making a hole in a ship may be the same thing as if a sailor made one. This is not an express decision, but it appears to have been the opinion of two eminent judges. Mr. Brown (defendant's solicitor) cited the case of *Blyth v. Shepherd* (9 M. & W. 763), which, though not an express authority, is in the defendant's favour. It turned on a point of pleading. A declaration on a policy of insurance contained two counts, one charging a loss by barratry the other by perils of the sea; both were not allowed, the real reason, however, being that it was

contrary to the rule prohibiting two counts on the same policy. But the court expressed an opinion that a loss by barratry might be described as a loss by perils of the sea. In the case of *Hegmann v. Parish* (2 Camp. 149) Lord Ellenborough expressed a similar opinion. Those are the only cases I have been able to find on the point, and they are all favourable to the defendant's contention. I think, therefore, I must hold that the damage was occasioned by a danger of the sea within the exception in the bill of lading. Mr. Young also contended that, after discovering the leak, the captain should have put back to Portland and discharged the cargo, as he admitted he thought it might have sustained damage. No authority was cited for this contention. No doubt it was held in *Worne v. Story* (25 L. J. 1, Ex.), that if a vessel becomes unseaworthy during a voyage, and the master having the opportunity of repairing neglects to do so, and the cargo afterwards suffers from perils of the sea in consequence of such nonrepair, the owner is liable. That, however, is a much stronger case; here the leak was at once stopped. The master is bound to do the best he can for both the ship and the cargo, and he must exercise his discretion. I do not see anything in this case to lead me to think he did wrong, or did not exercise a proper discretion in proceeding on his voyage. Mr. Young finally contended, that although the owner might not be personally liable, yet the ship might be so under sect. 2, subsect. 1, of the Act of 1863, under the words 'any claim in tort in respect of goods.' I cannot agree in that argument, and think the Legislature could not have intended to make the respondent liable for that for which its owner could not be answerable. My judgment is, therefore, for the defendants."

A decree was entered for the defendants, with costs, in accordance with the above judgment, and from this decree the plaintiff appealed.

Cohen, Q.C. (H. D. Varr with him) for the appellant (plaintiff).—I submit that the judgment below is erroneous, because it holds that barratry comes within "perils of the seas": although it may be covered by perils of the seas in a policy of marine insurance, it is not covered in a bill of lading. "Perils of the seas," in a bill of lading, does not even include the negligence of a master and crew. In *Lloyd v. The General Iron Screw Collier Company (Limited)* (10 L. T. Rep. N. S. 586; 33 L. J. 269, Ex.; 2 Mar. Law Cas. O. S. 322), it was held that an exception in a bill of lading, of "accidents or damage of the seas, rivers, and steam navigation of whatever nature or kindsoever," does not protect the shipowner from liability for damage arising from a collision caused by the gross negligence of the ship's master and crew; and in that case Pollock, C.B., says: "It is perfectly well known that there is a distinction between a marine policy on a ship or goods and an ordinary insurance against fire. If a man insures his house, and goes home in a state such as not to know what he is about, and in that condition sets his house on fire, he is as much entitled to recover the damage so done as if he had gone to bed as sober as a judge. But in the case of a marine policy of insurance, it has been decided that if the loss has been occasioned directly by the gross negligence of the master and mariners, and it is not a case within the excepted perils, the owners are liable;" and Bramwell, B., said that "perils of the seas"

[ADM.]

THE CHASCA.

[ADM.]

were inevitable accidents, and not events which might be avoided by care and prudence. The real cause of loss in the present case was the act of the crew in boring holes in the ship's side, and although the damage was done by water, the original cause is that which must be taken into account. In *Iontides v. The Universal Marine Insurance Company* (8 L. T. Rep. N. S. 705; 32 L. J. 170, Ex.; 1 Mar. Law Cas. O. S. 353) it was held that if goods are reduced to such a state by perils of the seas as that there is no hope of recovery, but while they still exist in specie, they are nominally taken possession of by persons in the military service of a belligerent state, this is a loss by perils of the seas and not by capture; that is to say, that if damage naturally results from an act done, it must be considered as occasioned by that act and not by the consequences of that act. A shipowner is liable for the wrongful and barratrous acts of his crew, unless those acts are excepted in his bill of lading. The damage in the present case was occasioned by barratry, which is not excepted in the bill of lading, and the shipowner is therefore liable: (*Key v. Wheeler*, 16 L. T. Rep. N. S. 866; L. Rep. 2 C. P. 302; 2 Mar. Law Cas. O. S. 466). A shipowner has all the liability of a common carrier, and is liable for any losses except such as are occasioned by the act of God or the Queen's enemies, unless he limits his liability by special contract: (*The Liver Alkali Company v. Johnson*, ante, vol. 1, p. 580; vol. 2, p. 352; 26 L. T. Rep. N. S. 505; 31 L. T. Rep. N. S. 95; L. Rep. 7 Ex. 267; L. Rep. 9 C. P. 338). Here the shipowner has only limited his liability in case of damage from perils of the sea and fire, whilst the damage was occasioned by the barratry of the crew; his liability therefore remains.

Milnead, Q.C. (*E. C. Clarkson* with him) for the respondent (defendant).—The case of *The Liver Alkali Works v. Johnson* is distinguishable, because in that case there was no contract at all, except at common law, and moreover it was not a maritime contract. Further, this is an American ship, and the English common law cannot be applied unless it has been shown to be applicable. It has never been really established that the owner of a seagoing ship is a common carrier: (*The Duero*, 22 L. T. Rep. N. S. 37; 3 Mar. Law Cas. O. S. 351.) They are not bound to carry all goods that are brought to them. If that be so, then, in order to show their liability as common carriers, it would be necessary to give evidence as to their liability as common carriers for the goods they do accept. It must be shown that there is a custom by which the liability of common carriers is imposed upon them, and such a custom would be a maritime custom. But then there is no such general maritime custom, and therefore no liability as common carriers. The question is then reduced entirely to the meaning of the contract in the bill of lading contained, and whether barratry is or is not a peril of the sea. In *The Freedom* (ante, vol. 1, pp. 28, 136; 24 L. T. Rep. N. S. 452; L. Rep. 3 P. C. 594) it is said, "The words in the bills of lading, 'dangers of the seas,' must of course be taken in the sense in which they are used in a policy of insurance. It is a settled rule of the law of insurance not to go into distinct cases, but to look exclusively to the immediate and proximate cause of the loss." And in *Dudgeon v. Pembroke* (ante p. 323; 31 L. T. Rep. N. S. 31; L. Rep. 9 Q. B. 581) it is distinctly laid down that, in the case of loss by perils of

the sea, the proximate and not the remote cause of loss must be regarded. Here the proximate cause was not the act of the crew, but damage by sea water, which is a peril of the seas. But even if the act of barratry be considered the proximate cause, it is an act for which the shipowner is not responsible. In *Lloyd v. The General Iron Screw Collier Company* (ubi sup.) the act of negligence was committed within the scope of the authority of the master and crew; it was a case of collision, and the charge was negligent navigation. Here the act is wholly out of the scope of the authority of the crew, and a principal cannot be liable for any wrongful act on the part of his agent committed beyond the scope of the agent's authority: (*Story on Agency*, p. 295).

Cohen, Q.C., in reply.—The shipowner has entered into a specific contract to deliver safely, unless he is prevented by certain excepted perils named in the bill of lading. He has not been prevented by these perils, but by a wrongful act on the part of the crew. He is therefore responsible.

Sir R. Phillimore.—This is an appeal from the judgment of the learned judge of the County Court of Durham, in a suit before him, which was a suit for damage done to a cargo of wheat.

The evidence established that the damage resulted from the barratrous act of the crew of the *Chasca* in boring holes in the bottom of the vessel, through which the water came and injured the wheat.

The question which the learned judge had to determine, and from which an appeal has been brought, was a question simply of law, namely, whether such a barratrous act as that was an excepted peril of the sea, because in this case there was a bill of lading in the following words: "Shipped in good order and condition by E. E. Morgan and Sons, on board the American barge *Chasca*, whereof Henry Pratt is master, now lying at the port of Portland, Oregon, and bound for Cork for orders, to say 16,050 sacks of wheat, containing 1,994,256 lbs., being marked and numbered in the margin, and are to be delivered in like good order and condition at the port of , as ordered at Cork, the dangers of the seas and fire only excepted;" and therefore, as this was not a danger by fire, the only question is, whether it falls within the category of excepted "dangers of the seas." The learned judge came to the conclusion that it did, after having an argument addressed to him by counsel, founding his opinion upon the presumed false analogy in cases of policies of insurance to cases depending on the contracts contained in bills of lading.

Now, the first question of law which the court has to decide is this; is the court entitled to look at the real cause, the cause remote, or must it confine its attention to the proximate cause, just as in a policy of insurance? The real cause the court is, in my judgment, entitled to look at.

The only case cited to the contrary is *The Freedom* (ubi sup.), where the learned judge who delivered the judgment of their Lordships says: "The words in the bill of lading, 'dangers of the seas,' must, of course, be taken in the sense in which they are used in a policy of insurance. It is a settled rule of the law of insurance not to go into distinct causes, but to look exclusively to the immediate or proximate cause of the loss." Now, that is a dictum in no way necessary for the judicial conclusion at which their Lordships arrived;

ADM.]

THE TURLIANI.

[ADM.]

and I say, without hesitation, that in my judgment it was an erroneous dictum, that must have fallen inadvertently from the judge who delivered the sentence. It must have been an erroneous dictum, because the facts of that case, and others of the same kind decided by the Privy Council at the same period, all proceeded upon the hypothesis that a loss occasioned by negligence was a loss which was not excepted by the exception of "perils of the sea" in a bill of lading. I say, then, that if losses occasioned by negligence are not within the exception of "perils of the sea" losses occasioned by barratry, are *a fortiori* not within it. Not only then, is there a variance with the cases and the decision itself, but a variance with other cases. First, the case of *Lloyd v. The General Iron Screw Collier Company (Limited)*, in which it is said by Pollock, C.B.: "We are all agreed that the plaintiff is entitled to our judgment. The declaration distinctly discloses the cause of the accident. It sets out the bill of lading, from which certain common perils are excepted, including barratry of the masters and mariners, but not gross negligence or improper conduct short of barratry. Then to the defendant's plea, that they were prevented from carrying the goods by the perils excepted, the plaintiff, to prevent any mistake, replies that the supposed perils were incurred by and through the gross negligence, mismanagement, and improper conduct of the defendants' servants, and not otherwise. The opinions handed down to us by those who have discussed those matters, and the decided cases, clearly establish the proposition that in cases of this sort we are to look, not at the *causa proxima*, but at the real cause of the loss. Here, therefore, if the direct negligence of the master and mariners should turn out to be the cause of the loss, the plaintiff is entitled to recover, notwithstanding the exception in the bill of lading." In the case of *Griff v. The General Iron Screw Collier Company*, decided in 1864 by a judge whose opinions are always cited with the highest respect in every court of justice, the late Mr. Justice Willes says: "As, however, reference has been made to cases on policies of insurance, and the interpretation that has been given to them, I may say that a policy of insurance is an absolute contract of indemnity from loss by perils of the sea, and it is only necessary to see whether the loss comes within the terms of the contract, and is caused by perils of the sea. The fact that a loss is partly caused by things not distinctly perils of the sea does not prevent it coming within the contract. In the case of a bill of lading it is different, because there the contract is to carry with reasonable care, unless prevented by the excepted perils." I am, therefore, of opinion that the dictum cited from the case of *The Freedom* cannot be put forward with any force as an authority that the court should derive the law as to bills of lading from the law as to policies of insurance.

The next question is one of fact, and I have anticipated the opinion of the court by saying that it seems to have been admitted that it was the boring of the holes in the bottom of the vessel by the barratrous act of the crew.

Now, the third question is one of law. Was this barratrous act a peril of the sea? I have no hesitation in arriving at the conclusion to which common sense, as well as all the interests of navigation, seem to render it desirable for the court to arrive, namely, that an act of this kind is

not a peril of the sea, and, on the authority of the cases and on principle I am constrained to reverse the sentence of the court below, and to pronounce in favour of the respondent, with costs.

Solicitors for the appellants, *Pritchard and Sons*, agents for *Bateson and Co.*, Liverpool.

Solicitor for the defendants, *Thomas Cooper*, agent for *B. Brown and Son*, Sunderland.

Dec. 10, 1874, and June 8, 1875.

THE TURLIANI.

Necessaries—Material men—Mortgagee—Maritime lien—Priority—Practice—Transfer from County Court—Reference to registrar and merchants—Ship under arrest of High Court—Subsequent arrest by County Court.

An advance of freight to enable a master to pay his ship's disbursements before sailing does not give the charterer a claim against the ship, which will take precedence of the claim of a mortgagee; nor does an advance for a similar purpose made by an insurance company.

Where it is necessary that a wooden ship bound upon a particular voyage should be coppered, the coppering is a "necessary for the voyage," which gives the material man doing the work to a foreign ship, upon the orders of the master, a maritime lien.

Where causes of necessities and wages had been instituted against a ship in the High Court, and other causes of necessities in a County Court against the same ship, and the latter had been transferred after decree made to the High Court for the purpose of enforcing the decrees, the ship being under the arrest of the High Court, the latter court ordered all the causes to be referred to the registrar and merchants to report the amount due thereon.

Seemingly, that where a ship is under the arrest of the High Court, and causes are also instituted in the County Court against the ship, she should not be arrested by the County Court, as it is not probable that the ship will be removed out of the jurisdiction of the County Court without satisfaction of the plaintiff's several claims, within the meaning of the County Courts Admiralty Jurisdiction Act 1868, sect. 22.

SEVERAL suits were instituted *in rem* against the Greek brig *Turliani*, in the High Court and in the County Court of Northumberland, bolden at Newcastle.

No. 6877 was a case of necessities instituted in the High Court on the 23rd May 1874, on behalf of Ernesto Rodinis, ship chandler and merchant. The claim made in this cause will be found set out in the first schedule to the registrar's report (*post*). The ship was arrested in this suit by the marshal, and remained under arrest till the claim was on the 30th June pronounced for, and the vessel was sold by an order of the court. An appearance was, on the 10th Dec., subsequently entered in this cause by Demetrio Vafiadachi, a mortgagee of the ship, as defendant.

No. 6893 was a cause of necessities, instituted on behalf of George Varvakiotis, shipbroker, in the County Court of Northumberland, bolden at Newcastle, but transferred before proceedings to the High Court, by order of the latter court. The claim made in this case will be found set out in the second schedule to the registrar's report (*post*).

[ADM.]

THE TURLIANI.

[ADM.]

and was pronounced for on the 8th July 1874, without prejudice to other claims. An appearance was also entered in this suit by the mortgagee on the 10th Dec.

No. 6895 was a cause of necessities instituted in the High Court on behalf of Thomas Grieve, hardwareman. This claim appears on schedule 3 to the registrar's report, and was on the 14th July 1874 pronounced for without prejudice to other claims. An appearance was also entered in this suit by the mortgagee on the 10th Dec.

No. 6911 was a cause of necessities (so called) instituted on behalf of Felice Bruma and others. This case was originally instituted in the County Court of Northumberland, holden at Newcastle, against the ship *in rem*, to recover an advance of 145*l.*, made at North Shields upon the security of an instrument in the following terms:

I, the undersigned, Zani Cambani, master of the Greek brig *Turliani*, acknowledge to have received as a loan from Messrs. Bruma, Villa, and Schiaffino, on account of the *Casa Marittima* of Genoa, the sum of 145*l.*, for the last expenses necessary for the continuation of my present voyage from North Shields to Buenos Ayres, binding myself to pay the said sum to the order of the *Casa Marittima* fifteen days after my arrival; and for the said sum I bind the freight and the ship. In faith of which I have signed the present document in duplicate, one taking effect, the other to be void.

Done at North Shields, 14th April 1874.

(Signed) ZANI CAMBANI, Master.

The ship was arrested in this suit by the County Court on the usual affidavit that she was about to leave the jurisdiction; at the time of such arrest she was already under arrest by the High Court in cause No. 6893. No appearance was entered in the County Court, and the plaintiffs obtained a decree for the amount claimed. After this decree the cause was, on the application of the plaintiffs, transferred, on the 1st July 1874, to the High Court, in order that they might be able to enforce their judgment against the ship, which was under the arrest of the High Court. An appearance was, after such transfer, entered in this suit, also in the High Court, by the mortgagee.

No. 6913 was a cause instituted on behalf of William Boyd, under the 2nd section of the County Court Admiralty Jurisdiction Act Amendment Act 1869 (32 & 33 Vict. c. 51), to recover 290*l.* for breach of charter-party, dated the 17th March 1874, and made between the plaintiff and the master of the *Turliani*, the said sum of 290*l.* being an advance of freight made by the plaintiff, as charterer, to the master of the *Turliani*, in relation to the carriage of goods under the said charter-party in the said vessel *Turliani*. This cause was originally instituted in the County Court at Newcastle, and no appearance having been entered in the County Court, the plaintiff obtained a decree for the amount claimed. The ship was arrested by the County Court in this suit, although already arrested in the High Court. After decree the cause was, on the application of the plaintiff, transferred on the 1st July to the High Court, to enable the plaintiff to enforce his judgment. An appearance was, after transfer, entered in the High Court in this suit also by the mortgagee.

No. 6918 was a cause of necessities instituted on behalf of John Freeland Fergus Common, and Robert Brotherick Avery. The items of claim in this cause will be found set out in schedule 4 to the registrar's report (*post*). The metal and nails upwearing thereby to have been supplied were furnished

by the plaintiffs for the purpose of coppering the ship. This coppering was done at North Shields by direction of Companis, the master, and a foreign surveyor. The vessel was at this time bound on a voyage to Sierra Leone; she was iron-fastened, and it was admittedly an imprudent thing to copper an iron fastened ship, but the plaintiffs supplied the ship under the master's orders, and to obviate any evil consequences took care that the heads of the iron holds should be well covered with lead to prevent their coming in contact with the copper sheathing. The remaining facts material to this claim will be found set out among the "Reasons" for the registrar's report: (See *post*.) This cause was instituted originally in the County Court at Newcastle, and the ship was arrested by that court, although already under arrest in the High Court. A decree was there obtained, in default of appearance, and the cause was afterwards, on the application of the plaintiff, transferred on the 7th July to the High Court, to enable him to enforce his judgment against the ship, then under the arrest of the High Court. An appearance was entered in the High Court in this suit also by the mortgagee.

No. 6919 was a cause of necessities instituted on behalf of the said John Freeland Fergus Common. The items of claim in this cause will be found set out in schedule 4 to the registrar's report. The work therein claimed for was in respect of docking and undocking the ship, burning and blacking her bottom, caulking her seams and butts under the metal, finding and laying on felt, punching, laying on, nailing and dressing the yellow metal (claimed for in cause No. 6919), finding all labour and material (except yellow metal), including dock dues. The extras claimed included lead for covering the iron bolts and felt. The smith's work claimed was in respect of necessary repairs to the ship's gear. The work was done under the circumstances mentioned in cause No. 6911, and the cause was instituted and transferred after decree, precisely in the same manner as cause No. 6911. An appearance was entered in the High Court in this suit also by the mortgagee.

No. 6941 was a cause of bottomry instituted in the High Court on behalf of Demetrio Vafiadachi, the mortgagee before mentioned. The claim in this cause was based upon two instruments, binding the ship for the payment of certain sums of money advanced by Vafiadachi to enable the owners of the *Turliani* to build and fit her out for her first voyage. These instruments, not being bottomry bonds by English law, and the plaintiff having no claim of priority over persons having maritime liens upon the ship, this cause was abandoned, and Vafiadachi entered an appearance in the other cases, as mortgagee of the ship under the said instruments.

No. 6961 was a cause of wages instituted in the High Court on behalf of Companis (otherwise Cambani), the master, and the sum claimed was 191*l.* 19*s.* 9*d.*, which was on the 10th Nov. 1874 pronounced for without prejudice to other claims. The ship had been built by one John Zancopulo, who sold part of her to Companis for 35,000 drachms. It was agreed that Zancopulo was to be captain, but that when he was ashore Companis was to act as captain, and have control of the ship and her affairs. Before the ship went to North Shields she had carried a cargo to Cuxhaven from the Levant. At Cuxhaven

ADM.]

THE TUELIANT.

[ADM.]

Zancopulo was taken ill, and directed the ship to go to Swansea to take up a charter to carry coal to Sierra Leone. Companis, however, took her to North Shields, owing to contrary winds. Whilst at North Shields a charter-party was entered into by Companis to go to Buenos Ayres with coals, and the ship, after being coppered, was duly laden under the charter-party. Companis, whilst at Newcastle, received various sums for the ship from the charterer and brokers, and had previously received considerable sums from Zancopulo at various times. Zancopulo alleged that the coppering of the ship was wholly without his knowledge and consent.

Dec. 10, 1874.—James P. Aspinall moved on behalf of the mortgagee that the several claims be referred to the registrar, assisted (if necessary) by merchants, to examine and report thereon, as usual.

E. C. Clarkson, for the plaintiffs in causes Nos. 6911, 6913, 6918, 6919, transferred from the County Court, objected upon the ground that the claims therein had already been investigated and pronounced for by the County Court, and that the defendant having neglected to enter an appearance in the County Court had no right to have the claims re-opened now. In cause No. 6913, the claim is for a sum advanced; a reference is unnecessary there.

Gainsford Bruce, for the other plaintiffs, contended that as the defendant had allowed such a length of time to elapse before asking a reference, he was now too late; and, further, that it would be useless to refer No. 6895, on account of the smallness of the claim.

Aspinall, in reply.

Sir R. PHILLIMORE.—I shall order all the claims, except that in causes Nos. 6895 and 6913, to be referred to the registrar. In taking this course I do not wish it to be understood that I decide that these claims in which judgments have already been investigated are to be reopened. Whether it will be necessary to reopen them or not is a question with which the registrar must deal when they come before him. There is, however, one matter in the case to which I wish to call attention. It is worthy of remark that this vessel, although under the arrest of this court, was arrested in several of the other mits by the same County Court, which is hardly consistent with the spirit of the County Courts Admiralty Jurisdiction Act, giving power to arrest only when there is a probability of the ship being taken out of the jurisdiction, the expense being very needlessly augmented thereby. I think it is desirable that the Bar and the Profession should consider this matter, which is one of importance.

In accordance with this order, the several claims came before the registrar, assisted by Sidney Young, Esq., merchant, who issued the following report:—

To the Right Honourable the Judge of the High Court of Admiralty of England.

Whereas there have been instituted in or transferred to this court nine different causes against the above-named foreign vessel, to wit:—

- No. 6877, for necessities on behalf of E. A. Rodinis.
- No. 6895, for necessities on behalf of George Varnakiotis, shipbroker.
- No. 6905, for necessities on behalf of Thomas Grieve.
- No. 6911, for necessities (so called) on behalf of Messrs. Bruna, Villa, and Schiaffino, a cause trans-

ferred from the Northumberland County Court, at Newcastle.

No. 6913, for breach of contract on behalf of William Boyd, also transferred from the above-named County Court.

No. 6918, for necessities on behalf of Messrs. Common and Avery, also transferred from the above-named County Court.

No. 6919, for necessities on behalf of Mr. Common, also transferred from the above-named County Court.

No. 6941, for bottomry (afterwards acknowledged to be mortgage) on behalf of Basilio Papayanni, agent of Demetrio Vafiatachi.

No. 6961, for wages and disbursements on behalf of John Companis as master of the vessel.

And whereas, on the 10th Dec. ult., you were pleased, at petition of the mortgagees, the plaintiff proceeding in cause No. 6941, to refer the claims in causes 6877, 6893, 6911, 6918, 6919, and 6961, to the registrar to report the amounts due thereon, to waive reference in causes 6895 and 6913.

And whereas the proctors representing the parties in all the above-mentioned causes, have agreed that I should also report as to the right of the several plaintiffs to the priority of payment out of the proceeds in court, as well as on the question of costs.

Now I do most humbly report that I have, with the assistance of Sidney Young, Esq., of London, merchant, carefully examined all of the claims filed in these causes, together with all accounts and vouchers, and the papers and proceedings produced and brought in, and having on the 29th Dec. ult., heard the evidence of Ernesto Antonio Rodinis, the plaintiff in cause No. 6877, of George Varnakiotis, the plaintiff in cause No. 6893, and of John Zancopulo, the owner of 32-64ths of the vessel, a witness produced by the mortgagees, and on the 4th Jan. inst. heard the parties through their proctors, on all sides. I find that the several claims ought to be paid out of the proceeds of the vessel, now remaining in court, in the following order:

(1.) The taxed costs of all parties, including those incurred as well in the County Court as in this court, save the costs of the plaintiff in cause 6961.

(2.) The claims of the material men for necessities, to the extent following:—In cause 6877, 191l. 5s. 3d.; in 6893, 90l. 13s. 11d.; in 6895, 13l. 16s. 4d.; in 6918, 129l. 15s. 10d.; in 6919, 100l. 19s.; as stated in the schedules 1, 2, 3, 4, and 5, hereto annexed.

(3.) The claim of the mortgagees in cause 6941, to value of 1000 French gold twenty-five franc pieces, equal to the sum of 800l. sterling, on his filing an affidavit to the effect that no part of the said mortgage debt has been paid, or any interest thereon.

(4.) The balance (if any) to be applied to the satisfaction of the remaining claim or claims in such manner as I may hereafter, if required, report.

All which is humbly submitted by

(Signed) H. C. BOTHERBY, Registrar.

Admiralty Registry, Doctors' Commons,
6th Jan. 1875.

No. 6877.

Schedule 1.

E. A. Rodinis, shipchandler and merchant.

	Claimed.	Allowed.
	£ s. d.	£ s. d.
1. Paid for letters	0 2 10
2. Cash lent for ship's use	40 19 4
3. Goods supplied	176 2 10	176 2 10
4. Boarded stores	15 3 5	15 3 5

£326 6 5 191 5 3

H. C. BOTHERBY, Registrar.

No. 6893.

Schedule 2.

George Varnakiotis, shipbroker.

	Claimed.	Allowed.
	£ s. d.	£ s. d.
1. Reporting ship at Custom House	1 1 0	1 1 0
2. Notice to Board of Trade for measure brief	0 16 0	0 16 0
3. Cash to master	4 0 0
4. Cash to North Sea pilot	3 10 0
5. Expenses incurred in trying to negotiate a loan and obtain money for ship's use ..	5 0 0

ADM.]

THE TURLIANI.

[ADM.]

	Claimed.	Allowed.
6. Trimmers loading vessel	£3 6 11	3 6 11
7. Telegrams to Genoa	1 1 3	...
8. Agency and expenses and petty disbursements, and for acting as interpreter	15 15 0	10 10 0
9. Cash to master	75 0 0	75 0 0
	£109 10 2	90 13 11

H. C. BOTHERBY, Registrar.

No. 6895.

Schedule 3.

Thomas Grievs, hardwareman.

	Claimed.	Allowed.
	£ s. d.	£ s. d.
Goods supplied	13 16 4	13 16 4

H. C. BOTHERBY, Registrar.

No. 6918.

Schedule 4.

	Claimed.	Allowed.
	£ s. d.	£ s. d.
1. Metal and nails	128 1 0	158 1 0
Deduct		
2. Cash received on account	40 0 0	40 0 0
Add	118 1 0	118 1 0
3. Metal omitted in above account	11 14 10	11 14 10
	£129 15 10	129 15 10

H. C. BOTHERBY, Registrar.

No. 6919.

Schedule 5.

Mr. Common, shipbuilder.

	Claimed.	Allowed.
	£ s. d.	£ s. d.
1. Contract work	76 5 0	76 5 0
2. Extras	19 6 3	19 6 3
3. Ditto	36 8 9	36 8 9
4. Smiths' work	14 19 0	14 19 0
Deduct	146 19 0	146 19 0
5. Cash received on account	40 0 0	40 0 0
	£106 19 0	106 19 0

H. C. BOTHERBY, Registrar.

The reasons upon which the registrar based his report were given by him in writing as follows:—

"The circumstances of this case are very peculiar.

"It seems that the *Turliani* or *Turlina* was a Greek vessel, built at Syra in the year 1872 by one Zancopulo. Whilst she was building, Zancopulo sold one half of the ship for the sum of 35,000 drachms to a person named Companis, and the vessel was registered in their joint names. It was arranged that for the first year, at all events, Zancopulo should be the master, and Companis mate; but that when Zancopulo was on shore, Companis was to be the master, and to have the management and control of the ship and of its affairs. It further appears that the owners, being unable to provide the necessary funds for the completion of the vessel, borrowed from a Greek named Demetrio Vafindachi, two sums of 700 and 300 Napoleons respectively, for which they gave two mortgages on the ship.

"The ship left Syra with Zancopulo on board as master, and Companis as mate, and proceeded thence to Cyprus, Odessa, and other places, and ultimately arrived with a cargo in Falmouth, whence she was ordered to proceed to Leery. On her way there she got on to a bank, and was obliged to put into Cuxhaven, where the cargo was discharged. At Cuxhaven she was placed on a bank, there being no dry docks there, and her bottom was caulked and tallowd, but no other repairs were done to her. She then sailed with Companis as master, Zancopulo remaining at Cuxhaven, partly because of his health, partly to settle the mortgages for Swansea, where a charter had been

obtained for her to carry a cargo of coals to Sierra Leone.

"It is said that on the way the vessel met with contrary winds, and, accordingly, instead of continuing her voyage, she proceeded to the Tyne, where Companis obtained a charter for her to convey a cargo of coals to Buenos Ayres. A quantity of necessaries having there been supplied to her, and her bottom having been coppered, she was ready to sail on her intended voyage, when she was arrested at the suit of the necessaries men.

"In the meantime, Zancopulo, having heard of the change of the vessel's destination, came over from Cuxhaven, and seeing the condition of affairs, he endeavoured to raise money to satisfy the claims upon her, but in vain. Accordingly the several suits, some of which had originally been instituted in the County Court of Newcastle, but were afterwards transferred to this court, proceeded; and on the 30th June last the court ordered the vessel to be appraised and sold to answer the claims against her.

"The vessel was accordingly sold, and the proceeds, amounting to 1810*l.*, were on the 14th Sept. last paid into court. But in the meantime other suits had been brought against the vessel, and amongst them one on the 8th Aug. by Demetrio Vafindachi, the mortgagee, suing as a bottomry bondholder, and another on the 28th of the same month by Companis, the master, for his wages and disbursements. The claim, I should observe, of Demetrio Vafindachi to sue as a bottomry bondholder was overruled by the court, but he was allowed to elaim in respect of his two deeds for 700 and 300 Napoleons respectively as a mortgagee.

"There were then nine causes against this vessel, and it was agreed that they should all be referred to myself to report the amounts due thereon, and at the same time to decide the right of the respective parties to priority of payment out of the proceeds.

"Accordingly, all the causes came before me on the 20th Dec., and on the 4th and 6th Jan. last, witnesses were examined, and the case was very fully discussed; and the conclusion to which I came was as follows:—

"First, that this being a foreign ship, a claim for necessaries, strictly so called, would, on the authority of *The Ella A. Clark* (Brown & Lush. 32), constitute a maritime lien under the 6th section of the 3 & 4 Vict. c. 65, and as such take precedence of the claims of a mortgagee, which is not a maritime lien.

"Secondly, that this being a foreign ship, a claim for necessities would, on the authority of the case of *The Jeany Lind* (L. Rep. 3 Adm. & Ecc. 529), take precedence of that of the master of a ship for his wages and disbursements, where the master, as in this case, was part owner, and had mortgaged his interest in the ship.

"Thirdly, that an advance of freight was not a necessary within the meaning of the Act, and that, therefore, such a claim would not be entitled to precedence over that of the mortgagee.

"Fourthly, that a claim for moneys advanced by an insurance company was equally not a claim for necessities, and would consequently not take precedence over that of the mortgagee.

"Fifthly, that looking at the various sums which it was proved that Companis, the master, had received at different places, to his conduct at North Shields, and to the general facts of the case,

ADM.]

THE TURLIANT.

[ADM.]

it had not been shown to my satisfaction that anything whatever was due to him in respect of his wages and disbursements, and that his claim ought therefore to be disallowed in toto.

"Sixthly, that seeing the difficulties which surrounded the case, it seemed to me that all the claimants, except Companis, were entitled to their costs, as well in this court as in the County Court. I therefore held:—

"(1.) That the costs of all parties, save those of Companis, the master, in cause No. 6961, should first be paid out of the proceeds.

"(2.) That then the claims of the material men for necessities, in causes Nos. 6877, 6893, 6895, 6918, and 6919, should be paid to the extent reported due.

"(3.) That then the claims of the mortgagee should be satisfied on his furnishing satisfactory proof that the claim had not been paid.

"And if after the payment of the above claims any balance remained, which seemed not to be very likely, the question should again come before me to decide how such balance should be distributed amongst the remaining creditors.

"To this ruling, as I understand, no exception is taken, except in regard to the allowance of the claims in causes Nos. 6918 and 6919, which were mainly, if not entirely, for the cost of coppering the vessel; and it was contended that this was not necessary. It was said that Zancopulo had designed the vessel for a voyage to Sierra Leone, for which it would not have been necessary to copper the vessel; but that, by altering her destination to Buenos Ayres, the coppering had become necessary. Now I am in a little at a loss to see what greater authority Zancopulo had to decide upon the destination of this vessel than Companis, seeing that they both held an equal share of her, and that Zancopulo, by remaining on shore at Cuxhaven, had virtually given up the command of the vessel and the management of its affairs to Companis.

"But, apart from this, I am told by my assessor that whether the vessel went to Sierra Leone or to Buenos Ayres, it was equally necessary that she should be coppered. Assuming that she was destined for a voyage to those climates, it was essentially necessary that she should be coppered. The coppering was a necessary for the voyage, whether she went to the one place or the other. Now it has been laid down by the present learned judge in the case of *The Riga*, reported in 3 Law Reports, A. & E., that there is no distinction to be drawn between necessities for the ship and necessities for the voyage. At page 522 he observes, 'I am unable to draw any solid distinction (especially since the last statute) between necessities for the ship and necessities for the voyage; and I shall follow the doctrine of the common law, as laid down by the high authority of Lord Tenterden, in the case of *Webster v. Seekamp*. In that case he says, the general rule is that the master may bind his owners for necessary repairs done, or supplies provided for the ship. It was contended at the trial that this liability of the owners was confined to what was absolutely necessary. I think that rule too narrow, for it would be extremely difficult to decide, and often impossible, in many cases, what is absolutely necessary. If, however, the jury are to inquire only what is necessary, there is no better rule to ascertain that

than by considering what a prudent man, if present, would do under circumstances in which the agent, in his absence, is called upon to act. I am of opinion that whatever is fit and proper for the service on which a vessel is engaged, whatever the owner of that vessel, as a prudent man, would have ordered if present at the time, comes within the meaning of the term 'necessaries,' as applied to those repairs done or things provided for the ship by order of the master, for which the owners are liable.' Every word in this passage appears to be specially applicable to the present case. As prudent owners it was their duty, as they intended her for such a voyage, to have her coppered.

"It was said, however, that it was not a prudent thing to copper an iron fastened ship such as this was, and that Mr. Common so admitted before me, but the captain and the foreign surveyor directed it to be done, and Mr. Common took the best measures for preventing any evil consequence arising from such a proceeding by covering the heads of the iron bolts with lead.

"It was on these grounds that I allowed the coppering. Nor is it to be forgotten that the coppering must have added considerably to her value, when she came to be sold by the court; and that to a certain extent, therefore, the value of the copper may be said to be in the proceeds.

"(Signed) "H. C. ROTHERY, Registrar.

"15th Feb. 1875."

To this report, in so far as it decided that the plaintiff in cause No. 6919 was entitled to recover for necessities supplied the defendant (the mortgagee) took objection, and his petition filed in objection to the report was, so far as material, as follows:—

2. The *Turliant* was a Greek brig of about 27½ tons register. She was built at Syra in the latter part of the year 1872, and was fastened with iron bolts. She was owned in moieties by John Zancopulo, master mariner, and Zanni L. Companis, mariner. Zancopulo was master of the *Turliant* until the month of February 1874, and Companis was a seaman on board her.

3. In or about the month of Feb. 1874 the *Turliant*, in consequence of damage received at sea, put into Cuxhaven, where she was caulked and some repairs were done to her. The said John Zancopulo, finding it expedient to remain for a time at Cuxhaven, instructed the said Companis to take the *Turliant* to Swansea, where the said Zancopulo had arranged a charter for her, and where he intended to rejoin her.

4. The *Turliant* accordingly proceeded to sea in charge of a pilot, but instead of going to Swansea the said Companis proceeded with the *Turliant* to North Shields, where she arrived on or about the 4th March 1874. The *Turliant* was then in good repair and seagoing condition, and not in want of any repairs, except some caulking and slight repairs to her upper works.

5. The said Companis, without the knowledge or sanction of the said Zancopulo, and before the arrival of Zancopulo at North Shields, employed the plaintiff to do the caulking and repairs mentioned in the preceding article, and to sheath the *Turliant* with yellow metal, and the sum allowed by the registrar to the plaintiff in this case is the amount of his account for the said repairs and metalting.

6. It was most imprudent and improper to metal the *Turliant*, she being an iron-fastened vessel. It was impossible to place the metal in contact with the iron, in consequence of the galvanic action which would thereby be produced upon the metal, and it was consequently necessary to take unusual precautions to prevent the contact of the metal with the iron bolts, and the expense of metalting the *Turliant* was thereby largely increased.

7. At the time of so metalting the ship the plaintiff well knew that the *Turliant* was an iron-fastened vessel, and was aware of the consequent impropriety and imprudence of metalting her.

8. On the 6th Jan. 1875 the plaintiff, John Friesland

[ADM.]

THE TURLIANI.

[ADM.]

Fergus Common, attended before the registrar, in the registry of this honourable court, to explain a mistake in the plaintiff's account in another cause against the Turliani, and the said John Freeland Fergus Common thereupon, in the presence of the solicitors for the plaintiff and defendant, stated to the registrar that he knew that the Turliani was an iron-fastened ship, and that he was aware of the imprudence of metallising the vessel, but that in consequence of the said Companis directing the vessel to be metallised, he took care, before placing the metal on the vessel, to cover the heads of the iron bolts with white lead, and then to place pieces of sheet lead over each bolt, and nail it on with copper or yellow metal nails.

9. By reason of the premises the defendant's solicitors submit—

- (a) That it was not necessary or proper to metal the Turliani.
- (b) That under the circumstances hereinbefore pleaded the plaintiff's claim, in so far as the metallising is concerned, is not a claim for necessities within the true intent and meaning of the 3 & 4 Vict. c. 63, s. 6.
- (c) That the claim of the plaintiff for metallising the Turliani ought to be postponed to the claim of the defendant as mortgagee.

And the petition prayed the right honourable the judge to refer the said report back to the registrar, with directions to amend the same, in so far as it reported in favour of the priority of the plaintiff's claim for metallising the Turliani over the defendant's, and to condemn the plaintiff in so much of the costs of the said reference as related to their said claim, and in the costs of that objection, and that otherwise justice might be administered to the defendant in the premises.

The answer of the plaintiff, John Freeland Fergus Common, admitted the truth of the allegations contained in article 1 of the said petition, and craved leave to refer to the said report and registrar's notes and reasons. It also admitted the truth of the allegations contained in the second article of the said petition, but further stated that upon the said John Zancopulo and Zanni Companis becoming co-owners of the Turliani, it was agreed between them that when the said John Zancopulo should be on shore the said Zanni Companis should be her master, and have the control of her and of her affairs. The answer then continued as follows:

3. As to the third and fourth articles of the said petition, the Turliani, after leaving Curhaven, met with contrary winds, in consequence of which the said Companis, who was then her master and had the management of her affairs, took her into North Shields, where she arrived, as in the said petition stated. The said Companis was then still owner of a moiety of the Turliani. On her so arriving at Shields she was in want of caulking and repairs to her upper works, and she was not metallised. The plaintiff was not aware of any such directions having been given by Zancopulo to Companis, as stated in the said petition, until the hearing of the reference in this cause by the registrar.

4. As to the fifth article of the said petition: After such arrival at Shields, the said Companis, being such master and part owner of the Turliani and having the management of her affairs, chartered her to proceed on a voyage to Buenos Ayres, and he employed the plaintiff to do the necessary caulking and repairs to the Turliani, and to sheath her with yellow metal, and the plaintiff accordingly, by the direction of the said Companis, and of

the surveyors employed by or on behalf of her owners or underwriters, did such caulking and repairs, and sheathed her with yellow metal, and the sum allowed by the registrar is the amount of the plaintiff's account for such caulking repairs and metallising.

5. As to the sixth and seventh articles of the said petition: In order that the Turliani might perform either the voyage contemplated by Zancopulo, which was a voyage to Sierra Leone, and other places on the voyage to Buenos Ayres, it was necessary to metal her, notwithstanding that she was iron-fastened. It was not imprudent or improper to metal her, provided proper precautions were taken to prevent galvanic action, and proper precautions were taken by the plaintiff, who knew the said vessel was iron-fastened, to prevent such galvanic action. The precautions taken were such as are usual in metallising iron-fastened vessels. The expense of metallising was thereby necessarily larger than it would have been if the Turliani had been a copper fastened vessel. Save as herein appears, the plaintiff denies the truth of the allegations in the said sixth and seventh articles.

6. As to the eighth article of the said petition: The plaintiff stated that after the Turliani came into dock he found that she was an iron-fastened ship, and in the sense that it would have been better to have replaced the iron fastenings with copper, if possible, before metallising the vessel, he stated that he was aware of the imprudence of metallising her—meaning that it would be imprudent, unless proper measures were taken with regard to the bolts—and he stated, that in consequence of Companis and the surveyors of the vessel directing her to be metallised, iron-fastened as she was, and ordering that before placing the metal on the vessel he should take the usual precautions, namely, those of covering the heads of the iron bolts with white lead, and then placing pieces of sheet lead over each bolt, and nailing such pieces on with copper or yellow metal nails; he followed such orders and took such precautions. Save as herein appears, the plaintiff denies the truth of the said eighth article.

7. The plaintiff submits that his said claim was properly allowed by the registrar, and that it is entitled to priority over the claim of the defendants as mortgagees.

The answer prayed the right honourable the judge to confirm the report of the registrar, and to reject the prayer of the said petition.

The pleadings in objection to the report were thereupon concluded.

June 8, 1875.—Cohen, Q.C. (*J. C. Mathew* with him) for the defendant (the mortgagee), stated that he was unable to urge any good reason against the report, and that he must abandon the objection.

E. C. Clarkson for the plaintiff.

Sir R. PHILLIMORE.—I have very carefully read through the case, the facts of which all appear upon the printed papers, and I have come to the same conclusion. Subject to any argument which I might have heard, I was unable to see any reason whatever for disturbing the report, which seems to me to be quite correct, and the reasons for which are sound.

Proctor for the plaintiffs in causes Nos. 6877 and 6895, *H. C. Coote*.

Solicitors for the plaintiffs in cause No. 6893, *Clarkson, Son, and Greenwell*.

Solicitors for the plaintiffs in causes Nos. 6911, 6913, 6918, 6919, and 6961, *Ingledeu, Ince, and Greening*.

Solicitors for the mortgagee, *Pritchard and Sons*.

SUBJECTS OF CASES.

ABANDONMENT.

See *Carriage of Goods*, No. 38—*Marine Insurance*, Nos. 1, 2, 29, 31, 33, 38, 39, 46, 48—*Salvage*, Nos. 19, 11, 13, 10, 21.

ADMIRALTY COURT.

See *Carriage of Goods*, No. 11—*Collision*, Nos. 6, 37, 34, 38, 39—*County Courts Admiralty Jurisdiction*, Nos. 1, 2, 3, 4—*Damages*, No. 1—*Jurisdiction*, No. 1, 2, 3—*Master's Wages and Disbursements*, Nos. 2, 12, 14—*Necessaries*, No. 1, 5—*Practice*, Nos. 1, 2, 3, 4, 5, 6, 7, 9, 10, 13, 14—*Salvage*, Nos. 1, 2, 3, 4, 5, 6, 7, 8, 12, 14, 17, 18—*Wages*, Nos. 1, 2, 4, 5.

ADMIRALTY COURT ACTS.

See *Jurisdiction*, Nos. 1, 2, 3—*Salvage*, No. 12.

ADVANCES.

See *Bottomry*, Nos. 1, 2—*Carriage of Goods*, No. 18—*Charter party*, No. 1—*Marine Insurance*, No. 43—*Necessaries*, Nos. 3, 4.

ADVICES.

See *Marine Insurance*, No. 4

AGENTS.

See *Broker's Lien—Carriage of Goods*, Nos. 40, 43—*Marine Insurance*, Nos. 6, 17, 29, 30, 35, 36—*Necessaries*, No. 4—*Practice*, Nos. 13, 14—*Sale of Ship*.

ANCHOR.

See *Collision*, Nos. 19, 33, 34—*Navigable River*, Nos. 1, 2, 4.

APPEAL.

See *Marine Insurance Association*, No. 3—*Practice*, Nos. 1, 2, 3, 4—*Salvage*, No. 14.

APPEARANCE.

See *Collision*, No. 37—*Mortgages*, No. 1—*Salvage*, No. 7.

APPROPRIATION.

See *Marine Insurance*, No. 22.

ARREST OF SHIP.

See *Collision*, No. 40—*Jurisdiction*, No. 2—*Necessaries*, No. 1—*Practice*, Nos. 5, 6, 7.

ASSIGNEES.

See *Bills of Lading*, Nos. 2, 3—*Carriage of Goods*, Nos. 1, 2, 3, 4, 5—*Jurisdiction*, No. 2.

"AT AND FROM."

See *Marine Insurance*, Nos. 3, 12, 28, 45.

VOL. II., N. S.

ATTACHING OF LIEN.

See *Necessaries*, No. 1.

ATTACHING OF POLICY.

See *Marine Insurance*, No. 3, 28, 45

ATTORNEY.

See *Practice*, No. 14.

AVERAGE.

See *Carriage of Goods*, Nos. 39, 35—*General Average—Marine Insurance*, Nos. 24, 25.

AVERAGE STATEMENT.

See *Jurisdiction*, No. 4—*Marine Insurance*, Nos. 24, 25.

BAIL.

See *Salvage*, No. 7.

BARRATRY.

See *Carriage of Goods*, Nos. 12, 21, 22.

BILLS OF EXCHANGE.

Presentation for acceptance—Representation—Forgery.—Where a bank present bills of exchange for acceptance to the drawers with a representation that they hold bills of lading to cover them, this does not amount to a representation that the bills of lading are genuine, and even if it turns out that they are forged, the acceptors are not released from their liability. (V. C. B.) *Baxter v. Chapman and others*.....page 170
See *Broker's Lien—Carriage of Goods*, Nos. 3, 4—*Hypothecation—Marine Insurance*, No. 6.—*Ship-building Contract*.

BILLS OF LADING.

1. Goods belonging to several merchants—One bill of lading—Objection to—Waiver.—Where goods ordered by merchants against their acceptance are shipped to them under one bill of lading with other goods not ordered by them, they waive any objection to the bill of lading by writing to the shippers on learning the fact of the shipment that they should send them copies of the bill of lading and other documents, treating the contract as subsisting. (Ex. Ch. from C.P.) *The Imperial Ottoman Bank v. Cowan*..... 57, 418
2. "Order or Assigns" omitted—Effect of—No notice of trust—Indorsees—Consignor and consignee.—The mere omission of the words "or order, or assigns," in a bill of lading, does not of itself affect the parties having the legal and equitable interest in goods as indorsees and holders with constructive notice of a trust existing under the arrangements between the consignor and consignee, and is not such an omission as

SUBJECTS OF CASES.

- ought to have excited the suspicion of the holders and put them on inquiry as to the said arrangements. (*Priv. Co.*) *Henderson and another v. The Comptoir D'Escompte de Paris* page 98
3. "Order or assign" — "Negotiable instrument." — *Semble*, that in order to make bills of lading negotiable, some such words as "or order, or assign," ought to be in them. (*Priv. Co.*) *Id.* 98
- See *Carriage of Goods*, Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 20, 21, 22, 24, 27, 28, 29, 32, 30, 41, 42 — *Charter-party*, No. 1 — *General Average*, No. 1.
- BLOCKADE.**
- See *Marine Insurance*, Nos. 38, 39.
- BOTTOMRY.**
1. *Master's liability on bond*. — In the absence of any special agreement to that effect, the master of a ship does not incur any personal liability to repay to a bottomry lender the sum borrowed by him on bottomry, where the bottomry bond becomes due by the safe arrival of the ship and the ship and freight prove insufficient to discharge it in full. (*U. S. Dist. Ct. East. Dist. of N. Y.*) *The bark Irma* 155
2. *Master's liability—Advances—Implied contract—Extinguishment*. — The implied contract of the master, arising under the general rule of the maritime law, out of an advance of money for the ship, is extinguished when a lawful contract of bottomry has been made and the debt has been put at risk. (*U. S. Dist. Ct. East. Dist. of N. Y.*) *Id.* 155
- See *Marine Insurance*, No. 43 — *Master's Wages and Disbursements*, Nos. 12, 13.
- BROKERS.**
- See *Broker's Lien—Marine Insurance*, No. 6.
- BROKER'S LIEN.**
- Retaining mate's receipts—Bills of lading given by master*. — Brokers purchasing on their own credit cotton for merchants for shipment do not, by retaining the mate's receipts endorsed to them by the merchants, keep their lien upon the cotton after the cotton has been shipped on board a ship belonging to the merchants and bills of lading have been signed by the master, so as to entitle them to claim either as against bankers holding the bills of lading as security for advances made against the cotton, or against the shipowners for the default of their master (his having no notice of the lien) in signing the bills of lading without having the mate's receipts returned to him. (*V. C. B.*) *Huthwaite v. Laing* 170
- BUOY.**
- See *Collision*, No. 32 — *Navigable River*, No. 4.
- CARGO.**
- See *Bill of Lading—Broker's Lien—Carriage of Goods*, Nos. 2, 3, 8, 9, 10, 12, 13, 14, 16, 17, 18, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 43 — *Charter-party*, Nos. 2, 3 — *General Average*, No. 1 — *Interest—Marine Insurance*, Nos. 3, 4, 5, 6, 7, 8, 9, 10, 11, 37, 38, 51, 52.
- CARRIAGE OF GOODS.**
1. *Bill of lading—Assignee—Rights of*. — An assignee of a bill of lading may have a better right against the shipowner to recover for breach of the contract of carriage than the assignor. (*Adm.*) *The Emilian Marie* 514
2. *Bill of lading—Assignee—Rights of—Arrangement between shipper and consignee—Notice*. — An assignee of a bill of lading, who has given valuable consideration without notice of any arrangement between the shipper and the various consignees giving priority to the holders of the other bills of lading in the case of short shipment of cargo in bulk, may claim from the shipowner full delivery of the cargo specified in his bill of lading, even though the arrangement has been made without the privity of the shipowner, and the master has indorsed the bill of lading with the words "weight unknown." (*Adm.*) *Id.* 514
3. *Bill of lading—Assignee—Rights of—Notice of bankruptcy of consignee—Putting on inquiry—Priority*. — A letter written by an assignor of a bill of lading to his assignee, informing the latter that the bankruptcy of the shipper and consignee (who had indorsed to the assignor) may possibly interfere with the proceeds of the shipment, so far as the assignor is concerned; and that he thinks it best to prevent the possibility of a hitch to send the bill of lading for the assignee to deal with, the latter having advanced money thereon, is not such a notice as will oblige the assignee to make inquiries as to the quantity of and the various rights to the cargo, so as to bind the assignee with constructive notice of any arrangement between the shipper and various consignees, giving priority to the holders of other bills of lading in the case of short shipment. (*Adm.*) *Id.* 514
4. *Bill of lading—Assignee—Rights of—Master signing as agent of charterer*. — The rights of an innocent holder of a bill of lading are not affected by the fact that the master signed as agent for the charterers, unless the holder has notice of the charter party, or that the master signed in that capacity. (*Adm.*) *Id.* 514
5. *Bill of lading—Assignment—Valuable consideration*. — A bill of lading assigned in part payment of a debt already due from the assignor to the assignee, is assigned for valuable consideration. (*Adm.*) *Id.* 514
6. *Bill of lading—Bills of Lading Act, sect 3—Measurements—Estoppel*. — By 18 & 19 Vict. c. 111, a 3, "every bill of lading is conclusive evidence of the shipment as against the person signing it." *Semble* that by this statute the bill of lading is not conclusive evidence as to the accuracy of measurements, and does not estop the person signing from disputing those measurements. (*Ex.*) *Blanchet v. Powell's Lincolnton Collieries Company Limited* 224
7. *Bill of lading—"Good order and condition"—"Quality and quantity unknown"*. — No admission as to quality—*Damage to cargo*. — A bill of lading, stating goods to have been shipped in good order and condition, but indorsed by the master with the words "quality and quantity unknown," does not admit as against the shipowner that the goods were shipped in good order and condition. (*Adm. and P.C.*) *The Ida* 158, 551
8. *Bill of lading—"Liberty to tow and assist vessels in all situations"—Deviation to assist—Loss—Liability of shipowner*. — A ship carrying goods under a bill of lading containing the usual exceptions and also a clause "liberty to tow and assist vessels in all situations," is at liberty to deviate for the purpose of rendering salvage assistance to property in danger, and if in so doing she herself is lost with her cargo by an excepted peril the shipowners are not responsible to the owners of cargo for the loss sustained by them. (*Ex.*) *Stuart and another v. The British and African Steam Navigation Co.* 497

SUBJECTS OF CASES.

9. *Bill of lading—Trans-shipment—Shipper's risk—Loss—Excepted perils—Liability.*—Where goods are shipped for Benin, on the West Coast of Africa, under a bill of lading containing the usual exceptions, and a memorandum "the within goods to be trans-shipped at Bonny, and forwarded by branch steamer at ship's expense, but shipper's risk," the words "at ship's expense but shipper's risk," apply to the trans-shipment of the goods at Bonny, and not to the forwarding of them from Bonny to Benin, and impose no new obligation on the shipowner after trans-shipment, and if a loss takes place within the excepted perils the shipowner is not responsible. (*Ex. Id.* ... page 497)
10. *Bill of lading—Signature by master—Shipowner not estopped—Charter party—Full cargo to be shipped—Short shipment—Payment by ship owner to charterers—No right of recovery.*—The signature of a master to a bill of lading does not estop the shipowner, and hence where by a charter-party it is agreed that a ship shall take on board a full cargo, to be provided by the charterers, and proceed therewith to a foreign port, the master to sign bills of lading for the weight of the said cargo put on board, as presented by the charterers, and without prejudice to the tenor of the charter-party, and cargo is shipped, and the master signs bills of lading presented by the charterers for a greater quantity than is actually shipped, there is no warranty on the part of the charterers that the bill of lading is indubitably correct, nor is the shipowner under any obligation to pay the consignees anything to make up for the apparent short shipment; hence no action will lie by the shipowner against the charterer to recover back money so paid to consignees. (*C. P.*) *Brown and others v. Powell Duffryn Steamship Company* 578
11. *Bill of lading—Charter party—Excepted perils—Damage to cargo—Charterers—Seizure.*—That charterers proceeding in a Court of Admiralty jurisdiction, for damage to cargo carried under a bill of lading, containing no exceptions, but signed by the master in pursuance of a charter-party containing the usual exceptions (perils of the sea, &c.), are bound by those exceptions. (*Adm.*) *The Catharine Chalmers* 598
12. *Bill of lading—Excepted perils—"Thieves"—Construction of—Liability of shipowner—Ours of proof.*—Where goods are shipped under a bill of lading excepting, amongst other things, "robbery, thieves, barratry, of the masters and mariners," and containing a clause that "the shipowner is not to be liable for any damage to any goods which is capable of being covered by insurance," the words "damage to any goods" in the insurance clause does not apply to the case of total abstraction of the goods and the word "thieves" applies, as in policies of marine insurances, only to thieves external to the ship, and the onus of showing that a loss occurring, whether by thieves robbery or barratry comes within one of the exceptions, lies upon the shipowner and not the shipper; hence if the goods totally disappear and the shipowner does not show the loss to have been occasioned by one of the excepted perils, the shipper will be entitled to recover their value. (*Q. B.*) *Taylor and others v. The Liverpool and Great Western Steam Company* 275
13. *Bill of lading—Excepted perils—Contagious Diseases (Animals) Act 1869—Liability of shipowner.*—Where sheep, shipped on board a ship for importation into England under a bill of lading providing that they are shipped at shipper's risk, and that the shipowner is not answerable for washing or throwing overboard, are washed overboard on the voyage in a gale of wind, the Contagious Diseases (Animals) Act, 1869, under which the Privy Council are empowered to make and have made an Order in Council requiring foot-holds to be provided for the purpose of "protecting animals brought by sea to ports in Great Britain from unnecessary suffering during the passage and when landing," does not give a right of action to the owners of the sheep to recover for their loss happening in consequence of the breach of the statutory duty, on the ground that the object of the statute was not to benefit the owners, but to prevent the introduction of contagious diseases into this country. (*Ex.*) *Gorris and another v. Scott* page 282
14. *Common carrier—Barge owner—Lighterman—Liability of—Goods carried for one person at a time—No special contract.*—Where a barge-owner makes it his business to let out barges on hire under the care of his own servants to any persons applying for them as required from time to time to carry cargoes, not between any fixed termini but to and from different points on a navigable river as each customer requires, each voyage being under a separate engagement made for that voyage, and each barge being let to and carrying the cargo of one customer only at a time; such a barge-owner carries on the ordinary employment of a lighterman, and, as such, incurs the liability of a common carrier in respect of the goods he carries, and is liable for all loss sustained except by the act of God or the Queen's enemies. *Quere*, however, whether such a carrier would be liable for refusing to receive and carry goods. (*Ex. Ch. from Ex.*) *The Liver Alkali Works (Limited) v. Johnson* 332
15. *Charter-party—Demurrage—Ship "to be loaded with usual dispatch"—Charterers—Engagements causing delay—Previous knowledge of master—Dock regulations.*—Where by a charter-party it is mutually agreed between shipowner and charterer that the shipowner's ship is "to be loaded with the usual dispatch of the port, or if longer detained to be paid 40s. demurrage," and that the ship is to be loaded at a named dock, by the regulations of which no shipper could have more than three vessels loading in dock at the same time, and, by reason of the charterer having more than three vessels entered in their books which had to be loaded in the dock before that ship, the ship is delayed an unreasonable time, the contract to load with the usual dispatch of the port must be considered as an absolute contract to load with that dispatch and within a reasonable time, independently of any other engagements of the charterers, even if it can be shown that at the time of the making of the charter-party the shipowner knew that such previous engagements existed, and the shipowner can recover demurrage. (*Q. B.*) *Ashcroft v. Crow Orchard Colliery Company* 397
16. *Charter-party—Reasonable cargo—Unseaworthy ship—Unreasonable delay—Frustration of contract—Dissolution.*—Where a charter-party is entered into, the shipowner is bound to provide a reasonably fit ship to carry a reasonable cargo of the kind specified in the charter-party, and the charterer is bound to provide such a cargo; and if such a cargo is provided, and the ship after loading turn out unfit to carry such cargo and consequently unseaworthy, and has to be unloaded and cannot be made fit to carry the cargo within a reasonable time, the charterer is absolved from the performance of his contract and is entitled to recover from the shipowner the loss sustained by him in consequence of the ship-

SUBJECTS OF CASES.

- owner's default. (Ex. Ch. from C.P.) *Stanton v. Richardson; Richardson v. Stanton*.....page 288
17. *Charter-party—Delay of outward voyage by excepted perils—Arrival after expected time—Contract not wholly frustrated—Duty of charterer to load.*—Where by a charter-party it is agreed that a ship shall proceed forthwith to a foreign port and there load a cargo for the charterers, taking an outward cargo for the benefit of the shipowner, subject to usual perils excepted in the charter-party, the exception of the perils of the sea applies to the outward voyage; and if the vessel proceeds on her outward voyage as quickly as possible, consistently with the operation of the perils excepted, and arrives within such time that there has been no such delay as to frustrate the object of the contract from a commercial point of view, the charterer is bound, notwithstanding that the ship arrives at the outward port after the expected time, to provide the stipulated cargo at the port; and if he neglects to do so he is liable to an action for not loading according to charter-party, although he may offer a cargo at another neighbouring port. (C.P.) *Hudson and another v. Hill and another*..... 278
18. *Charter-party—Freight—Advances before voyage begins—Not freight—No lien for.*—A charter-party, providing that the freight shall be at certain specified rates, and that a certain sum shall be advanced in cash on signing bills of lading and clearing at the custom house of the port of shipment, and that for the security and payment of all freight, dead freight, demurrage, and other charges, the master or owners shall have an absolute lien and charge on the said cargo or goods laden on board, does not, after the loading and clearing of the ship, but before she sails and before the signing of the bills of lading, give the master and owners a lien upon the cargo loaded for the sum agreed to be advanced, such advance not being freight, and no freight having been earned. (L. C. & L. JJ.) *Ex parte Nyholm; Re Child*..... 165
19. *Charter-party—Demurrage—Lay days—Civil commotion, &c. excepted in favour of charterer—Default in loading—What will exempt.*—Where a charterer by his charter-party undertakes to load a ship within certain given lay days "accidents or causes occurring beyond the control of the shippers or affreighters, which may prevent or delay her loading or discharging, including civil commotion, strikes, riots, stoppage of trains, &c., always excepted," or to pay demurrage, he cannot excuse default in loading within the lay days by giving evidence of general disturbance and cessation of work in the district about the time; but to exempt himself from liability must show a disturbing cause, actually preventing the loading of the particular ship. (Adm.) *The Villosa Belle*..... 228
20. *Damage to cargo—Bill of lading—Excepted perils—Damage by other causes—Liability of shipowner.*—A shipowner carrying goods under a bill of lading, by which he contracts to deliver in good order and condition, certain perils excepted, is bound to deliver in that condition, unless prevented by those perils, and is responsible for any damage to goods occasioned otherwise than by those perils. (Adm.) *The Chacea*..... 600
21. *Damage to cargo—Bill of lading—Perils of the sea—Barbarity of crew—Excepted peril—Liability of shipowner.*—Injury to cargo damaged by sea water during a voyage, in consequence of the barbarous act of the crew in boring holes through the sides of the ship for the purpose of scuttling her, is not a loss by perils of the sea, within the meaning of the usual exception in a bill of lading, such as will exempt the shipowner from his liability for the damage under his contract to deliver in good order and condition. (Adm.) *Id.*.....page 600
22. *Damage to cargo—Perils of the sea—Bill of lading—Policy of insurance—Barbarity—Scuttling ship.*—Even if damage to cargo by sea water caused by the barbarous act of the crew in boring holes through the ship for the purpose of scuttling her, loss would come within the meaning of the words, "perils of the sea," in a policy of insurance, it is not included in those words as used in a bill of lading. (Adm.) *Id.*..... 600
23. *Damage to cargo—Condition at time of shipment—Onus of proof.*—In a suit against shipowners for damage to cargo, the onus is upon the plaintiffs to show in the first instance that the goods were shipped in good order and condition, before they can call upon the shipowners to show excuse for the injury done to the goods (overruled, see p. 551). (Adm.) *The Prosperina Palao*..... 158
24. *Damage to cargo—Bill of lading—"Good order and condition"—Quantity and quality unknown—"Condition at time of shipment—Onus of proof.*—There is no rule of law by which the consignee of goods under a bill of lading, stating goods to have been shipped in good order and condition, but containing the words "quantity and quality unknown," is bound to show that the goods were shipped in good order and condition, or fail in his suit against the shipowner for damage done to the cargo; but failing proof of the condition of the cargo when shipped, the consignee is bound to show that the damage which is sustained is traceable to causes for which the shipowner is responsible. *The Prosperina Palao* (note, p. 158) disapproved of. (P.C.) *The Ida* 551
25. *Damage to cargo—Straining—Perils of the sea excepted—Stowage.*—Damage to cargo caused by the coking of wine from casks through straining in bad weather is damage occasioned by perils of the sea, and the shipowners are, under the usual exceptions, exempt from liability therefore where the cargo is properly stowed, or is stowed in such a manner that the master is not responsible for bad stowage. (Adm.) *The Catharina Chalmers* 593
26. *Damage to cargo—Charter-party—Stowage by charterer's stevedores—Liability.*—Where a charter-party stipulates that a vessel is "to be stowed by charterers' stevedores, at risk and expense of vessel," and a cargo is supplied by the charterers and is stowed by their stevedores, the shipowner is not responsible for damage occasioned by bad stowage. *Blacic v. Stenbridge* (6 C.R., N.S. 874) followed. (Adm.) *Id.*..... 208
27. *Delivery of goods—Port—Place of delivery—Bill of lading—Freight—Shipowner's duties and rights.*—The duty of a shipowner to deliver goods at the usual place of delivery of a port, to which he has contracted to carry under a bill of lading stipulating only that the goods shall be delivered at the port without any particular part of the port being named, is an implied duty only, and does not amount to an engagement to go to the usual place in all events and under all circumstances. The shipowner's express contract is to deliver in the port, and if it be impossible to deliver at the usual place of delivery by reason of the prohibition of the port authorities, or other accidental cause, the contract is not dissolved, but may be performed by the master being ready to give delivery at some other convenient part of the port, and keeping the cargo in that place for a reasonable time ready for delivery, and the shipowner will thereupon be entitled to his freight. (P.C.) *Brown (app.) v. Gandet (resp.); Cargo ex Argos*..... 6

28. *Delivery of goods—Bill of lading—Landing of goods—Shipowner's duty.*—A bill of lading by which a shipowner contracts to deliver at a port, "the goods to be taken out within twenty-four hours after arrival or pay demurrage," does not absolutely require that the shipowner should be ready, not merely to deliver, but also to land the goods in the port, or that the merchant should be able, on receiving them, to land them, but it casts upon the merchant the duty of taking the goods out of, or at all events from alongside the ship; hence, if it should be impossible to land the goods, by reason of a prohibition of the port authorities, the shipowner may still perform his part of the contract if he be ready to deliver the goods to the merchant in the port without landing them. (P.C.) *Id.* page 6
29. *Delivery of goods—Demurrage—Expenses—Bill of lading—Default of consignee.*—When goods carried under a bill of lading, by which the shipowner is to deliver at the port of destination, and the merchant is to take them out within twenty-four hours or pay demurrage, cannot be landed at, but may be delivered within that port, the shipowner cannot recover from the merchant demurrage and expenses claimed in respect of attempts to land the goods at other ports, before he is ready to give delivery at the port of destination; but he may recover expenses incurred, in consequence of the default of the merchant in taking delivery, after he is ready to give delivery at that port, in hiring a vessel to store the goods, if thereby the merchant is relieved from the demurrage payable in respect of the detention of the ship. (P.C.) *Id.* page 6
30. *Delivery of goods—Freight—Time of payment—General average—Demurrage—Lien—Detention of cargo by master—Liability.*—Where, by a charter-party and bill of lading, freight is "to be paid on unloading and right delivery of the cargo," the master having a lien by common law for freight and general average, and a lien by contract for demurrage, the payment of the freight and the delivery of the goods are concurrent acts in which all that is required from the owner of the cargo is readiness and willingness to pay at the time of delivery; and before paying any sum for general average, the owner of cargo is entitled to be satisfied that the amount claimed is the result of a proper adjustment; and if the owner of cargo on arrival of the ship in port, and before discharge, refuses to pay the amount claimed for freight and general average before the amount due is finally ascertained, but offers to pay a large proportion of the freight, and there being no doubt as to his solvency, to sign an average bond for the payment of the general average when ascertained, but the master, nevertheless, insists upon retaining the cargo on board ship until his lien for freight and general average is satisfied, detention by the master is not wrongful, but, *quære*, can he impute the delay in the discharge to the owner of cargo or claim for demurrage on that ground? (P.C.) *Meibrodt v. Pittsmon; The Energic* 555
31. *Delivery of goods—Mate's receipt—Short delivery—Liability of shipowner—Freight.*—Where a mate gives a receipt purporting to represent the amount of goods shipped on board a ship, and the charterers pay the consignee for the amount so represented, and also pay the master freight on that amount, but a smaller amount is delivered; the giving of the receipt is not such an act of negligence in itself as will entitle the charterers to recover from the shipowner the amount paid in excess to the consignee if all that was actually shipped was delivered; but the charterers may recover from the shipowner the amount of freight overpaid. (Ex.) *Buddulph and others v. Bingham* page 225
32. *Delivery of goods—Bill of lading—Where responsibility of shipowner ceases.*—Where goods shipped under a bill of lading containing the words, "To be delivered from the ship's deck, where the ship's responsibility is to cease," arrive at their port of destination, and the usage of that port is that goods are unloaded by the dock company, and then that the consignee should send lighters into which the goods are delivered also by the dock company and also, if within a specific time, at the expense of the shipowner, the shipowner is not responsible for the loss of any of the goods after they have been unloaded on to the quay in accordance with the usage. (C.P.) *Petrocchino and others v. Bell* 310
33. *Delivery of goods—Merchant Shipping Act Amendment Act 1862, sect. 67.—Landing and warehousing cargo—Default of consignee—Willful default and necessary.*—To justify the master of a ship in landing or warehousing a cargo under the Merchant Shipping Act Amendment Act 1862 (25 & 26 Vict. c. 63), s. 67, by which it is enacted that where the owner of goods imported "fails to land and take delivery thereof, and to proceed therewith with all convenient speed" by the time named in the charter-party, &c., "the shipowner may land and unship the said goods," and warehouse them, it is not necessary that the failure of the owner of cargo should be a "willful default" in landing, &c.; but the master is at liberty to land the goods whenever the delivery of them to the owner within the proper time has been prevented by circumstances, whether the latter is or is not to blame. (P.C.) *Meibrodt v. Pittsmon; The Energic* 555
34. *Delivery of goods—Merchant Shipping Act Amendment Act 1862, sect. 67.—Landing and warehousing cargo—Lien—Stop order—Excessive amount—Wrongful detention.*—The provisions of the Merchant Shipping Act Amendment Act 1862 (ss. 67 and 68), giving power to a master to land and warehouse a cargo, and give notice of his lien to the warehouseman, enable the master to retain his lien but do not extend it to charges not due at the time of landing, and if the master willfully, and for the purpose of exacting from the cargo owner charges for which he has no lien, places upon the goods a stop order for an excessive amount, which the cargo owner is compelled to pay before he can obtain his goods, the landing and detention of the goods for that amount is a wrongful act, for which the owner of cargo may recover. (P.C.) *Id.* 555
35. *Delivery of goods—Merchant Shipping Act Amendment Act 1862, sect. 67.—Landing and warehousing cargo—Lien for freight and general average—Stop order—Payment of part.*—Where a master lands and warehouses goods under the Merchant Shipping Act Amendment Act 1862, and to preserve his lien for freight and general average, places on them a stop order for the amounts claimed, and one of those amounts is paid by the cargo owner, it becomes the duty of the master to reduce the stop order to the amount for which he can after such payment reasonably claim a lien, and his refusal to do so amounts to a wrongful detention of the cargo. (P.C.) *Id.* 555
36. *Delivery of goods—Merchant Shipping Act Amendment Act 1862, sect. 67.—Lien—Claim exceeding amount due.*—*Seriale*, that a master is not liable merely because he lands and warehouses goods under a stop order for a sum in excess of

- the amount due to him if he *bona fide* claims a lien for that sum. (P.C.) *Id.* page 555
37. *Delivery of goods—Mersey Docks Act Consolidation Act 1858, sect. 36—Master porters—Short delivery—Liability.*—The Mersey Docks Act Consolidation Act 1858, sect. 36, making the master porters, appointed under that Act to discharge cargoes in the Mersey Docks, responsible for any loss, damage, or injury sustained by the cargoes discharged by them during the receiving, weighing, and loading off by the master porters or their servants, does not in any way discharge the shipowner from his liability existing before he delivers to the master porter, and his responsibility for short delivery remains unaffected by the Act. (Adm.) *The Emilien Marie.* 514
38. *Freight—Abandonment of ship and cargo by crew—Brought in by salvors—Right of shipowner to recover freight—Sale of cargo by court—Refusal of shipowner to consent.*—Where a ship, injured by collision without fault of her master and crew, is abandoned by them, and is afterwards taken possession of and brought in safely into port by salvors, who institute a suit against ship and cargo, the shipowner, having by the abandonment put an end to his contract of carriage, loses all claim to have the cargo put into his possession to enable him to carry it on and so earn his freight, and all claim to be paid full freight out of the proceeds of the cargo, if sold by order of the court. Nor can the shipowner have any claim for *pro rata* freight unless there be a new contract express or implied to pay the same, and if the shipowner refuses to consent to a sale of the cargo by the court, when applied for by the salvors and owner of cargo, unless he be paid full freight, no such contract can be implied. (Adm.) *The Kathleen.* 367
39. *Freight—Charter and sub-charter—Bills of lading signed without knowledge of sub-charter—Lien for freight—Delivery without prepayment—Right of recovery of freight.*—Where the master of a ship enters into a charter-party with a shipbroker by which it is agreed that goods shall be carried at a certain named freight, and the shipbroker, without authority from the master, enters into a second charter-party, relating to the same ship and to goods of the same character and quantity, with merchants agreeing that the goods shall be carried to the same port but at a higher rate of freight than that named in the first charter-party; and it is agreed in both charter-parties that the freight shall be prepaid and that the shipowner shall have an absolute lien for freight, and the merchants ship the goods without knowledge of the first charter-party; and the master, without knowledge of the second charter-party, receives the goods and signs bills of lading for them, making the freight payable as per charter-party, and without taking prepayment carries and delivers the goods; the shipowner cannot recover the freight from the merchant after payment of the same by the latter to the shipbroker, because there is no contract between the shipowner and the merchant. There being no *consensus ad idem* the bill of lading is no contract, as it does not refer in the minds of the shipowner and merchant to the same charter-party, nor is there any implied contract to pay freight other than as agreed upon by the charter-party signed by the merchant. (Q.B.) *Suselt v. Tiden.* 307
40. *Freight—Charter-party—Lump freight—Short delivery—Excepted perils—Rights of shipowner.*—Where by a charter-party, it is agreed that a ship shall load a full and complete cargo to be provided by the charterers or their agents, freight to be paid in a lump sum fixed by the charter-party, and after the loading of the cargo part thereof is lost without default of the shipowner, by perils excepted in the charter-party, but the remainder is duly delivered according to the charter-party, the charterers are not entitled to deduct from the lump freight a sum proportioned to the amount of cargo which has been so lost; but the shipowner is entitled to his full freight. *The Norway* (B. & L. 404) followed. *Robinson v. Knight* (C.P.) page 19
- Merchant Shipping Company (Limited) v. Armistage* (Q.B. and Ex. Ch.) 51, 185
41. *Freight—Charter-party—Freight payable on invoice quantity shipped—Bill of lading—Quantity and quality unknown—Right of shipowner.*—When a ship is chartered to load a cargo of grain and deliver at a British port by a charter-party, by which freight is to be paid at so much for a given quantity shipped, and in the event of any part of the cargo being delivered in a damaged condition the freight to be payable "on the invoice quantity taken on board, as per bill of lading, or half freight on damaged or heated portion, at captain's option," and the cargo is shipped under a bill of lading naming the quantity shipped, but the captain, before signing the bill of lading, writes thereon "quantity and quality unknown," signing of this memorandum will not take away the captain's right to be paid freight on the invoice quantity, if on arrival he claim by notice to the indorsee of the bill of lading to be paid in that way. (C.P.) *Tully v. Terry.* 61
42. *Freight—Bill of lading—Lump freight—Short delivery.*—The whole freight, if a lump sum, named in the bill of lading is payable to the shipowner carrying under it, although a less quantity of goods than the quantity named in the bill of lading be delivered. (Ex.) *Blanchet v. Powell's Llanthwit Collieries Company Limited.* 224
43. *Master—Powers and duties of—Agent for shipper—Right to recover expenses.*—The master of a ship being, in many cases of accident and emergency, the agent from necessity of the owners of cargo where he cannot obtain instructions from them, has not only the power, but a duty cast upon him to act in such cases for the safety of the cargo in such manner as may be best under the circumstances in which it may be placed, and is entitled as a correlative right to charge the owner of the cargo with the expenses properly incurred in so doing. The obligation on the part of the master to act for the merchant does not cease after a reasonable time for the latter to take delivery has elapsed, and hence, after such time, if it be impossible to land and warehouse the goods, or leave them at their port of destination, the master may, in the absence of all advice, carry or forward them to such place, even back to the port of shipment, as is most convenient to the owner, and charge him with the expense of so doing. (P.C.) *Brown (app.) v. Gaudet (resp.)* *Cargoes, Argos.* 6
- See Bills of Lading—Charter-party—Marine Insurance, Nos. 3, 23, 37, 38, 51, 52, 53.*
- CARRIERS.**
- See Carriage of Goods—Marine Insurance, Nos. 3, 4.*
- CAVEAT TO PREVENT RELEASE.**
- See Practice, No. 5.*
- CHARTERED FREIGHT.**
- See Carriage of Goods, Nos. 39, 40, 41—Marine Insurance, Nos. 19, 20, 21, 22, 23.*

SUBJECTS OF CASES.

CHARTERER.

See *Carriage of Goods*, Nos. 4, 11, 15, 16, 17, 18, 19, 26, 31, 39, 40—*Collision*, No. 17—*Marine Insurance*, No. 23—*Necessaries*, No. 3.

CHARTER-PARTY.

1. *Advances for disbursements—Indorsement on bills of lading—Insurance—Right to recover back.*—A charter-party stipulating "sufficient cash for ship's disbursements to be advanced the master against freight, subject to interest, insurance, and 2½ per cent. commission; and the master to endorse the amount so advanced upon his bills of lading," entitles the shipowner to rely upon an insurance of advances so made being effected by charterers, who, by the charter-party stipulate for and receive the right to charge the premium, and in case of the loss of the ship on her voyage the neglect to insure will preclude the charterers from recovering back the advances. (*H. of L. Se. App.*) *Watson and Co. v. Shankland and others*..... page 115
2. *Breach of contract to receive cargo—Other vessels engaged—Rise in price of goods—Damages.*—Where, by a charter-party, it is agreed that the shipowner shall have a ship ready at a certain time to receive a cargo for a foreign port, and the shipowner fails in the performance of his contract, and in consequence thereof the charterer is obliged to charter other vessels at a higher rate, and to pay a higher price for his cargo, the price having risen during the delay occasioned by the shipowner's default, the charterer is entitled to recover as damages against the shipowner the loss sustained by the chartering of the other vessels and the difference in the price of the cargo, provided that the shipowner does not show that the cargo has by reason of the rise in price become of greater value in the foreign port. (*Ex. Ch.*) *Featherstone v. Wilkinson* 31
3. *Charterer—Demurrage—Cesser of liability—Cargo loaded—Lien for freight and demurrage.*—Where a charter-party between shipowner and charterer provides a number of loading days and the rate of discharge per working day, that ten days on demurrage for all like days above the said days shall be paid at a specified rate per day, and that the charterer's liability shall cease when the ship is loaded, the captain or owner having a lien on cargo for freight and demurrage, the demurrage days mentioned include such days at both the port of loading and the port of discharge, and the charterer's liability, for all demurrage at the port of loading ceases on the ship being loaded. (*Ex. Ch. from Q.B.*) *Kirk v. Cory; Francesco v. Mistry* 593, 594n.
4. *Demurrage—Shipowner's lien—Detention beyond demurrage days.*—*Seemable*, the shipowner's lien for demurrage includes a claim for damages caused by detention beyond the demurrage days. (*Ex. Ch. from Q.B.*) *Kirk v. Cory* 593
5. *Warranty—Ship expected to be at a port.*—Where, by a charter-party, it is expressed that a ship "is expected to be at" a port on a given date, those words are in the nature of a warranty that the ship will be at the port named on that date, and an action is maintainable for a breach of that warranty. (*C.P.*) *Corking v. Massey*... 18
6. *Warranty—Ship "expected to be at a port"—Breach—Plea of knowledge of plaintiffs as to ship's engagements.*—A plea that at the time of making of the above agreement, the ship was engaged upon certain voyages, as was well known to the plaintiff, and that the charter-party was made subject to the condition that the ship

should with all convenient speed fulfil her said engagements, and then proceed to the named port, is a good plea to a declaration for breach of warranty. (*C.P.*) *Id.* page 18
See *Carriage of Goods*, Nos. 11, 15, 16, 17, 18, 19, 26, 39, 40, 41—*Interest—Marine Insurance*, Nos. 19, 20, 22, 23.

COAL DUES.

Banker coals.—*Tyne Coal Dues Act 1872—Liability for dues.*—Banker coals carried away from the port of Newcastle for the purpose of being consumed beyond the limits of the port, and for the use of the ship carrying them, are coals exported within the meaning of the Tyne Coal Dues Act, 1872, sect. 3, and the persons so exporting coals must pay the dues fixed by that section. (*Q. B.*) *Muller v. Baldwin* 394

COLLISION.

1. *Breach of regulations—Excuse of prior collision—Responsibility for prior collision to be considered.*—Where a ship seeks to excuse her failure to comply with the sailing regulations and with a seaman-like precaution, by showing that such a failure was in consequence of her being disabled in a prior collision, it is material to inquire whether the prior collision was due to her default, or was the result of inevitable accident. *Seemable*, if the prior collision be due to the default of the ship so seeking excuse, and if her subsequent failure to comply as aforesaid contribute to the collision proceeded for, she will be to blame therefor. (*Priv. Co.*) *The Kij benken* 213
2. *Crossing ships—Sailing ships—Closehauled—Luffing—Sailing Rules, Arts. 12 & 18.*—Where a ship close hauled is bound to keep her course luffing as close to the wind as she can without losing headway is not a deviation within Article 18 of the Regulations for Preventing Collisions at Sea, such as will render her liable for a collision with another vessel, whose duty it is to keep out of her way. (*Priv. Co.*) *The Aino; The Amelia* 96
3. *Crossing ships—Steamships—Taking pilots—Special circumstances—Sailing Rules, Arts. 14 & 19.*—Two vessels bearing down at the same time from different directions upon a well-known pilot station to take pilots on board are to be treated as crossing vessels within the meaning of Art. 14 of the Regulations for preventing Collisions at Sea, if their courses, if continued, would intersect; and the fact of their seeking pilots at the same place is not such a special circumstance within the meaning of Art. 19 as will take them out of the operation of the rule requiring that the ship which has the other on her own starboard hand shall keep out of the way of the other. (*P. C. Affirming Adm. Ct. Vol. p. 475*) *The Ada; The Scipio* 4
4. *Crossing ships—Steamships—Taking pilots—Keeping course—Sailing Rules, Arts. 14, 18, 19.*—Where a vessel is approaching a pilot station to take a pilot, and has, as regards another vessel doing the same thing, the right to keep her course she has a right to keep sufficient headway on her to give her steering way, so as to get on her proper course after taking a pilot, and is not bound within Art. 16 to stop and reverse. The other vessel is bound to stop and let her take her pilot or to take some other means of avoiding her. (*P. C.*) *The Ada; The Scipio* 4
5. *Crossing ships—Steamships—"Keeping out of way"—Porting—Stopping &c.—Sailing Rules, Art. 14.*—Art. 14 of the regulations for preventing collisions at sea, which provides that "if two vessels under steam are crossing so as to involve risk of

- collision the ship which has the other on her own starboard side shall keep out of the way of the other," is not to be construed so that "keeping out of the way" means in all cases porting; a vessel may within the meaning of that article keep out of the way by stopping, or by going ahead, or by starboarding, or by porting, or by going astern, as the circumstances of the case may require. (Priv. Co.) *The Nor*page 264
6. *Damage by salvor—Gross negligence—Liability.*—Where damage is inflicted upon a ship by another engaged in rendering salvage services to the former, the Court of Admiralty regards the negligence of the salvor less severely than it does the negligence of a vessel wholly unconnected with the injured vessel, but will condemn the salvor in the damage where he has been guilty of gross negligence and want of proper navigation. (Adm.) *The C. S. Butler; The Baltic* 237
7. *Danger of collision—Wrong manœuvre—Liability.*—A vessel which, having performed her own duty, is thrown into immediate danger of collision by the wrongful act of another is not to be held liable if at that moment she adopts a wrong manœuvre. (Priv. Co.) *The Nor* 264
8. *Fog—Ferry boats—Crossing river—Liability for damage.*—A steam ferry boat continuing to cross and recross the river Mersey during a dense fog takes upon herself the responsibility incident to such a course, and is not entitled to set up public convenience against the probability of loss of life and property; but she will be liable for any damage done to other vessels with which she may come into collision, provided those vessels take the precautions required by law to warn her of their position. (Adm.) *The Lancashire* 202
9. *Fog—Steamship—Duty to anchor—Liability.*—Where a steamship, whilst in a good and well-known anchorage ground, enters a dense fog, it is her duty to anchor at once; and if she neglects to do so, and continues her course, she will be to blame for a collision ensuing, provided that the other vessel has done all that the law requires. (Adm.) *The Otter* 208
10. *Fog—Signal—Bell—Horn—Sailing ship.*—Where a sailing vessel is motion during a thick fog, instead of blowing a fog horn rings a bell, there is a presumption that the failure to blow the fog horn contributes to the collision, and, as the burden of showing that it was in no degree occasioned by that failure lies upon the sailing vessel, it is impossible to rebut the presumption. (U. S. Sup. Ct.) *The Steamer Pennsylvania* ... 378
11. *Inevitable accident—Plea of—Onus of proof—Duty to begin.*—In a case of collision, where the defendants plead inevitable accident alone, it lies upon the plaintiff to show a *prima facie* case of negligence against the defendants, and the plaintiffs must therefore begin. (Adm.) *The Abraham* 34
12. *Inevitable accident—Duty to keep course.*—Disabled ship unable to keep out of way—*Sailing Rules, Art. 18.*—Where it is the duty of a ship to keep out of the way of another, but she is unable to do so by reason of being disabled in a former collision, and the other ship, being unaware of her disabled condition, continues her course, under Article 18, a collision ensuing is the result of inevitable accident. (Priv. Co.) *The Aimé; The Amelia* 96
13. *Launch—Reasonable precaution—Onus of proof.*—It is the duty of those who launch a vessel to do so with the utmost precaution, and to give such notice as is reasonable and sufficient, according to local circumstances, to prevent injury happening to other vessels from the launch, and the burden of proving that these things have been done lies upon them. (Adm.) *The Glen-garry*page 230
14. *Launch—Reasonable precaution—Notice of launch—General notice sufficient.*—Where in launching a vessel in a river the usual precautions taken in that river have been taken, and the usual general notice that the launch was about to take place has been given, the persons having charge of the launch have performed all they are required to do by law, and no specific notice of the exact moment of the launch is required. (Adm.) *Id.* 230
15. *Launch—Notice of—River Mersey.*—In the River Mersey to give notice of a launch taking place it is customary to have the ship dressed in flags an hour or more before high water (about which time the launch takes place); to have tugs, one at least also dressed in flags, plying about some time before the launch in front of the yard where the ship is lying; and there are usually a number of small boats lying off ready to pick up timber when the ship comes away. (Adm.) *Id.* 230
16. *Liability—Collision caused by negligence of third ship.*—Where a steamship, in order to avoid collision with another ship, is obliged by the wrongful act of that other ship to take measures which bring her into collision with a third ship, without any negligence on her own part, the Court of Admiralty will not hold her responsible for the damage to the injured vessel. *Scuttle*, that the owners of the injured vessel should proceed against the original wrongdoer. (Adm.) *The Thames*... 512
17. *Liability in rem—Ship chartered—Crew charterers' servants.*—A ship, chartered by her owners so that the whole control and management of ship and crew are vested in the charterers, is liable in a proceeding in rem for damage done to another ship by the negligence of her crew, although they are the charterers' servants. (Adm.) *The Lemington* 473
18. *Lights—Duty of vessel at anchor—Trimming lamp so excuse.*—It being the duty of a vessel at anchor to carry a riding light always visible, no such excuse as that of taking the lamp down to be trimmed can be admitted, if the absence of the light brings about a collision. (P.C.) *The C. M. Palmer; The Larnas* 94
19. *Lights—Distance visible—Deficiency—Merchant Shipping Act 1873, sect. 17—Infringement—Liability.*—A ship carrying side lights, which are visible only at the distance of about a mile, instead of at a distance of two miles, as required by the regulations, infringes those regulations so as to make her liable to be deemed in fault under the Merchant Shipping Act 1873, sect. 17. (Adm.) *The Magnet* 478
20. *Light—Deficiency—Distance visible—Merchant Shipping Act 1873, sect. 17—Liability—Scuttle.*—that a ship carrying such lights must be deemed in fault, whether the deficiency of the light did or not contribute to the collision. (Adm.) *Id.* 478
21. *Lights—Obscuring of—Merchant Shipping Act, 1873, sect. 17—Liability—Scuttle.*—that where lights are so fixed that they are partly obscured from a particular point right ahead by the cat-heads of a ship carrying them, but are visible both above and below the cat-heads, there is no such infringement within the statute as will render the ship liable in a collision with another ship approaching broad on the starboard bow of the former. (Adm.) *The Duke of Sutherland* 478
22. *Lights—Screens—Shorter than regulation—Merchant Shipping Act 1873—Infringement.*—The regulation as to the length of the screens of a

SUBJECTS OF CASES.

- ship's side lights, being for the purpose of preventing those lights from being seen across the bows of the ship carrying them, and being merely subsidiary for the purpose of securing the visibility of each distinct light, a ship carrying screens shorter than those required by the regulations is not guilty of any infringement within the meaning of the Merchant Shipping Act 1873, if the lights are not in fact seen across her bows, and it is shown that by reason of the construction of the ship she could not have carried larger screens with safety. (Adm.) *The Fanny M. Corvill*, page 478
23. *Lights—Screens—Shorter than regulation—Merchant Shipping Act 1873—Infringement.*—A ship carrying her side lights with screens shorter than required by the regulations, is not to be deemed in fault if the shortness of the screens could not by any possibility have contributed to the collision. (P.C. from Adm.) *Id.* page 565
24. *Lights—Screens—Shortness of—Peculiar build of ship—Merchant Shipping Act 1873—Special circumstance.*—*Semble*, that the peculiar build of a ship requiring her side light screens to be shorter than provided in the regulations, is not a "circumstance of the case making a departure from the regulation necessary," within the meaning of the Merchant Shipping Act 1873, sect. 17. (P.C. from Adm.) *Id.* page 565
25. *Lights—Overtaking ship—Duty of overtaking ship to exhibit light astern.*—There is no duty imposed upon any ship to exhibit a light or signal astern to another ship approaching the former from such a direction that the regulation lights of the leading ship are not visible to those on board the following ship, even when the leading ship is in the fair way of a harbour on a night when vessels not showing lights cannot be seen at a greater distance than one or two cables' length. (But see Vol. III., pp. 1, 4.) (Adm.) *The Earl Spencer*, page 523
26. *Look-out—Report of light—Reply—Duty of look-out man.*—*Semble*, that where the look-out has once reported to the pilot or officer of the watch a light on board another ship, and the report has been answered, there is no farther duty on the look-out to report that light a second time on seeing the ship. (Adm.) *The City of Cambridge*, page 193
27. *Merchant Shipping Act 1873, sect. 17—Regulation for preventing collisions—Infringement—Liability.*—Where a collision occurs at night, and the lights of one of the ships are not burning at the time when the vessels come in sight, and the court is not satisfied that the want of those lights is occasioned by circumstances over which the crew of the ship had no control, she must, even if the want of the lights did not contribute to the collision, be held to blame under the Merchant Shipping Act 1873, sect. 17, which provides that "If in any case of collision it is proved to the satisfaction of the court that the circumstances of the case made a departure from the regulations necessary." (P.C.) *The Hibernia*, page 454
28. *Merchant Shipping Act 1873, sect. 17—Regulations for preventing collisions—Infringement.*—The Merchant Shipping Act 1873, sect. 17, renders it necessary for the court, in every case of collision, to inquire whether there has been an infringement of a regulation, and, if so, whether the circumstances rendered a departure from the regulations necessary. (P.C.) *Id.* page 454
29. *Merchant Shipping Act 1873, sect. 17—Regulations for preventing collisions—Infringement—Both ships to blame.*—Although a ship must be deemed in fault for an infringement of the regulations preceding but not occasioning the collision under the Merchant Shipping Act 1873, sect. 17, she is not necessarily wholly in fault; but if the other ship has been guilty of negligence, or a breach of the regulations, the latter will also be held to blame, and the damages divided between them. (P.C.) *Id.* page 454
30. *Merchant Shipping Act 1873, sect. 17—Regulations for preventing collisions—Infringement—Materiality to the case.*—A ship, to be deemed in fault under the Merchant Shipping Act 1873, (36 & 37 Vict. c. 85), sect. 17, for having infringed any of the regulations for preventing collisions, must have infringed those regulations in such a manner that the infringement is material to the case before the court, and is such as might by possibility have caused or contributed to the particular collision; a mere infringement which by no possibility could have anything to do with the collision will not render the ship liable. (Adm.) *The Moynel, the Duke of Sutherland, The Fanny M. Corvill*, page 478
31. *Merchant Shipping Act 1873, sect. 17—Regulation for preventing collisions—Infringement—Liability.*—To render a ship liable to be deemed in fault under the Merchant Shipping Act 1873, sect. 17, for an infringement of the regulations for preventing collisions, the infringement must be one having some possible connection with the collision in question; a mere infringement, which by no possibility could have anything to do with the collision, will not render the ship liable. (P.C. from Adm.) *The Fanny M. Corvill*, page 565
32. *Moorings—Insufficiency of—Duty of master—Order of port authorities—Liability of owner.*—Although it is the duty of the master of a ship to take all such precautions as a man of ordinary prudence and skill, exercising reasonable foresight, would use to avert danger and to prevent his ship doing damage to others in the circumstances in which he is placed, there is no obligation upon a master who is ordered by the authorities of the port in which his ship lies to take up a berth in a particular part of the harbour to examine the sufficiency of a buoy to which he moors his ship in that place, although that buoy may belong to a private company, if the port authorities sanction the use of the buoy, and treat it as a proper and sufficient mooring place for vessels frequenting the port. If through the insufficiency of such a buoy the ship parts from her moorings on a storm arising, the shipowner will not be responsible for damage ensuing by collision provided the master has taken other precautions sufficient under ordinary circumstances to meet the exigencies of the case. (Priv. Co.) *The William Lindsey*, page 118
33. *Moorings—Parting of—Anchor—Question of seamanship—Nautical assessors.*—The question whether a master should under such circumstances have let go an anchor, or whether the having an anchor ready to let go was a sufficient precaution, is a question of practical seamanship upon which the Court of Appeal will be guided by the opinion of their nautical assessors. (Priv. Co.) *Id.*, page 118
34. *Onus of proof—Duty to begin—Inevitable accident—Ship at anchor.*—In all cases of damage, the onus being upon the plaintiff to establish negligence against the defendant, the plaintiff must begin; and this rule applies to cases where the only defence is inevitable accident and the plaintiff's vessel is at anchor, contrary to the

- former practice of the High Court of Admiralty. (Adm.) *The Otter* page 208
35. *Pilot—Duty of—Ship at anchor—Length of cable—Swinging—Helm—Sheering.*—Where a ship in charge of a licensed pilot is anchored within pilotage waters, the pilot is responsible for the length of cable at which the ship rides, and it is his duty, when the ship swings to the tide, to superintend that manœuvre and to regulate the helm, and it is negligence on his part to go below before the ship is fully swung, leaving the helm amidsheips without orders as to its regulation; and if, through want of length of cable and of regulation of the helm, the ship sheers and so parts from her anchor in swinging during his absence, he will be also responsible, provided that the watch on deck take the right manœuvre to counteract the sheering. (Adm. and Priv. Co.) *The City of Cambridge* 193, 239
36. *Pilot—Duty of—Ship at anchor—Parting cable—Officer of watch—Duty of.*—Where a ship at anchor in pilotage waters and in charge of a licensed pilot parts her cable, the necessity for letting go another anchor is a matter within the discretion of the pilot and the manœuvre should be directed by him; and if the pilot is below at the time, the officer of the watch will be justified before giving any orders to bring up the ship in calling the pilot on deck to take charge, provided that there be no immediate necessity for action. (Priv. Co.) *Id.* 239
37. *Practice—Admiralty court—Foreign plaintiffs—Cross cause—Security to answer judgment—Appearance—Staying proceedings—Admiralty Court Act 1861, sect. 34.*—Where a cause of damage is instituted in the High Court of Admiralty against a ship, in respect of a collision in which the ship of the plaintiffs is totally lost, and the defendants institute a cross cause in personam against the plaintiffs in respect of the same collision, both parties being foreigners resident abroad, and the plaintiffs decline to give security to answer judgment in the cross cause, or to enter an appearance, the court will apply the provisions of the Admiralty Court Act 1861 (24 Vict. c. 10, s. 34), and will order proceedings to be stayed in the principal cause until security is given in the cross cause. (Adm.) *The Charick* 121
38. *Practice—Costs—Damage to ship by barge—County Courts Admiralty Jurisdiction Act 1868, sect. 9.*—A plaintiff proceeding without leave in a Superior Court for damage to his ship, within the body of a county, by a barge (propelled by oars only), taking judgment by default, and having his damages assessed by the sheriff at an amount under 300*l.*, is not entitled to his costs, by reason of the County Courts Admiralty Jurisdiction Act 1868, sect. 9. (Q. B. Bail Court.) *Parkis v. Flower* 226
39. *Practice—Admiralty Court—Costs—Compulsory pilotage.*—In a collision case, where a defendant raises, together with other defences, that of compulsory pilotage, and his ship is found to blame, but is dismissed on the ground that the negligent act of the compulsory pilot was the sole cause of the collision, each party pays his own costs according to the practice of the High Court of Admiralty. It has never been the custom in that court to apportion the costs in such cases according to the findings on the various issues. (Adm.) *The Scheenn* 259
40. *Practice—Admiralty Courts—Costs—Arrest—Reference—County Court Admiralty Jurisdiction Act 1868—Certificate.*—A ship was damaged by another, outward bound, and the owners of the injured vessel, in the bona fide belief that their damage was greater than it actually was, instituted a suit in the High Court of Admiralty and arrested the ship for a large amount, but accepted bail and released the ship at once on ascertaining their actual damage; the defendants admitted liability, and the damage was referred to the Registrar; the claim made by the plaintiff was a little over 300*l.*, but the Registrar reduced the amount claimed by more than one third, and made no report as to costs. On application by the plaintiffs, the court certified for the costs of suit under the County Courts Admiralty Jurisdiction Act 1868, but condemned the plaintiffs in the costs of the reference. (Adm.) *The Naomi* page 588
41. *River navigation—Byelaws made by local authority—Effect of.*—Byelaws made by a local authority governing the navigation of a river are to be taken as evidence of what it is the duty of vessels to do in the circumstances named therein, and although the mere breach of one or any of them will not be sufficient reason for holding a ship to blame for a collision, yet, if that breach occasions or contributes to the collision, the existence of the byelaw will afford the best reason for holding the ship violating the byelaw to be guilty of a breach of duty, and consequently to blame for the collision. (Adm.) *The Raitheville Hall* 210
42. *River navigation—Byelaws—Side of river—Fog.*—Where a byelaw regulating the navigation of a river prescribes the side of the river upon which a ship is to navigate going up or down the river, the observance of this byelaw is doubly necessary during a fog when vessels can only be made out at short distances; and the breach of the byelaw cannot be excused by the plea that it was usual during foggy weather to navigate on the wrong side of the river in order to insure greater safety for the vessel so doing. (Adm.) *Id.* 210
43. *River navigation—Tyne byelaws—Side of river—Crossing river.*—By the byelaws in force regulating the navigation of the river Tyne (clause 17) all vessels proceeding to sea must keep to the south side of mid channel, and (clause 20) "vessels crossing the river, and vessels turning tako upon themselves the responsibility of doing so safely with reference to the passing traffic;" under these byelaws a vessel outward bound coming at full speed out of the Tyne dock (on the south side of the river Tyne), and crossing the river to the north side, whether intentionally, in violation of clause 17, or unintentionally by reason of the force of the tide, is bound to use the utmost caution to avoid the passing traffic, and to contemplate before attempting to come out any contingencies, such as tide, stoppage of the traffic, &c., which may arise, and she should only cross if it can be done without risk to that traffic; if a collision occurs by want of such caution the ship will be responsible. (P.C.) *The Henry Morton* 466
44. *River navigation—Tyne byelaws—Steamships overtaking ships.*—Semble, that the 21st clause of the above byelaws, providing that "when steam vessels are proceeding in the same direction, but with unequal speed, the vessel which steams slowest shall when overtaken" take certain measures to allow the overtaking steamship to pass her, applies only to a vessel overtaking and passing another actually upon the same course with itself. (P.C.) *Id.* 466
45. *River navigation—Lights—Dumb barge—No duty to carry lights in the Thames.*—Dumb barges in motion driving with the tide up or down the river Thames at night are not bound to carry lights. (Adm.) *The Owen Wallis* 208

SUBJECTS OF CASES.

46. *River navigation—Lights—Trinity house lighter—"Ship"—Thames Conservancy byelaws.*—A Trinity House lighter, which is a vessel propelled by sails as well as oars, but is exclusively employed in their navigation of the Thames and never goes to sea, is not a "ship" within the meaning of the Merchant Shipping Acts, and is not bound to carry, when under weigh in the Thames, the lights prescribed by the Regulations for preventing Collisions at Sea to be carried by all sailing vessels; and, as the existing byelaws made under the Thames Conservancy Acts 1857 and 1864 (20 & 21 Vict. c. xlviii; 27 & 28 Vict. c. 113) contain no provision as to the lights to be carried by sailing vessels navigating the Thames, Trinity House lighters are under no obligation to carry lights when under weigh in that river. (*Adm.*) *The C. S. Butler*. 408
47. *River navigation—Dumb barge—Side of river—The Thames.*—A dumb barge coming up the river Thames on a flood tide may keep on either side of the river, and there is no obligation on her by custom or otherwise to keep in mid-channel. (*Adm.*) *The Ocean Wallis*. 206
48. *River navigation—Dumb barge—Steamship—Duty to keep out of the way—The Thames.*—There is no duty on a dumb barge driving with the tide in the Thames to keep out of the way of a steamship; but it is the duty of the steamship to keep out of the way of the barge. (*Adm.*) *Id.* 206
49. *Speed—Steamship—Sailing ship—Duty to ascertain course of latter.*—When a steamer sights a sailing vessel in the night time at a distance of three miles, but, owing to the fact that the sailing vessel's lights are not visible, cannot ascertain the course of the sailing vessel, it is the duty of the steamer to slacken speed and wait to ascertain that course before adopting any decided manoeuvre for the purpose of avoiding the sailing vessel. If the steamer immediately on sighting the sailing vessel adopts such a manoeuvre, as by porting, and a collision ensues without fault on the part of the sailing vessel, the steamer is alone to blame. (*P.C.*) *The Bougainville v. The James C. Stevenson*. 1
50. *Speed—Steamships—Lights of other ship obscured—Duty to slacken speed and ascertain course.*—Where a steamship is approaching another, whose exact course cannot be at once ascertained by reason of her lights being obscured by her own smoke, it is the duty of the former to take no decided step, but to slacken speed and to wait till that course is ascertained before taking any decided step to avoid the other vessel. (*Priv. Co.*) *The Kona; The Ava*. 182
51. *Speed—Steamship—Lights—Uncertainty as to course—Duty to slacken speed.*—A steamer seeing lights close ahead of her, carried by some ship, and being unable to make out those lights, or the course of the ship carrying them, should slacken speed until she is able to ascertain the meaning of the lights, and to avoid the vessel carrying them. (*Adm.*) *The Duke of Sutherland*. 478
52. *Speed—Steamship—Dark night—Entering harbour.*—A steamship entering a harbour at full speed on a night when ships not showing lights can be seen only at a distance of one or two cables' length will be held to blame if she injures another ship. (*Adm.*) *The Earl Spencer*. 523
53. *Speed—Steamship—Smoke obscuring lights and look-out.*—It is negligence on the part of a steamer to go at full speed under steam and sail before the wind whilst her smoke is blown over her bows so as to obscure her lights and to prevent her from seeing and from being seen by other ships approaching from an opposite direction. (*Priv. Co.*) *The Kona; The Ava*. 182
54. *Speed—Fog—Steamship.*—Seven miles an hour is too high a rate of speed for a steamship in a fog. (*U. S. Sup. Ct.*) *The Steamer Pennsylvanica*. page 378
55. *Steamship—Towing ship—Sailing ship—Duty of tug—Special circumstances—Sailing rules Nos. 15 and 19.*—A steamship towing another ship is within the meaning of the Regulations for preventing Collisions at Sea relating to steamships, and is not by reason of her incumbered condition altogether absolved from the duty of keeping out of the way of a sailing vessel; still allowances should be made, under the circumstances of each case, for the comparatively disabled condition of the incumbered steamer, and the duty of additional precaution is imposed upon a sailing ship approaching a steamer so incumbered. (*P.C.*) *The American and The Syria*. 350
56. *Steamship—Towing ship—Sailing ship—Duty of sailing ship—Sailing rules, Art. 18.*—Where a ship is ordered by the regulations to pursue a certain course in relation to another vessel, she has a right to presume that that other vessel will do her duty, and also observe the regulations; hence a sailing ship, approaching a steamship towing another ship, has a right to hold on her course until there is immediate danger of collision, in the expectation that the steamship will observe the regulations and keep out of her way. (*P.C.*) *Id.*. 350
57. *Steamship—Towing ship—Negligence of tug—Liability of tug—Governing power.*—Where a collision takes place between a tug towing a ship and another ship, the question whether the tug is liable to make good the damage done by the negligence of the tug, depends upon the determination of the question whether the "governing power" is in the tug or in the tow. If the tug is in the service of and under the orders of the tow, the tow is answerable for the negligence of the tug as for the negligence of a servant; but if the tug is, although rendering service to the tow, not under the control of the latter, but is itself the governing power, then the tow is not liable for the negligence of the tug. (*P.C.*) *Id.* 350
58. *Steamship—Towing ship disabled—Same owner—Governing power in tug—Liability of tow.*—Where the master of a steamship, finding another steamship belonging to the same owners with her engines disabled, undertakes, not in pursuance of any specific contract made with the master of the disabled ship, but out of his sense of duty to his employers and in the hope of obtaining salvage reward, to tow the ship home, the towing ship is not under the control of the tow, nor is the governing power in the tow, so as to render the tow responsible for the negligent acts of the tug. Nor does the fact that both ships belong to the same owners render the towed ship responsible for the acts of the tug. (*P.C.*) *Id.*. 350
- See County Courts Admiralty Jurisdiction, Nos. 1, 2, 3—Damage, Nos. 1, 2, 3—Freight, No. 38—Salvage, No. 9—Towage, No. 3.

COMMON CARRIER.

See Carriage of Goods, No. 14—Marine Insurance, Nos. 3, 4.

COMPULSORY PILOTAGE.

1. *Trinity House pilotage—Thames district—Merchant Shipping Act 1854, sects. 353, 376—General exemption—Ship carrying passengers between Boulogne and London.*—A steamship carrying cargo and passengers from Boulogne to London is not bound under the Merchant Ship-

- ping Act 1854 (17 & 18 Vict. c. 104) to employ a pilot whilst navigating the river Thames, the general exemption contained from 6 Geo. 4, c. 125, sect. 59, and the order in council of 18th Feb. 1854, by the Merchant Shipping Act 1854, sect. 353, not being overridden by sect. 379, relating to Trinity House pilotage and exempting such a ship only when not carrying passengers. *Reg. v. Stanton* (8 Ell. & Bl. 445), and *The Earl of Auckland* (Lush 164, 387), followed. (Adm.) *The Mowle* page 386
2. *Trinity House pilotage—Outport district—Merchant Shipping Act 1854, sect. 370—Particular provision—Local Act—Appointment of pilots—Trinity subcommissioners.*—A Trinity House outport district by sect. 370 of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104) comprises any pilotage district for the appointment of pilots within which no particular provision is made by any Act of Parliament or charter. A port for which by a local Act passed in 1852 the Corporation of the Trinity House are required to appoint subcommissioners resident at the said port to examine and certify pilots for the port, is not a port for which such particular provision is made, because the local Act merely adopts and incorporates the provisions of the general Pilotage Act (6 Geo. 4, c. 125, sect. 5, repealed but re-enacted in the Merchant Shipping Act 1854, sect. 309) enacting that the said corporation are required to appoint subcommissioners at such ports or places as they may think requisite to examine and certify pilots. (*Q. B.*) *Hadgraft* (app.) v. *Hevitt* (resp.) 373
3. *Trinity House pilotage—Outport district—Merchant Shipping Act 1854, sects. 353, 370—Local Act—Coasting trade exemption.*—The express enactment in the Merchant Shipping Act 1854, sect. 379, that ships not carrying passengers, employed in the coasting trade, shall be exempted from compulsory pilotage overrides a provision in a local Act passed in 1852 that all ships navigating within a district (6 Trinity outport) shall employ a licensed pilot, and such obligation is not continued by Merchant Shipping Act 1854, sect. 353, enacting that the employment of pilots shall continue compulsory in all districts in which the same was compulsory before that Act. *Hadgraft* (app.) v. *Hevitt* (resp.) 373
4. *Trinity House pilotage—Outport—Ipwich Dock Act—Merchant Shipping Act 1854, sect. 374—Coasting vessel—Exemption.*—The port of Ipwich, the pilotage of which is regulated by the Ipwich Dock Act (15 Vict. c. xvi.), is a Trinity outport district, and although by the above Act (sect. 91) all ships are bound to take a pilot whilst within the district, such obligation is taken away in the case of coasting vessels not carrying passengers by the Merchant Shipping Act 1854, sect. 372. (*Q. B.*) *Id.* 373
5. *Mersey pilotage—Mersey Docks Act—Consolidation Act 1858—Pilot offering to take charge entitled to pilotage rate—Compulsion.*—The Mersey Docks Act Consolidation Act 1858 (21 & 22 Vict. c. xli.)—providing for the pilotage of the river Mersey, and enacting (sect. 199), *inter alia*, that if the master of any vessel (with certain exceptions), being outward bound, "shall proceed to sea, and shall refuse to take on board or to employ a pilot, he shall pay to the pilot who shall first offer himself to pilot the same, the full pilotage rate," as if the pilot had piloted the ship, and, further, that (sect. 138) if a master requires the services of a pilot whilst his ship is lying at anchor in the Mersey, the pilot shall be paid for every day or portion of a day he shall attend, the sum of five shillings; "but no such charge shall be made for the day on which such vessel, being outward bound, shall leave the river Mersey to commence her voyage"—compels a master so proceeding to sea to take a pilot. (Adm. & P. C.) *The City of Cambridge*... page 193, 229
6. *Mersey pilotage—Mersey Docks Act—Consolidation Act 1858, sect. 139—"Proceeding to sea"—Anchoring in river—Compulsion from leaving dock.*—Where a ship ready and about to proceed to sea leaves one of the Mersey Docks at night in charge of a licensed pilot, and casts anchor in the river so as to be ready to cross the bar at the mouth of the river on the next morning's tide at an earlier hour than she could if she left the dock in the morning, the going into and casting anchor in the river is a step in the "proceeding to sea" within the meaning of the Mersey Docks and Harbour Board Act 1858 (21 & 22 Vict. c. xli.) sect. 139, and the employment of the pilot is compulsory under that section from the time of leaving dock, and if the ship breaks away from her moorings, and damages another vessel through the pilot's sole default the owners will not be responsible. (Adm. & P. C.) *Id.* 193, 229
7. *Mersey pilotage—Mersey Docks Act—Consolidation Act 1858—"Proceeding to sea"—Anchoring in river—Extra payment to pilot—Compulsion from leaving dock—Voluntary employment.*—The fact that the pilot becomes entitled, under sect. 138 of the Act, to an extra payment of five shillings a day beyond the amount payable for compulsory pilotage, whilst employed on the ship at the requirement of the master during the time she is anchored in the river, except on the day when the ship leaves the Mersey to commence her voyage, does not alter the character of the employment during that time, so as to make it a voluntary employment or any the less compulsory. (Adm. & P. C.) *Id.* 193
- See *Collision*, Nos. 35, 36—Pilot.
- CONCEALMENT OF MATERIAL FACTS.
See *Marine Insurance*, Nos. 13, 14, 15, 16, 17, 18.
- CONDITION.
See *Marine Insurance*, Nos. 4, 22.
- CONSIGNOR AND CONSIGNEE.
See *Bill of Lading*, No. 1—*Carriage of Goods*, Nos. 2, 10—*Marine Insurance*, Nos. 6, 7, 9, 23, 26.
- CONSTRUCTIVE TOTAL LOSS.
See *Marine Insurance*, Nos. 1, 2, 5, 9, 12, 20, 21, 46, 48.
- CONSULAR COURTS.
See *Jurisdiction*, No. 4.
- CONTAGIOUS DISEASES (ANIMALS) ACT.
See *Carriage of Goods*, No. 13.
- CONTRIBUTORY NEGLIGENCE.
See *Damage*, No. 4.
- CO-OWNERS.
Breach of contract—Action for—Damage to partnership—Benefit to one partner—Right of defendant to take into account.—In order to entitle a defendant in an action brought against him by partners for a breach of contract causing damage to the partnership to take into account a benefit accruing to any of the plaintiffs from such breach for the purpose of reducing the damages, such benefit must be a joint benefit accruing to the partnership; and it is immaterial for the assess-

SUBJECTS OF CASES.

ment of damages whether or no individual plaintiffs have actually benefited in other ways from the very default of the defendants for which as a partnership they are suing. Where partnerships sue for breach of contract, the damages must be confined to those sustained by the partnership; and part owners of ships are for the purposes of such an action in the same position as partners. (C.F.) *Johnson v. The East and West India Dock Company* page 503
See *Master's Wages and Disbursements*, No. 1, 2.

CORPORATION.

See *Dock*.

COSTS.

See *County Court Admiralty Jurisdiction*, No. 4—*Interpleader—Marine Insurance*, No. 34—*Practice*, Nos. 7, 13, 14—*Salvage*, No. 6—*Wages*, No. 5.

COUNTY COURTS ADMIRALTY JURISDICTION.

1. *Damage—Jurisdiction—Co-extensive with Admiralty Court as to subject matter.*—The Admiralty Courts Acts (3 & 4 Vict. c. 65, s. 6; 24 Vict. c. 10, s. 7), confer upon the High Court of Admiralty of England over causes of damage arising within the body of a county the jurisdiction which that court originally possesses over such causes arising on the high seas; and the jurisdiction given to the County Courts, having admiralty jurisdiction over causes of damage, by the County Courts Admiralty Jurisdiction Acts 1868 and 1869 (31 & 32 Vict. c. 71, s. 3, sub-sect. 3; 32 & 33 Vict. c. 51, s. 4), is as large (where the amount claimed does not exceed £300), as that possessed by the High Court of Admiralty. (*Q. B. Bail Court*.) *Purkis v. Flosser* 226
2. *Damage—Jurisdiction—Barge—Ship damaged by—Admiralty Court—County Court.*—Damage to a ship by a barge (propelled by oars only), would be within the jurisdiction of the High Court of Admiralty if it occurred on the high seas, and (by the Admiralty Court Acts) if it occurred on a tidal river within the body of a county; hence the County Courts having admiralty jurisdiction would have jurisdiction over such damage. *The Surala* (Lush, 549) followed (*Q. B. Bail Court*.) *Id.* 226
3. *Damage—Jurisdiction—Action against pilot—Admiralty cause.*—An action against a pilot for negligence in navigating a vessel whereby it came into collision with another vessel, which it damaged, is not an Admiralty cause within the meaning of the County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71, sect. 3, sub-sect. 3), and may therefore be brought in any County Court, though such court be not one appointed under the Act for the trial of Admiralty causes. (*Ex.*) *Flosser v. Bradley* 489
4. *Freight—Demurrage—Breach of charter—Jurisdiction—Admiralty Court—County Courts Admiralty Jurisdiction Act 1869, sect. 2.*—The jurisdiction given to the County Courts by the County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71) sect. 3, and the County Courts Admiralty Jurisdiction Amendment Act 1869 (32 & 33 Vict. c. 51), sect. 2 is confined to causes within the jurisdiction of the High Court of Admiralty; and, therefore, in an action in a Superior Court on a charter-party for freight or demurrage, which is a cause not within the jurisdiction of the Admiralty Court, a plaintiff, claiming and recovering a sum between £20 and £300, is entitled to his costs, and cannot be deprived of them by the operation of sect. 9 of the Act of

1668 (31 & 32 Vict. c. 71), which is not applicable to such a case. *Simpson v. Blues* (ante, vol. 1, p. 320; L. Rep. 7 C. P. 290; 26 L. T. Rep. N. S. 679) approved, and *Carpo ex Dryas* (ante vol. 1, p. 519; L. Rep. 5 P. C. 134; 28 L. T. Rep. N. S. 77) dissented from. (*Ex.*) *Guestland v. Pries and others, Fulmore v. Wait* page 543
See *Collision*, Nos. 38, 40—*Practice*, Nos. 1, 2, 3, 5, 6, 7—*Salvage*, No. 6.

COUNTY COURT APPEAL.

See *Practice*, Nos. 1, 2, 3.

CROSS CAUSES.

See *Collision*, No. 37.

CROSSING SHIPS.

See *Collision*, Nos. 2, 3, 4, 5.

CUSTOM.

See *General Average*, Nos. 1, 2.

DAMAGE.

1. *Damage to pier—Harbours, Docks, and Piers Clauses Act 1847, sect. 74—Undertakers—Maritime lien—Liability of ship in rem—Inevitable accident.*—The owners of a pier, who are undertakers within the meaning of the Harbours, Docks, and Piers Clauses Act 1847, acquire, under sect. 74 of that Act, a maritime lien in respect of any damage done to their pier by a ship, and may proceed in rem to recover that damage in the High Court of Admiralty, and the shipowners are debarred by sect. 74 from setting up the defence of inevitable accident. (*Adm.*) *The Merle; Demais v. Towell* 402
2. *Damage to pier—Harbours, Docks, and Piers Clauses Act 1847—Limited Company—Undertakers—Winding-up.*—Where a limited company, duly constituted by provisional order made under the General Piers and Harbours Acts 1861 and 1862, as the undertakers of a pier, within the meaning of the Harbours, Docks, and Piers Clauses Act 1847, is voluntarily wound-up, and its property sold by the liquidator, a purchaser of the pier has transferred to him both the property and the rights of the original undertaker, becomes the undertaker within the meaning of the last-mentioned Act, and can recover against a ship for damage done to his pier by that ship, although such damage be the result of inevitable accident. *The Merle* 402
3. *Damage to sea wall—Harbour, Docks, and Piers Clauses Act 1847, sect. 74—Liability of ship.*—The owners of a ship which the crew have left owing to stress of weather, are answerable, under sect. 74 of the Harbours, Docks, and Piers Clauses Act 1847 (10 & 11 Vict. c. 27) for damage done to a sea wall, after the crew have left her. (*Q. B.*) *The River Wear Commissioners v. Adamson and others* 145
4. *Steam tug—Fog—Negligently proceeding—Running ashore—Pilot in charge of ship—Contributory negligence.*—Where a ship, in tow of a steam-tug and in charge of a licensed pilot who has the control over and directs the course of both vessels, is navigating a river in a fog so dense that the banks of the river cannot be seen, and those on board the tug and ship in tow do not know in what direction they are going, it is negligence on the part of both vessels to proceed; but as it is the duty of the pilot in charge to give orders to the tug to stop so as to enable the ship in tow to come to an anchor, the neglect on the part of the pilot to give such orders is contributory negligence, which will preclude the owners of the

SUBJECTS OF CASES.

- sailing ship from recovering (at common law) against the owner of the steam-tug in an action for negligently running the sailing ship ashore by proceeding during the fog. (P.C.) *Smith and others v. The St. Lawrence Tow Boat Company*page 41
5. *Steam-tug—Towing ship—Control—Moving power—Master or pilot in charge.*—A steam-tug towing a sailing ship directs the course of both vessels so long as no directions are given by the person in charge of the ship in tow. The steam-tug is the moving power, but it is under the control of the master or pilot on board the ship in tow. (P.C.) *Id.* 41
- See *Carriage of Goods*, Nos. 20, 21, 22, 23, 24, 25—*Collision—Marine Insurance*, Nos. 10, 11—*Pilot—Tonnage*.
- DAMAGES.**
- See *Charter-party*, No. 2.
- DAMAGE TO CARGO.**
- See *Carriage of Goods*, Nos. 21, 22, 23, 24, 25—*General Average*, Nos. 1, 2—*Jurisdiction*, Nos. 1, 2, 3.
- DECK CARGO.**
- See *Marine Insurance*, Nos. 52, 53.
- DELAY.**
- See *Marine Insurance*, No. 23.
- DELIVERY OF CARGO.**
- See *Carriage of Goods*, Nos. 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37.
- DEMURAGE.**
- See *Carriage of Goods*, Nos. 15, 19, 29, 30—*Charter-party*, Nos. 3, 4—*County Courts Admiralty Jurisdiction*, No. 4.
- DERELICT.**
- See *Carriage of Goods*, No. 88—*Salvage*, Nos. 10, 11, 16, 21.
- DESERTION.**
- See *Salvage*, Nos. 10, 11, 16, 21—*Wages*, No. 3—*Master's Wages and Disbursements*, Nos. 6, 7.
- DETENTION MONEY AND BOARD.**
- See *Master's Wages and Disbursements*, No. 14.
- DEVIATION.**
- See *Carriage of Goods*, No. 8.
- DISBURSEMENTS.**
- See *Master's Wages and Disbursements—Necessaries*, No. 3.
- DISCHARGE.**
- See *Carriage of Goods*, Nos. 30, 33, 34, 35, 36, 37.
- DOCK.**
- Graving Dock—Use of—Interest in land—Statute of Frauds, sect. 4—Corporation—Contract under seal.*—A contract for the use by shipowners of a graving dock for repairing ships belonging to a municipal corporation is not a contract concerning an interest in land, and consequently need not be in writing under the 4th section of the Statute of Frauds, and such a contract being one of frequent occurrence and daily necessity need not be under seal, and though not under seal is binding on the corporation. (C.P.) *Wells v. The Mayor, &c. of Kingston-upon-Hull*..... 589
- DOCK REGULATIONS.**
- See *Carriage of Goods*, No. 15.
- DRUNKENNESS.**
- See *Master's Wages and Disbursements*, No. 3, 4.
- ERROR OF JUDGMENT.**
- See *Master's Wages and Disbursements*, No. 11.
- ESTOPPEL.**
- See *Carriage of Goods*, No. 6—*Marine Insurance*, Nos. 2, 43.
- EVIDENCE.**
- See *Carriage of Goods*, Nos. 23, 24—*Collision*, No. 11—*Marine Insurance*, Nos. 32, 34—*Practice*, Nos. 3, 4, 8, 9, 14, 15—*Salvage*, Nos. 3, 4, 5.
- EXCEPTED PERILS.**
- See *Carriage of Goods*, Nos. 11, 12, 13, 20, 21, 22, 25, 40—*Marine Insurance*, Nos. 10, 11, 37, 38, 39.
- EXCESSIVE VALUATION.**
- See *Marine Insurance*, No. 14.
- FIRE.**
- See *General Average*, No. 1, 2—*Marine Insurance*, No. 45.
- FOG.**
- See *Collision*, Nos. 8, 9, 10, 56—*Damage*, No. 4.
- FOREIGN CONTRACT.**
- See *Sale of Ship*.
- FOREIGN SHIP.**
- See *Sale of Ship—Wages*, Nos. 1, 2, 5.
- FORFEITURE OF WAGES.**
- See *Master's Wages and Disbursements*, Nos. 3, 4, 5, 6, 7, 8—*Wages*, No. 3.
- FORGERY OF SHIPPING DOCUMENTS.**
- See *Bills of Exchange*.
- FRAUD.**
- See *Marine Insurance*, Nos. 14, 15, 16, 17, 18, 31.
- FREIGHT.**
- See *Carriage of Goods*, Nos. 18, 30, 31, 35, 38, 39, 40, 41, 42—*Charter-party*, No. 3—*Interest—Marine Insurance*, Nos. 10, 20, 21, 22, 23—*Necessaries*, No. 3.
- GENERAL AVERAGE.**
1. *Damage by water—Extinguishing fire—British custom.*—Loss occasioned by water used to extinguish fire on board ship not having hitherto been treated by British average adjusters as a general average loss, owners of goods, carried under a bill of lading providing for "average, if any, to be adjusted according to British custom," cannot recover for damage so sustained as for a general average loss; under such circumstances the question whether such a loss is by law a general average loss does not arise. (Ex. Ch. from Q. B.) *Stewart v. The West India and Pacific Steamship Company*page 32
2. *Damage by water—Scuttling ship—Extinguishing fire—General average loss.*—Damage to cargo by scuttling a ship to put out a fire is the subject of

SUBJECTS OF CASES.

general average contribution. There is no valid custom excluding the loss from general average. (*Nisi Prius*, per Cockburn, C.J.) *Archard and others v. Ring and others*page 422
 See *Carriage of Goods*, Nos. 30, 35—Jurisdiction, No. 4—*Marine Insurance*, Nos. 25.

GOOD ORDER AND CONDITION.

See *Carriage of Goods*, Nos. 7, 24.

GUARANTEE.

See *Bills of Exchange*.

HARBOURS, DOCKS, AND PIERS CLAUSES ACT, 1847.

See *Damage*, Nos. 1, 2, 3.

HYPOTHECATION.

Bills drawn against goods—Policy of insurance—Deposit of papers with bank—Extent of bank's lien.—Where a merchant consigns goods to this country, draws a bill of exchange against the goods, and before acceptance discounts the bill with a bank, and in order to secure repayment, insures the goods, deposits the bills of lading and the policy with the bank together with a letter of hypothecation authorizing the bank in case the bill or any other bills of it should not be accepted or paid to sell the goods and recoup themselves, but making no mention of the policy, the bank acquires no right, on the goods being destroyed by the perils insured against and on the failure of the consignor and consignee, to apply the proceeds of the policy to pay other bills drawn upon other parties by the merchant, and discounted by the bank, or to satisfy anything beyond the amount of the bill of exchange, drawn against the goods and a third person to whom the policy has been assigned can claim to have the amount over the value of the bill paid over to them by the bank. (*V.C.B.*) *Latham v. The Chartered Bank of India, Australia, and China* 178

ILLEGALITY.

See *Marine Insurance*, No. 41.

INCEPTION OF RISK.

See *Marine Insurance*, Nos. 3, 28.

INDORSEES.

See *Bills of Lading*, No. 23—*Carriage of Goods*, Nos. 1, 2, 3, 4, 5.

INEVITABLE ACCIDENT.

See *Collision*, Nos. 11, 12.

INJUNCTION.

See *Navigable River*, No. 6.

INSPECTION OF DOCUMENTS.

See *Practice*, No. 9.

INSURABLE INTEREST.

See *Marine Insurance*, Nos. 6, 7, 8, 22, 42, 43, 44.

INTEREST.

Freight—Not payable on day certain—Interest not recoverable.—Interest cannot be recovered under 3 & 4 Will. 4, c. 42, sect. 28, upon an amount of freight payable under a charter-party "after entire discharge and right delivery of the cargo in cash two months after date of ship's report inwards at Custom House," because the freight is not payable upon a day certain. (*Ex. Ch.* from *Q.B.*) *Merchant Shipping Co. v. Armitage* 185

INTERPLEADER.

Two or more claimants of cargo—Shipowner's duty—Shipowner contesting each claim—Costs.—Where there are two or more claimants of goods in the hands of a shipowner, the only way in which he can as stakeholder protect himself is by filing a bill of interpleader. If, instead of doing so, he litigates with the claimants separately, he must pay the costs of the successful claimant, who will be entitled to an inquiry as to damages. (*L.J.J.*) *Living v. Zeden*page 396

INTERVENER.

See *Salvage*, No. 7.

IPSWICH DOCK ACT.

See *Compulsory Pilotage*, No. 4.

JETTISON.

See *Marine Insurance*, No. 52.

JURISDICTION.

1. *Admiralty Court*—Damage to cargo—Breach of contract before goods laden—Admiralty Court Act 1861, sect. 6.—The High Court of Admiralty has no jurisdiction to entertain a suit for breach of contract under the Admiralty Court Act 1861 (24 Vict. c. 10), sect. 6, where the breach occurs before the goods are laden on board the vessel which under the contract afterwards carries the goods into a port in England or Wales. (*Adm.*) *The Dannebrog* 452
2. *Damage to cargo*—Cargo carried into English port of call—Discharged abroad—Ship returning to England—Arrest—Admiralty Court Act 1861, sect. 6.—When a foreign ship carrying cargo, acting in pursuance of the contract of affreightment, which gives the option of several ports of call, English and foreign, puts into an English port of call for orders, she carries her cargo into the English port within the meaning of the Admiralty Court Act 1861 (24 Vict. c. 10), sect. 6; and though she be ordered to a foreign port, and there discharge her cargo, the Court of Admiralty has jurisdiction to entertain against her a suit by the assignees of the bills of lading of the cargo, for damage to cargo, and to arrest her on her return, after discharging, to this country. (*Adm.* and *Priv. Co.*) *The Piece Superiore* 162, 319
3. *Admiralty Court*—Damage to cargo—Breach of contract by master—Master part owner—Liability in rem.—*Bentley*, the High Court of Admiralty has jurisdiction to proceed in rem against a ship for breach of contract, within the meaning of the Admiralty Court Act 1861 (24 Vict. c. 10), sect. 6, although that breach is committed by one of the part owners of the ship only (the master), and is a breach for which the other part owners would not be responsible. (*Adm.*) *The Emilien Marie* 514
4. *Levantine Consular Court*—Ship disabled—Average statement—Made up under decree of Court—Customs of Levant—Presumption as to jurisdiction.—Where in an action to recover from underwriters a general average loss it appears that the ship arrives at Constantinople disabled from proceeding on her voyage, and that the British Supreme Consular Court has, on the application of the master, appointed surveyors who make recommendations as to sale of part and transshipment of the rest of the cargo, and that the court has made orders in accordance with those recommendations, and further, that the court has appointed average adjusters, who investigate the various claims and make up an aver-

SUBJECTS OF CASES.

age statement in accordance with the law of the port of destination of the ship, and that the statement is registered and homologated by a decree of the court, and it further appears that the Orders in Council respecting the jurisdiction of the consular courts in the Levant expressly reserve to these courts the right to enforce customs obtaining in the Ottoman dominions, it will be taken by the court trying the action that the consular court had the jurisdiction so exercised. (C. F.) *Mavro and another v. The Ocean Marine Insurance Company* page 361
 See *County Courts Admiralty Jurisdiction*, Nos. 1, 2, 3, 4—*Sale of Ship—Salvage*, No. 6.

LADING.

See *Marine Insurance*, Nos. 3, 7, 8.

LANDING AND WAREHOUSING CARGO.

See *Carriage of Goods*, Nos. 33, 34, 35, 36.

LANDING-STAGE.

See *Navigable River*, Nos. 1, 2, 3, 4.

LAUNCH.

See *Collision*, Nos. 13, 14, 15.

LAY DAYS.

See *Carriage of Goods*, No. 19—*Charter-party*. Nos. 3, 4.

LIABILITY IN REM.

See *Collision*, No. 17—*Jurisdiction*, Nos. 2, 3.

LIEN.

See *Broker's Lien—Carriage of Goods*, Nos. 30, 34, 35, 36, 39—*Charter-party*, Nos. 3, 4—*Master's Wages and Disbursements*, No. 10—*Mortgages*, Nos. 1, 2—*Necessaries*, Nos. 1, 2, 3—*Shipbuilding contract*.

LIFE SALVAGE.

See *Salvage*, No. 12.

LIGHTERMAN.

See *Carriage of Goods*, No. 14.

LIGHTS.

See *Collision*, Nos. 18, 19, 20, 21, 22, 23, 24, 25, 26, 51, 52, 53, 54, 55.

LIMITATION OF LIABILITY.

Ship under arrest—Payment in court in limitation suit—Release—Admission of liability.—Defendants in a collision case, in which their ship was under arrest, having instituted a suit for limitation of liability, the court, upon the motion of the plaintiffs in the limitation suit, (defendants in the collision case) ordered the ship to be released, on payment into court in that suit of the aggregate amount of 15*l.* per ton of the registered tonnage of the ship, and of a sum to cover interest and costs, and did not require that the plaintiffs in the limitation suit should admit liability before ordering the release. (Adm.) *The Sisters* 589

LOOK-OUT.

See *Collision*, No. 26.

LOSS.

See *Carriage of Goods*, No. 8—*General Average*, Nos. 1, 2—*Marine Insurance*, Nos. 5, 9, 10, 11, 12, 19, 20, 21, 22, 23, 24, 25, 33, 37, 38.

LUFFING.

See *Collision*, No. 2.

MARINE INSURANCE.

1. *Abandonment—Ship—Notice—Implied acceptance of—Insurers taking possession and keeping salvage—Claim for—Effect of.*—When notice of abandonment of a ship is given to underwriters, mere silence on their part will not operate as an acceptance of abandonment; but if the underwriters, on a loss occurring, and after notice of abandonment duly given, take possession of a ship by their agent, take her to a place of safety, repair her, and detain her in their custody for an unreasonable time without giving notice to the assured that they are acting on his behalf, and that they do not accept the abandonment, their acts will amount to a constructive acceptance of abandonment; nor will the fact that the insurers think fit to libel the ship in the Admiralty Court for salvage reward affect their liability, if the assured has not interfered in the salvage suit nor taken any steps to assert his continued ownership. (Priv. Co.) *The Provincial Insurance Company of Canada v. Leduc* page 338
2. *Abandonment—Acceptance of—Partial loss—Total loss—Estoppel—Canadian Civil Code.*—Acceptance of abandonment by underwriters is irrevocable, and makes a partial loss tantamount to a total loss, and the insurers are precluded from relying upon a subsequent recovery of the property because they are estopped from saying that the loss is not total; and although by the Canadian Civil Code, art. 2545, abandonment cannot be made of a stranded ship if she can be raised so as to be sent forward to her destination, this article does not apply to cases where abandonment of a stranded ship has been accepted by underwriters, but must be read in conjunction with other articles (2547, 2549), by which abandonment and acceptance vest the property in the insurer, and cannot be defeated by subsequent events, as in English law. (Priv. Co.) *The Provincial Insurance Company of Canada v. Leduc* 338
3. *Cargo—Common Carriers—Inception of risk—From the loading—Named ports—Warranty—Attaching of policy—Common carriers—Intendment of parties.*—A clause in a policy of marine insurance, providing that the adventure upon goods to be carried by the assured as common carriers between certain ports, shall begin "from and immediately following the loading thereof on board the said vessels at" certain ports enumerated, is not, unless so expressly provided by the policy, to be construed as a warranty that the goods shall be loaded at such ports, but as mere recital, description, or intension, or expectation, that the goods will be there loaded; and the policy attaches to goods in the custody of the assured for the purposes of transportation in the ordinary course of their business as common carriers, carried into a port named in the policy by one of the vessels, but not in the strict sense loaded at that port on board the vessel, provided that the facts show that, by reason of the nature of the transactions to which the policy relates, the parties intended that the policy should so attach. (Sup. Ct. of Cal. U. S.) *Wells, Fargo, and Company v. The Pacific Insurance Company* 111
4. *Cargo—Common Carriers—Open policy—Advice of shipments—Warranty—Condition precedent.*—A memorandum on an open policy of insurance upon goods carried between certain ports by the insured as common carriers, providing that the agents of the insured should send to their head office "advice of the amount of each shipment," is not a warranty, or condition precedent,

SUBJECTS OF CASES.

- without the strict performance of which the right to demand an indorsement of a loss under the policy would not accrue; and where the usual mode of forwarding letters of advice is by the steamers in which the goods are shipped, the losses must necessarily be notified to the underwriters after they have occurred, and the insured are entitled to recover if the loss be notified to the insurers by the person in charge of the goods without any letter of advice, as this would comply with a memorandum providing for the losses being made known to the insurers as soon as known to the assured. (Snp. Ct. of Cal. U. S.) *Id.*.....page 111
3. *Cargo—Constructive total loss—Wreck—Sale of cargo by salvors—When loss takes place—Limitation of action.*—Where ship and cargo are wrecked and cast ashore, but part of the cargo continues to exist in specie and is taken out, and, it being impossible to forward it to its destination, is sold by the salvors on the spot, there is no total loss of the cargo, actual or constructive, until the sale has taken place; and, consequently, a condition in a policy on the goods, that no action shall be maintainable on the policy unless commenced within twelve months after any loss shall have occurred, is complied with if an action, to recover for a total loss of the goods, is commenced within twelve months after the sale has taken place; the action need not be commenced within twelve months after the wreck. (P.C.) *Browning (app.) v. The Provincial Insurance Company of Canada* 35
6. *Cargo—Brokers making advances—Insurable interest—Extent of interest of all concerned—Right to insure.*—Brokers who in the course of their business are in the habit of receiving consignments of cotton from abroad, and of making advances by acceptances, usually negotiated abroad, against the consignment, have an accepting the bills and so becoming liable upon them an equitable interest in every part of the cotton against which they have made the advances, and have such an interest in the selling and managing the consignment, as in law gives them a right to insure to its full value, and if the goods be lost in transit may, on a declaration averring interest in themselves, recover on a policy effected by them at the request of the consignors to cover the interests of all concerned the full amount insured, applying the proceeds to the extent of their claims, and holding the remainder as trustees for the persons beneficially interested: (per *Borill, C.J.*, and *Denman, J.*); and contra (per *Keating and Brett, J.J.*), the brokers making advances on the cotton in transit, have only a contract right on the cotton to have the bills of lading delivered to them on payment of their acceptances, and as consignees, though interested in every part, are not the legal owners, nor trustees for the persons beneficially interested, and cannot therefore recover more than their own beneficial interest. (C. P.) *Ebbcorrh and others v. The Alliance Marine Insurance Company.* 126
7. *Cargo—Insurable interest—Named ship—Cargo part loaded—Appropriation to buyer—Right to recover for part shipped.*—Where a merchant buys a grain cargo per a named ship, and part of that cargo is shipped and the rest alongside when the ship goes down and, with the part loaded, is lost, there is such an appropriation of the cargo already loaded, the ship being named in the contract, as to prevent the seller from withdrawing it without the buyer's consent; the option of accepting or rejecting the part cargo remains to the buyer even after the loss, and if he does not reject, the cargo remains at his risk, and he has an insurable interest therein to the extent of the quantity shipped, and to its full value, and if he has insured the cargo at and from the loading port, "as interest may appear," he can recover the value of the quantity shipped. (C.P.) *Anderson v. Morice*page 452
8. *Cargo—Insurable interest—Named ship—Cargo part loaded—Existing contract—Expectancy of benefit.*—Even if the property in the cargo does not pass to the merchant under such a contract, he still has an insurable interest in it, because he has an existing contract with regard to it from the time of its being loaded on board, by virtue of which he has an expectancy of benefit and advantage arising out of or depending on the safe arrival of the cargo. (C.P.) *Id.*..... 425
9. *Cargo—Machinery—Damage to component parts—Total loss.*—Where the component parts of "machinery" insured "free of particular average" are by the perils insured against, some totally lost and the remainder so damaged that they are useless for the purpose for which they were intended when shipped, there is a total loss, which can be recovered from the underwriters, the species of the machinery being destroyed. (U.S. Snp. Ct.) *The Great Western Insurance Company v. Fogarty.* 262
10. *Cargo—Tea—Packages—Damage by perils to some—Loss to be ascertained by separation and sale of contents damaged—Loss by injury to reputation—Divisibility of damage.*—Where by a policy of marine insurance, packages of tea valued at a certain sum are insured against the usual risks, "and all other losses and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods or any part thereof; warranted by the assured free from damage or injury from dampness, change of flavour, or being spotted, &c. except caused by actual contact of sea-water with the articles damaged occasionally by sea perils; in the case of partial loss by sea damage to dry goods, cutlery, or other hardware, the loss shall be ascertained by a separation and sale of the portion only of the contents so damaged, and not otherwise; and the same practice shall obtain as to all other merchandise as far as practicable," and certain packages of tea are damaged during transit by sea perils, the remainder being unharmed, then for the purpose of assessing the damage sustained, the packages coming under the head of "all other merchandise," are divisible, and the underwriters are liable only for the deterioration in value of such of the chests as have in fact been damaged by sea-water, and not for injury to the reputation of the rest from having formed part of a shipment of which part had been damaged by sea-water. (C.P.) *Calder v. The Great Western Insurance Company* 90
11. *Cargo—Tea—Packages—Damage by perils to some—Divisibility of damage—Semble, even if the policy had not contained the above clause, the packages would still have been divisible, and the underwriters liable only for such as had been in fact damaged by sea-water.* (C.P.) *Id.* 90
12. *Cargo—Valued policy—At and from—Port of cargo loaded—Total loss of part—Valuation—Invoice price.*—Where a cargo bought to arrive by a particular ship is insured "at and from" the port of loading by that ship "as interest may appear," amount of invoice to be deemed the value, and before the full cargo is loaded, the ship and part of cargo are totally lost, the policy must be treated as a valued policy, the valuation being the amount of the proper invoice.

- according to the contract between the buyer and vendor. (C.P.) *Anderson v. Morice*page 425
13. Concealment and representation—Duty of assured.—Though an assured is not bound to disclose everything which might influence the mind of an underwriter, he is bound to disclose all those facts which a rational insurer, governing himself by the principles and calculations commonly applied to policies and risks, would regard as bearing on those risks. (Q.B.) *Forbes v. Pender* 266
14. Concealment and representation—Duty of assured—Excessive valuation—Forsyng risk.—An excessive valuation of the subject matter of insurance is a fact which, as bearing on the risks insured against, ought to be disclosed to an underwriter by an assured, and the concealment of such a fact will vitiate a policy if its disclosure would have materially affected the mind of the underwriter in assuming the risk. (Q.B.) *Id.* 266
15. Concealment and representation—Reinsurance on subject matter—Duty of communication.—An assured may effect reinsurance directly on the subject-matter of insurance against the risks or any part thereof insured against in the original policy, without being bound to disclose in the policy or otherwise that it is a reinsurance unless challenged so to do. (Ex.) *McKenzie v. Whitworth* 490
16. Concealment and representation—Ship contract—Knowledge of material fact after initialling.—Communication.—A slip being in practice the complete and final contract between the parties to a contract of marine insurance, although not enforceable at law or in equity, there is no obligation on the assured to communicate a material fact which comes to his knowledge after the initialling of the slip and before the issuing of the policy. (Q.B.) *Cory v. Paton* 302 (Ex. Ch. from C.P.) *Lishman and others v. The Northern Maritime Insurance Company (Limited)* 504
17. Concealment and representation—Ship—Knowledge of material fact after initialling.—Contract made by agent of assured—Ratification by assured—Duty to communicate.—The fact that the contract of insurance has been entered into by an agent of the assured and the slip been initialled by the underwriter, subject to the approval of the assured, and that the ratification of the assured does not take place until after the material fact comes to his knowledge, does not, where the assured was ignorant of the material fact when the slip was initialled, entitle the underwriter to have the fact communicated to him. (Q.B.) *Cory v. Paton* 302
18. Concealment and representation—Ship contract—Warranty in policy not in slip—Material fact—Duty of communication.—The introduction into a policy on freight of a warranty (as in the original slip) for the benefit of underwriters, to the effect that the hull of the ship is not insured beyond a certain amount, does not create a new contract or new risk different from the slip, and therefore does not affect the duty of communication of material facts (Ex. Ch. from C.P.) *Lishman v. The Northern Maritime Insurance Company (Limited)* 504
19. Freight—Particular ship—Chartered freight upon homeward voyage—Insurance during outward voyage—Constructive total loss of ship on outward voyage—Right to recover on policy on freight.—Where an insurance upon chartered freight, to be earned by a particular ship named in the charter-party upon a homeward voyage, is effected by the shipowner to cover risks to be incurred during the previous outward voyage, damage by perils of the seas sustained during the outward voyage, to an extent which result in such injury that on her arrival at her chartered port of loading the cost of repairs to enable her to perform her homeward voyage under the charter-party would be more than she would be worth when repaired, will entitle the assured to claim against the underwriters on freight as for a total loss of freight. (H. of L.) *Hankin and others v. Potter and others*page 65
20. Freight—Particular ship—Chartered freight on homeward voyage—Insurance during outward voyage—Constructive total loss of ship—Total loss of freight—Notice of abandonment.—To entitle the assured to claim as for a total loss of freight under such circumstances, an notice of abandonment is necessary, because the loss of the freight is an actual total loss resulting from the inability of the ship to perform the contract created by the charter-party, by the terms of which no other ship could earn the chartered freight, and in consequence the underwriters could not by abandonment either take or earn any part of the chartered freight; notice of abandonment being necessary only where abandonment transfers to the underwriters something beneficial to them. (H. of L.) *Id.* 65
21. Freight—Particular ship—Chartered freight upon homeward voyage—Insurance during outward voyage—Total loss of freight—Notice of abandonment to underwriters on ship—No necessity for.—The right of the assured to claim as for a total loss of freight under such circumstances is not affected by his neglect to give due notice of abandonment to the underwriters on ship for the purpose of claiming against them as for a constructive total loss of ship, because the rights of the assured as to the insurances on ship and freight depend upon different considerations and totally different contracts, which ought not to be mixed together; the policy on freight ought to be considered as though the ship had never been insured; hence conduct of the assured in delaying the voyage to the port of loading for a considerable time, in employing the ship for other purposes than that for which she was chartered (as a store ship), and in having the ship surveyed and temporarily repaired in an intermediate port on the outward voyage, after the damage is sustained, so that great and unnecessary delay took place before notice of abandonment was given to the underwriters on ship, will not affect the rights of the assured under the policy on freight, which becomes a total loss as soon as the damage is sustained. (H. of L.) *Id.* 65
22. Freight—Payable on quantity delivered—Half on signing bills of lading—Half on delivery—Prepayment relates to whole cargo—Half cargo lost—Amount recoverable on policy on freight.—Where goods are shipped under a charter-party by which the freight is made payable at an agreed rate "on the quantity delivered," half on "signing bills of lading," and the remainder "on right delivery of the cargo," the prepayment of the freight in advance, which cannot be recovered back in case of the loss of the cargo, presupposes a delivery of the entire cargo, and is made in respect thereof, and it is not competent to the owners of the cargo, in case of a loss of half the cargo, to appropriate the whole of the amount prepaid to that portion of the cargo which is actually delivered, but he can only claim to have the prepayment distributed ratably over each portion of the cargo delivered; consequently the loss to the shipowner is not the half of the total amount of freight, but only half the freight pay-

SUBJECTS OF CASES.

- able under the charter-party for the portion lost; hence if the shipowner, at the time of shipment, insures the freight still due in a valued policy, fixing the amount of the valuation at half the freight payable under the charter-party, he cannot recover as for a total loss of half the freight, but can only recover as for a partial loss, the amount recoverable being a sum bearing the same proportion to the actual loss sustained as the amount insured bears to the total amount of freight payable. (Ex. Ch. reversing C. P.) *Attison v. The Bristol Marine Insurance Company* page 312
23. Freight—Ship chartered to proceed to port and there land—Prevented from proceeding within reasonable time by perils insured against—Total loss of freight.—Where a ship is chartered to proceed with all convenient speed from L. to N., and there load a cargo for S., the usual perils excepted, and after leaving L., but before reaching N., she gets aground, and the delay in getting the ship off and in repairing her will be necessarily so great as to make it unreasonable for the charterers to supply the agreed cargo at the end of the time, and so great as to put an end, in a commercial sense, to the speculation entered upon by the shipowner and the charterers, the latter are discharged from their contract on the ground that there is an implied condition of the contract that the ship shall arrive at N. within a reasonable time, and on the failure of this the contract is at an end. Consequently, the adventure having been frustrated by perils of the sea, there is a total loss of chartered freight within the meaning of a policy effected by the shipowner "on chartered freight at and from L. to N. in tow, while there and thence to S.," and the shipowner may recover thereon. (Ex. Ch. from C. P.) *Jackson v. The Union Marine Insurance Company (Limited)* 435
24. General average—Particular average—Foreign adjustment—Warranty against average unless general—Foreign law—Liability of underwriter.—Where a policy of insurance upon goods on board a vessel from Varna to Marseilles, contains the words "general average as per foreign statement," and a warranty against average unless general, and the voyage is by perils of the sea terminated at an intermediate port, and the average statement there duly made up in accordance with the law of the port of destination, and by such statement the damage sustained by the wheat is made to appear as general average, the loss, although only a particular average loss by the law of England, must be treated as general average as per foreign statement, and may be recovered from the underwriters. (C. P. and Ex. Ch.) *Mauro and another v. The Ocean Marine Insurance Company* 361, 590
25. Particular average—Stranding—Foreign adjustment—Foreign law—Liability of underwriters.—When goods are first insured under a Dutch policy, and afterwards under an English policy, the latter containing the words "to cover only the risk excepted by the clause warranted free from particular average, unless the ship be stranded, sunk, or burnt, to pay all claims and losses on Dutch terms, and according to statement made up by the official *depecheur* in Holland," the terms of the English policy do not, in the absence of notice of the same or existence of the Dutch policy, amount to notice to the underwriters of the Dutch policy, and the English policy must be construed independently thereof; but if the ship be stranded according to English law, but not according to Dutch law, and an average statement is made up according to the terms of the English policy, but according to the principles of Dutch law, showing a particular average loss, the English underwriters are bound by that statement and the assured may recover. (C. P.) *Hendricks v. The Australasian Insurance Company* page 244
26. Policy—Assignment of after interest ceased.—Where the interest of the insured has ceased before loss, a subsequent assignment of the policy is ineffectual. (Q. B.) *The North of England Fire Oil Cake Company (Limited) v. The Archangel Maritime Bank and Insurance Company (Limited)* 571
27. Policy on cargo—Assignment after interest ceased—Passing of policy.—Where cargo is insured for a voyage, including risk of lighters, and the assured during the voyage sells the cargo to be paid for in 14 days from being ready for delivery or at seller's option on handing shipping document (which option is not exercised) and the cargo is discharged into lighters employed by the purchasers, one of which sinks, and the assured afterwards assigns the policy to the purchasers, the purchasers cannot recover on the policy because the policy does not pass by the contract of sale, the interest of the assured ceases on delivery into the lighters and the subsequent assignment is void. (Q. B.) *Id.* 571
28. Policy—Attaching of—"At a port"—Implied understanding or warranty—Risk—Variation of.—When a policy of marine insurance is entered into insuring a ship or goods thereon "at and from a port," there is, in the absence of a direct representation, an implied understanding that the vessel shall be at that port within such a time that the risk shall not be materially varied; otherwise the risk does not attach. (Q. B.) *De Wolf v. Archangel Maritime Bank and Insurance Company* 573
29. Policy—Contract—Agent—Principal—Right to sue.—A contract of marine insurance, entered into with underwriters by an agent in his own name, but without expressing the interest in the subject of insurance to be in any particular person, may be sued upon by the principal in whom the interest is. (P. C.) *Brenning (app.) v. The Provincial Insurance Company of Canada (reps.)* 35
30. Policy—Contract—Form of—A. B. As well in his own name, &c.—Agent—Principal—Certificate or slip—Right to sue.—Where the common form of policy of a marine insurance company contains the usual clause, "A. B. as well in his own name as for and in the names of all and every other person or persons to whom the same shall appertain, &c.," and it is the usage of the company on accepting a risk to issue a certificate or slip as a provisional agreement entitling the assured to a policy in their common form, the certificate is to be construed as a contract containing the above clause, and, if the certificate is made out in the name of an agent the principal on whose behalf the contract is made may (in Canada where there are no Stamp Acts as to agreements for marine insurance) sue upon the certificate in his own name. (P. C.) *Id.* 35
31. Policy—Fraud—Finding by court of law—Cancellation of policy by court of equity.—Where an action of law has been brought on a policy of marine insurance, and it has been decided in a special case stated in that action that that policy and others given under the same circumstances were procured by fraud, the Court of Chancery will, upon the facts so established, make a decree cancelling the policies. (V. C. B.) *London and Provincial Marine Insurance Company v. Seymour* 169

32. *Policy—Warranty—Condition—Construction of—Evidence.*—Where a warranty or condition in a policy of marine insurance is expressed in clear terms, evidence will not be admitted to show that it is to be construed contrary to the apparent meaning of those terms, although the desired construction may be that which has ordinarily been put upon it by persons making use of that form of policy. (*Priv. Co.*) *The Provincial Insurance Company of Canada v. Leduc* page 338
33. *Policy—Warranty—Time of voyage specified—Breach—Liability—Abandonment.*—Where a ship is insured on a time policy at and from Montreal, to trade between the Island of Newfoundland, Nova Scotia, Cuba, &c., and Quebec and Montreal, and the policy contains a stipulation in the following words: "Not allowed under this policy to enter the Gulf of St. Lawrence before the 25th April, nor to be in the said Gulf after the 15th Nov.; nor to proceed to Newfoundland after the 1st Dec., or before the 15th March, without payment of additional premium, and leave first obtained, war risk, and sailing voyages excepted;" the policy is not to be construed as declaring that the vessel may proceed from any of the ports named in the policy to Newfoundland on or before the 1st Dec., notwithstanding it might have to pass through the Gulf after 15th Nov.; but under that clause the vessel is neither to be in the Gulf after the 15th Nov., nor to proceed to Newfoundland from any port after the 1st Dec.; and if the ship enters the Gulf after the 15th Nov., she commits a breach of warranty within the words of the policy, and the underwriters are not liable for any loss occurring in consequence of that breach, unless they accept abandonment with a knowledge of the breach. (*Priv. Co.*) *The Provincial Insurance Company of Canada v. Leduc* 338
34. *Practice—Costs—Examination of defendants' witnesses before plea—Reg. Gen. H. T. 1853, R. 12.*—Where in an action upon a policy of marine insurance witnesses are examined on behalf of defendants to save expense after declaration but before plea, the defendants not pleading through default of the plaintiffs, the costs of the examination are not costs before instruction for plea within the meaning of Reg. Gen., H. T., 1853, R. 12, and will be allowed upon taxation where the defendant having subsequently pleaded several pleas and paid money into court under the money counts, the plaintiff discontinues. (*Q.B.*) *Previle and another v. The Adelaide Fire and Marine Insurance Company* 577
35. *Reinsurance—Agents abroad—Neglect to reinsure—Damages—Suit in equity.*—A claim for damages by an insurance company against their agent for not reinsuring, according to instructions, cannot be enforced in a suit in equity for an account of the transactions between the principal and agent. (*L.J.* reversing *V. C. B.*) *The Great Western Insurance Company of New York v. Canlife* 219, 228
36. *Reinsurance—Agents abroad—Credit system—Remuneration of agents—Discount—Custom.*—Agents for an insurance company abroad, whose business it is to effect reinsurance for the company, but with respect to whose remuneration no stipulation has been made between the company and the agents, are entitled to retain, for their own benefit, the discount which they receive as brokers under the "credit" system (12 per cent.) by the custom of insurance business, more especially if the mode of remuneration has been made known to their principals; and they need not account for the same to their principals. (*L. J.* reversing *V. C. B.*) *Id.* 219, 228
37. *Risks insured against—Restraint of princes—Land transit—Marine policy—Liability.*—A marine policy in the ordinary Lloyd's form against the usual perils "arrests, restraints, and detentions of princes," on goods which are expressed in the policy to be carried by a route, which is (within the knowledge of the underwriters) partly by sea and partly by land, covers the risk of transit both by land and water, and if the goods are lost by the perils insured against while upon land, the assured are entitled to recover. (*C.P. and Ex. Ch.*) *Redonochi and others v. Elliot and others* page 21, 399
38. *Risks insured against—Restraint of princes—Land transit—Siege—Abandonment—Liability.*—Where goods insured under a policy covering torrens risks, and against (*inter alia*), "arrests, restraints, and detentions of princes," are in course of their transit detained in a town by reason of that town being regularly besieged, the detention is a "restraint of princes" within the meaning of the policy, which will give the assured the right to abandon and claim as for a total loss. (*C.P. and Ex. Ch.*) *Id.* 21, 399
39. *Risks insured against—Restraint of princes—Land transit—Siege—Notice of abandonment—When to be given—Scruble.*—That in such a case notice of abandonment may be given immediately or within such a reasonable time after the commencement of the restraint as will enable the assured to ascertain whether the restraint is likely or not to be permanent. (*C.P.*) *Id.* 21
40. *Ship—Classification—Underwriters' Association—Suspension of class—Right of shipowner to relief.*—Where an underwriters' association for the registry of ships, having a ship classed on their lists submitted to them for inspection and being dissatisfied with her condition, bond *fide* and without malice make an entry on their books suspending the ship's class, and decline to remove the entry till certain alterations are made in the ship, the shipowners are not entitled to relief, although they may be injured by the entry. (*V.C.M.*) *Clover v. Roydon* 167
41. *Ship—Illegal voyage—Carrying passengers without Board of Trade certificate—Owners ignorant of master's act—Liability of underwriters.*—Where a ship, not licensed by the Board of Trade to carry passengers, does carry them, if such carriage is the act of the master alone without the knowledge of the owners and contrary to their intentions, the policy is not vitiated by the illegal carriage of passengers. (*Q.B.*) *Dudgeon v. Penbrooke* 323
42. *Ship—Insurable interest—Joint purchase—Payment of whole by one owner—Authority by one to insure whole—Right to recover in name of other.*—Where a ship is purchased in the name of two persons, A. and B., but the purchase money is by arrangement between them paid by A. only; and B., in order to give some security to A. for the payment of his share, authorizes A. to insure the ship in his (A.'s) name alone, and in case of the loss of the ship, to receive the whole insurance money, and so pay himself the amount due to him from B., A. has an insurable interest in the whole ship, and may, in an action on a valued policy, recover in his own name the full amount insured. A statement by B. to a third person of this arrangement with A., being a declaration against his (B.'s) interest, is evidence against the insurers to show A.'s insurable interest. (*Priv. Co.*) *The Provincial Insurance Company of Canada v. Leduc* 338
43. *Ship—Insurable interest—Material men—Necessaries—Advances—Bottomry bond.*—Where ma-

SUBJECTS OF CASES.

- terial men lend money to a ship's captain to provide necessaries for his ship at a foreign port receive a bottomry bond, insure the ship, and on an adjustment of average are awarded a sum as due to them under the policy from the underwriters, they have an insurable interest, and are entitled to recover the amount found due by the adjustment. (U.S. Sup. Ct.) *The Merchants' Mutual Insurance Company v. Baring and others* ...page 411
44. *Ship—Insurable interest—Mortgage—Right of shipowner to insure.*—A shipowner whose ship is mortgaged may, if he remains in possession, insure his ship to the full amount of her value. *The Provincial Insurance Company of Canada v. Leduc* 338
45. *Ship—Fire—Policy on ship in dock "with liberty to go into dry dock"—Lying in river for repairs—Not covered.*—A policy against fire in the hull of a ship whilst "lying in the Victoria Docks, London, with liberty to go into dry dock, and light boiler fires once or twice during the currency of this policy," although covering the ship whilst in the Victoria Dock and the dry dock, and during her passage up and down the river between the two (if such passage be necessary by reason of her being unable to go into dry dock without so passing), does not cover the ship whilst lying in the river for repairs, after coming out of dry dock, and before returning to the Victoria Dock. (Ex. Ch. from C.P.) *Pearson v. The Commercial Union Assurance Company* 100
46. *Ship—Sale by master—Total loss—Necessity for sale—Notice of abandonment.*—The master of a ship may, under certain circumstances, effect the sale of his ship so as to thereby render the underwriters liable for a total loss without notice of abandonment, but he can only do so in cases of stringent necessity—that is to say, a necessity that leaves the master no alternative, as a prudent and skillful man acting *bona fide* for the best interests of all concerned and with the best and soundest judgment that can be formed under the circumstances, but to sell the ship as she lies. If he comes to this conclusion hastily, either without sufficient examination into the actual state of the ship, or without having previously made every exertion in his power, with the means then at his disposal, to extricate her from the peril or to raise funds for her repair, he will not be justified in selling, even though the danger at the time appear exceedingly imminent. (P.C.) *The Colquhoun Marine Insurance Company v. Bartsch* ... 336
47. *Ship—Time policy—Unseaworthiness—Knowledge of shipowner—Warranty.*—When a jury have found in an action on a time policy that a vessel was sent to sea in an unseaworthy condition, but that such condition was at the time unknown to the shipowners, there being in such case no warranty of seaworthiness, they can recover even though the unseaworthiness as a fact materially contributed to the loss. (Q. B.) *Dudgson v. Pembroke* 323
48. *Ship—Time policy—Warranty—Voyage and times specified—Effect of breach—Acceptance of abandonment—Estoppel.*—A warranty in a time policy upon a ship for certain voyages, that the ship shall not proceed to or be at certain places after given dates, has not the effect of leaving the ship totally uninsured by the policy if, in breach of the warranty, she proceeds to, or is at those places after the dates, so as to preclude recovery in all cases; and if the underwriters, after a loss occurs whilst the ship is upon a voyage in breach of the warranty, duly accept abandonment, they will be estopped from setting up that there was no loss within the policy or the breach of warranty. (Priv. Co.) *The Provincial Insurance Company of Canada v. Leduc*page 338
49. *Ship—Unseaworthiness—Sinking at moorings—Presumption—Evidence.*—Where a ship, previously to all appearances staunch and sound, and recently thoroughly repaired, and a few days before examined without any defects being discoverable, sinks suddenly at her moorings when she has taken in five-sixths of her cargo, and no direct evidence can be given why she foundered, and no cause assigned for her doing so, these facts raise a presumption of unseaworthiness which mere conjectures and suggestions of a cause cannot displace. But evidence of the ship's excellent conduct up to the time immediately preceding the loss, of extensive repairs recently done, of careful surveys recently made, and of the localisation of the injury, may be properly left to the jury on the question as to seaworthiness and loss by a peril insured against, and is evidence on which they are justified in finding a loss by perils insured against, and they are not bound to find that she was unseaworthy. (C.P.) *Anderson v. Morice* 425
50. *Ship—Warranty of seaworthiness—Subject-matter of insurance.*—The warranty of seaworthiness implied in a policy of marine insurance is to be considered with reference to each subject-matter of insurance, and the ship can only be said to be seaworthy for the purposes of that warranty if it is seaworthy in respect of that subject-matter. (C.P.) *Daniels v. Harris* 413
51. *Ship—Warranty of seaworthiness—Insurance on cargo—Effect of warranty—Destruction of cargo.*—In a policy on cargo the implied warranty that the ship is seaworthy cannot be considered to contemplate the destruction, in order to save the ship on an ordinary voyage, of that very cargo which is the subject-matter of insurance. (C.P.) *Id.* 413
52. *Ship—Warranty of seaworthiness—Insurance on cargo—Effect of warranty—Jettison of deck cargo.*—Where a policy is effected on deck cargo it is not a compliance with the warranty of seaworthiness that the ship can, without danger to herself, should she encounter ordinary rough weather, be made seaworthy by the jettison of the deck cargo, which is the subject-matter of the insurance. (C.P.) *Id.* 413
53. *Ship—Warranty of seaworthiness—Insurance on ship or under-deck cargo—Effect of warranty—Jettison of deck cargo.*—Scemble, that if the policy had been on the ship and under-deck cargo, and not on the deck cargo, the implied warranty of seaworthiness would have been satisfied by the safety of the ship and under-deck cargo, and would not have been affected by the peril to or loss of the deck cargo, provided that the latter, by reason of the facility with which it could have been got rid of, would have caused no danger to the ship, or subject-matter of insurance. (C.P.) *Id.* 413
54. *Ship—Policy—Stamp Act—Contract not enforceable unless stamped—Not divisible.*—An underwriter's slip is a contract of marine insurance within the meaning of the Stamp Act 1870, and such a contract cannot be enforced unless expressed in a stamped policy, and the agreement on behalf of underwriters signing a slip is not an agreement divisible into two parts, the one to make a contract of marine insurance, and the other to prepare a policy in accordance with that contract, but is a whole agreement to insure, which can only be enforced against underwriters after being expressed in a stamped policy. (Q. B. and Ex. Ch.) *Fisher v. Liverpool Marine Insurance Company (Limited)* 44, 254

SUBJECTS OF CASES.

See *Carriage of Goods*, No. 22—*Charter-party*, No. 1
—*Jurisdiction—Marine Insurance Association—Necessaries*, No. 3.

MARINE INSURANCE ASSOCIATION.

1. *Rules of—Power to expel member—Expulsion without hearing—Action against.*—A mutual marine insurance association whose committee, by the rules, have absolute power to expel a member if they think his conduct suspicious, or that he is, for any other reason, unworthy of remaining in the society, cannot expel any member without hearing him, and giving him an opportunity of explaining his conduct, and any expulsion without a hearing is void; consequently an action will not lie against the committee for expelling a member without a hearing, he being still a member, and still entitled to enforce his rights in equity, and having sustained no legal damage. (Ex.) *Wood v. Wood and others* page 289
2. *Rules of—Members—Shipowner not member paying contributions—Right to sue—Ketoppel.*—Where by the rules of a mutual marine insurance association no person can become a member, except by signing the articles; but a shipowner, having an equitable interest, and having transferred to him the legal interest in a ship, which has been insured in the association by its former owner, a member, pays the contributions claimed from him by the association, the latter are estopped from disputing the shipowner's interest in the policy and his right to sue on it, although he may not have complied with the rules as to membership. (Q.B.) *Edwards v. Ayrerayon Mutual Shipping Insurance Society (Limited)* ... 469
3. *Rules of—Settlement of disputes—Arbitration—Appeal—Condition precedent.*—Where such a society provides by its rules that disputes are to be settled by the directors, and that an appeal shall be to the whole society, and that no action, &c., should be brought for any claims on the society by its members, such appeal must be resorted to, and is a condition precedent to any action against the society by a member for the recovery of any loss. (Q.B.) *Id.* 469
4. *Rules of—Several insurance—Policies signed by managers—Specification of names of insurers.—Stamp act.*—Where by the rules of a marine insurance association, members severally, and not jointly, insure each other's ships for one year from noon of any day named, and the members make annual contributions to meet the losses, any excess going to a reserve fund, the managers signing the policies for all members, and being authorised to issue special rate policies for less than a year to members, and the managers issue special rate policies to members signing them with the names "as joint managers per procreation of the several members of the association for insuring each other's ships, every member bearing his equal proportion according to the sums mutually insured therein, excepting members paying special rates," such signatures to the policies are not valid within the meaning of sect. 7 of 30 Vict. c. 23, as they are not a specification of the names of the insurers, who are necessarily varying from time to time. (L.J. affirming M.R.) *Re Average Association, Ex parte Corry and Houkley* 530, 570
5. *Rules of—Special rate policies—Non-members—Ultra vires.*—The issuing of special rate policies to non-members by the managers of such an association as above without authority by rule or otherwise is ultra vires. (L.J. affirming M.R.) *Id.* 530, 570

MARITIME LIEN.

See *Master's Wages and Disbursements*, Nos. 9, 10—*Mortgages*, No. 1—*Necessaries* Nos. 1, 2, 3, 5.

MARSHALLING ASSETS.

See *Master's Wages and Disbursements*, No. 9.

MASTER.

See *Carriage of Goods*, Nos. 33, 34, 35, 36, 39, 43—*Marine Insurance*, No. 46—*Master's Wages and Disbursements*.

MASTER, DUTY AND POWERS OF.

See *Carriage of Goods*, Nos. 33, 34, 35, 36, 39, 43—*Collision*, Nos. 32, 33—*Damage*, No. 5—*Marine Insurance*, No. 46—*Master's Wages and Disbursements—Necessaries* No. 4—*Sale of Ship*.

MASTER'S WAGES AND DISBURSEMENTS.

1. *Co-owners—Set-off—Counter-claim—Account—Merchant Shipping Act 1854, sect. 191.*—In a suit for wages and disbursements by a master, who is also co-owner, the other co-owners may, under the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104) s. 191, set up a counter-claim or set-off in respect of outstanding co-ownership accounts, and claim that the balance (if any) be paid to them. (Adm.) *The City of Mobile* page 123
2. *Co-owner—Set-off—Counter-claim—Account—References to registrar and merchant—Merchant Shipping Act 1854, sect. 191—Pleading.*—To a petition claiming master's wages and disbursements, and praying a reference of any accounts arising in respect thereof to the registrar and merchants, an answer alleging the master to be also co-owner, and that accounts are outstanding between the plaintiff and the defendants, as co-owners, showing a balance on all accounts in favour of the defendants, and praying a reference to the registrar and merchants of all master's and co-ownership accounts, will be allowed by the High Court of Admiralty. (Adm.) *Id.* 123
3. *Forfeiture of wages—Drunkenness in port.*—Occasional drunkenness in port on the part of the master of a vessel will not, if unaccompanied with neglect of duty, work a forfeiture of wages. (Adm.) *The Rebeck* 387
4. *Forfeiture of wages—Constant drunkenness.*—Sensible, that constant drunkenness on the part of a master, whether there be proof of neglect of duty or not, will work a forfeiture of either the whole or part of his wages, according to circumstances. (Adm.) *Id.* 387
5. *Forfeiture of wages—Disobedience to orders—Damage to ship—Ship worked against orders.*—Where a master receives express orders from his owners as to the voyage which he is to make, and the ports to which he is to take the ship, and those orders are given under and with a view to a state of circumstances (political) out of which danger might arise to the ship, and which are known to and discussed by the master and owner at the time when they are given, the master is not justified, out of an alleged apprehension of that danger, in taking the ship on other voyages and to other ports; and if he does so take the ship, he will not be entitled to recover his wages for the time during which she is engaged against the owners' orders, even if the voyage is for the owners' benefit. (Adm.) *Id.* 387
6. *Forfeiture of wages—Desertion—What amounts to—Animus revertendi.*—A master's wages may

SUBJECTS OF CASES.

be forfeited by desertion, but there can be no absolute desertion of his ship working a forfeiture of the whole of his wages if there be an *animus revertendi* upon the part of the master. (Adm.) *Id.*..... page 387

7. *Forfeiture of wages—Leaving ship for unreasonable time—Appointment of another master—Right to recover.*—Where a master quits his ship and remains away for such a time and under such circumstances as leads his owners reasonably to suppose that he has no intention of returning, the owners will be justified in removing the vessel from the place where it is left, and appointing another master; and the original master will not be entitled to recover his wages for any period after the time when he so quitted the ship. (Adm.) *Id.*..... 387

8. *Forfeiture of wages—Error of judgment—Negligence—Disobedience—No mala fides.*—Where a master receives instructions to take the balance of freight due at the end of a voyage in cash, or by bank bill upon London, and, without sufficient inquiry, but without mala fides and rather through error of judgment, he takes a bill which he believes to be (but which is not) a bank bill, and which is afterwards discounted, causing loss to his owners, this negligence or disobedience, not being wilful, does not work a forfeiture of his wages, nor can the owners claim to deduct the amount of their loss from his wages. (Adm.) *The Danmore*..... 509

9. *Lien—Priority—Bottomry on ship freight and cargo—Marshalling assets.*—Where a master has given a bottomry bond by which he has bound ship, cargo, and freight, and himself personally for the due execution of the bond, and the proceeds of the ship and freight alone are insufficient to satisfy both the bond and the master's claim for wages and disbursements, but the proceeds of ship, cargo, and freight will cover all, the High Court of Admiralty will marshal the assets, so that the master shall be paid in priority out of ship and freight, leaving the bondholders to fall back upon the cargo for the balance of their claim; the owners of cargo cannot take themselves out of the operation of this rule by becoming holders of the bond. *The Edward Oliver* (2 Mar. Law Cas. O. S. 597) followed. (Adm.) *The Eugenie*..... 104

10. *Lien—Priority—Bottomry bondholder—Master not personally bound.*—Presuming a master to have a lien upon his ship for wages and disbursements, he is entitled to payment out of the proceeds of the ship in priority to a bottomry bondholder, provided that he, the master, has not personally bound himself by the bond. (U. S. Dist. Ct. East Dist. of N. Y.) *The bark Irma*..... 153

11. *Practice—Admiralty Court—Costs—Detention money and board.*—In calculating, on taxation of costs in a cause for the recovery of a master's wages, the amount due to the master for detention money and board whilst detained ashore as a witness, the fact that he through his wife carries on a business will not deprive him of his right to be allowed detention money; but if he live at his place of business during his detention, the fact that he can live more cheaply at home than elsewhere is to be taken into consideration in fixing the amount to be allowed for subsistence money. (Adm.) *The Royal Family*..... 421

MATERIAL MEN.

See *Marine Insurance*, No. 43—*Mortgages* Nos. 1, 2—*Necessaries*.

MATE'S RECEIPTS.

See *Carriage of Goods*, No. 31.

MEASUREMENT.

See *Carriage of Goods*, No. 6—*Tonnage*.

MEASURE OF DAMAGES.

See *Charter-party*, No. 2.

MERCHANT SHIPPING ACTS.

See *Carriage of Goods*, Nos. 33, 34, 35, 36—*Collision*—Nos. 19, 20, 31, 32, 23, 24, 27, 28, 29, 30, 31—*Salvage*, Nos. 6, 13—*Tonnage*.

MERSEY DOCKS ACT.

See *Carriage of Goods*, No. 37—*Compulsory Pilotage*, Nos. 5, 6, 7.

MERSEY, THE RIVER.

See *Compulsory Pilotage*, Nos. 5, 6, 7—*Navigable River*, Nos. 1, 2, 3, 4.

MOORINGS.

See *Collision*, Nos. 32, 33—*Navigable River*, Nos. 1, 2, 4.

MORTGAGE.

See *Marine Insurance*, No. 44—*Mortgages*.

MORTGAGEES.

1. *Lien—Proceeding in rem—American law—Appearance—Material men—Necessaries—Home-port—Priority.*—Mortgagees have no maritime lien upon a ship upon which they hold a mortgage; and, according to United States' law, no remedy against the ship in rem in the admiralty courts, but may appear as respondents in a suit in rem, and set up their mortgage as the conditional owners of the ship, and claim that their mortgage is a legal lien on the ship prior in date to the attachment under the motion in a suit by material men for necessities supplied in a home port, and also prior to the contract for the supply of the necessities. (U. S. Dist. Ct. East Dist. of Wisconsin.) *W. H. Wolf v. The Sene* *Selt*..... page 107

2. *Material men—Necessaries—Mutual knowledge of mortgages and repairs—Distribution of proceeds.*—Where mortgagees know that repairs are being made on and necessities supplied to a ship on which they hold a mortgage, whereby she is made a more valuable security, and the material men execute the repairs, &c., with a knowledge of the mortgage, but relying on their right to proceed in rem against the ship, the parties are entitled, upon principles of equity, to be placed upon an equality as to the distribution of the proceeds of sale of the ship. (U. S. Dist. Ct. East. Dist. of Wisconsin.) *Id.*..... 107

See *Necessaries*, No. 3.

MUTUAL MARINE INSURANCE ASSOCIATION.

See *Marine Insurance Association*.

NAUTICAL ASSESSORS.

See *Collision*, No. 33.

NAVIGABLE RIVER.

1. *Pier—Landing stage—Right to make—Local board—Admiralty.*—By a local Act (27 & 28 Vict. c. cxvii.) the Wallasey Local Board are authorised, for the purpose of their ferry between Liverpool and New Brighton, to make and maintain in accordance with certain deposited Parliamentary plans, a pier or landing stage at New Brighton, in the River Mersey, together with all such jetties,

SUBJECTS OF CASES.

- explanades, landing places, and other works and conveniences in connection therewith as the local board shall from time to time think fit, provided they deposit with the Admiralty plans of the landing stage and works connected therewith, and the same be approved by the Admiralty and are constructed in accordance with such plans. Under this section the local board have the right (already exercised) to make and maintain at the end of a permanent fixed pier, erected in accordance with the Act, a floating landing-stage below low-water mark, and to moor the same permanently to the bed of the river by anchors, whether the same be within the deposited plans or not, provided it be approved by the Admiralty. (C. P.) *Jelliffe v. The Woolsey Local Board*...page 146
2. *Pier—Landing stage—Erection without statutory authority—Nuisance—Obstruction*.—*Semble*, that the erection in a navigable river, without statutory authority, of a floating landing stage, moored permanently by anchors fixed in the bed of the river, is a public nuisance and obstruction, which will entitle any one of the public using the river to recover against the erectors for any damage sustained therefrom. (C. P.) *Id.*... 146
3. *Pier—Landing stage—Authority by statute—Duty of makers—Due care*.—Persons authorized by statute to place in a navigable river anything which is an obstruction to the navigation thereof, are bound to exercise their powers with due care, and if the obstruction is of a character to injure the property of the public, to prevent such injury as far as possible. (C. P.) *Id.*... 146
4. *Pier—Landing stage—Mooring—Anchors—Buoys—Damage*.—*Semble*, that persons laying down anchors as permanent moorings of a floating landing stage in a navigable river, are bound to mark the positions of the anchors by means of sufficient buoys attached thereto, and that the neglect thereof will render them liable for damage occasioned by the anchors. (C. P.) *Id.*... 146
5. *Obstruction—Nuisance—Right to place*.—No person has a right to put an obstruction in a navigable river, although at the time it be not a nuisance. (M. B. & L. J.J.) *Attorney-General v. Terry*...174, 217
6. *Obstruction—Nuisance—Benefit to trade of individual—Injunction*.—If an obstruction erected in a navigable river is a nuisance to persons using and navigating the river, the mere fact that it is a benefit to the trade of a particular individual cannot be considered such a benefit to the public as will excuse the obstruction, and an injunction will be granted to abate it. (M. B. & L. J.J.) *Id.*... 174, 217
7. *Obstruction—Nuisance—Public benefit—Direct benefit*.—The question whether obstructions made in a river or harbour are a nuisance or not depends on whether, upon the whole, they produce public benefit, not giving to the words "public benefit" too extended a sense, but applying them to the public frequenting the port. The benefit to the public must be a direct benefit. (M. B. & L. J.J.) *Id.*...174, 217

NECESSARIES.

1. *Lien—Material men—Home port—Attaching of lien—Arrest*.—*Semble*, that the lien of material men for necessities supplied to a ship in her home port—that is, their right to be paid out of the *res*—attaches only on the seizure of the ship under admiralty process. (U. S. Dist. Ct., East. Dist. of Wisc.) *W. H. Wolf v. The Scovell*... 107
2. *Lien—Material men—Necessary for voyage—Coppering*.—Where it is necessary that a wooden ship bound upon a particular voyage should be

- coppered, the coppering is a "necessary for the voyage," which gives the material man doing the work to a foreign ship, upon the orders of the master, a maritime lien. (Adm.) *The Twelfth*...page 603
3. *Lien—Priority—Advances of freight—Ship's disbursements*.—An advance of freight to enable a master to pay his ship's disbursements before sailing does not give the charterer a claim against the ship, which will take precedence of the claim of a mortgagee; nor does an advance for a similar purpose made by an insurance company. (Adm.) *The Twelfth*... 603
4. *Master's authority—Necessity—Absence of owner or authorized agent—Want of knowledge of presence of agent or owner*.—The master of a ship has authority to pledge his owner's credit for money borrowed or for goods supplied by him (the master's) orders in a foreign port only where (1) it is necessary to borrow money for the prosecution of the enterprise, or the goods are reasonably necessary for the use of the ship; (2), where neither the owner or his duly authorized agent is at the port, nor within such distance that he can be reasonably expected to interfere. Want of knowledge of the presence of the owner or an agent on the part of the person supplying goods or money to a master will not entitle him to recover against the owner. (C. P.) *Gunn v. Roberts*... 250
5. *Practice—U. S. law—Proceeding in rem—Lien*.—A right to proceed in rem may exist, although there may be no maritime lien upon the *res* against which the claim is made. There is no maritime lien for necessities supplied to a ship in her home port, and yet by the United States' rules of practice for Courts of Admiralty the material men may proceed in rem against the ship. (U. S. Dist. Ct., East. Dist. of Wisc.) *W. H. Wolf v. The Scovell*... 107
- See *Mortgages—Practice*, No. 10.

NON-DELIVERY OF CARGO.

See *Carriage of Goods*, Nos. 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 40, 42.

NOTICE OF ABANDONMENT.

See *Marine Insurance*, Nos. 1, 20, 39, 46.

NOTICE OF ACTION.

See *Practice*, Nos. 11, 12.

NUISANCE.

See *Navigable River*, Nos. 5, 6, 7.

OBSTRUCTION TO NAVIGABLE RIVER.

See *Navigable River*, Nos. 5, 6, 7.

ONUS OF PROOF.

See *Carriage of Goods*, Nos. 13, 14—*Collision*, No. 11.

OPEN POLICY.

See *Marine Insurance*, No. 4.

OUTPORT.

See *Compulsory Pilotage*, Nos. 2, 3, 4—*Practice*, Nos. 13, 14.

OUTPORT CHARGES.

See *Practice*, Nos. 13, 14.

PACKAGES.

See *Marine Insurance*, Nos. 10, 11.

SUBJECTS OF CASES.

PARTIAL LOSS.

See *Marine Insurance*, Nos. 7, 10, 11, 12, 24, 25.

PARTICULAR AVERAGE.

See *Marine Insurance*, Nos. 12, 24, 25.

PARTICULARS.

See *Practice*, No. 15.

PART OWNERS.

See *Co-owners—Master's Wages and Disbursements*, Nos. 1, 2.

PASSING OF PROPERTY.

See *Marine Insurance*, Nos. 7, 8.

PERILS.

See *Carriage of Goods*, Nos. 9, 11, 13, 19, 20, 25,
40—*Marine Insurance*, Nos. 10, 11, 37, 38, 39.

PIER.

See *Damage*, Nos. 1, 2.

PILOT.

Compulsory pilotage—Fellow servant—Negligence of crew.—A pilot compulsorily employed on board a ship is not a fellow servant of the crew of the ship, and consequently can recover against the owners of the ship for injury received by him through the negligence of the crew, their servants. (Q. B.) *Smith v. Steele* page 487
See *Collision*, Nos. 35, 36—*County Courts Admiralty Jurisdiction*, No. 3—*Damage*, Nos. 4, 5—*Salvage*, No. 17.

PILOTAGE.

See *Compulsory Pilotage*.

PILOT, DUTY OF.

See *Collision*, Nos. 35, 36.

PLEADING.

See *Salvage*, Nos. 1, 2, 3, 4, 5.

POLICY.

See *Hypothecation—Marine Insurance*, Nos. 4, 12, 13, 14, 15, 16, 17, 18, 26, 27, 28, 29, 30, 31, 32, 33, 37, 38, 45, 47, 48, 52, 53, 54.

PORT.

See *Carriage of Goods*, Nos. 27, 28.

PORTEERS.

See *Carriage of Goods*, No. 37.

PRACTICE.

1. *Appeal—County Court—Arrest by Admiralty Court.*—Where plaintiffs appeal from a County Court in a cause *in rem* in which there has been a decree for the defendants and the ship has in consequence been released, the High Court of Admiralty will on the *ex parte* application of the plaintiffs order a warrant to issue for the detention of the ship till bail given or the appeal decided. *Semble*, that notice should be given before arrest to the defendants, so that they may come in and apply for the suspension of the warrant if they see fit. (Adm.) *The Merion* 259

2. *Appeal—County Court—Arrest by Admiralty Court.*—In an appeal by plaintiffs from a County Court in a cause *in rem*, in which there was a decree for the defendants, and the ship had in consequence been released, the High Court of Admiralty, on an *ex parte* application of the plaintiffs, ordered a warrant to issue for the detention of the ship, and, as the ship proceeded against was a foreign one, did not require notice of the intention to arrest to be given to the defendants. (Adm.) *The Freir* page 589

3. *Appeal—County Court—Judge's notes of evidence—Shorthand writer—Conflict.*—In an appeal to the High Court of Admiralty from a County Court where there is a conflict between the transcript of the notes of evidence and judgment taken by a shorthand writer in the County Court under the County Court Rules No. 32, and the County Court Judge's own notes, the version given by the County Court Judge must be accepted as binding, and if the County Court Judge after the shorthand writer's notes so as to correspond with his own version, the Court of Admiralty will order the alterations so made to be carried into effect in the printed copies of the appendix. (Adm.) *The Rothwaite Hall* 210

4. *Appeal—Privy Council—Question undecided below.*—Where the High Court of Admiralty has given no opinion on a question, which in the opinion of the Court of Appeal is a vital one in the case, the Court of Appeal will decide that question on the evidence before them. (Priv. Co.) *The C. M. Palmer; The Larnes* 94

5. *Arrest—Transfer from County Court—Arrest in High Court in other suits—Consent to prevent release.*—Where an admiralty cause, instituted *in rem* against a ship, has been transferred from a County Court to the High Court of Admiralty, and no bail has been given in either court, and the ship is already under the arrest of the High Court in other suits, the High Court will order the issue of a caveat to prevent her release, in case the other causes should be withdrawn. (Adm.) *The Rio Lima* 54

6. *Arrest—Ship under arrest of High Court—Arrest by County Court—County Courts Admiralty Jurisdiction Acts.*—*Semble*, that where a ship is under the arrest of the High Court, and causes are also instituted in the County Court against the ship, she should not be arrested by the County Court, as it is not probable that the ship will be removed out of the Jurisdiction of the County Court without satisfaction of the plaintiff's several claims, within the meaning of the County Courts Admiralty Jurisdiction Act 1868, sect. 22. (Adm.) *The Turlini* 603

7. *Arrest—Ship under arrest in High Court—Arrest by County Court—Possession fees—Costs.*—Where a ship, already under the arrest of the High Court of Admiralty, is arrested in an admiralty cause instituted in a County Court, the plaintiffs knowing of the previous arrest, and that cause is afterwards transferred to the High Court, the possession fees charged by the high bailiff in respect of the County Court arrest will not be allowed by the High Court upon taxation of plaintiff's costs. (Adm.) *The Rio Lima* 143

8. *Discovery of documents—Affidavit required.*—To obtain discovery of documents, the affidavit in support of the application must allege some one particular document to be in the possession of the party from whom discovery is sought. (Adm.) *The Proceeds of the Cordelia* 35

9. *Inspection of documents—H. M. ships—Reports by captain and officers to Admiralty—Privilege.*—Where a collision occurs between one of H. M.

SUBJECTS OF CASES.

- ships and a ship belonging to a private owner, and the captain of H. M. ship makes (in accordance with the usual practice) a report to the Lords of the Admiralty, the High Court of Admiralty will not, in a cause against the captain of H. M. ship, in which an appearance has been entered by the Queen's Proctor by order of the Lords of the Admiralty, order it to be produced for inspection by the opposite parties if the Secretary to the Lords of the Admiralty makes an affidavit to the effect that such production would be prejudicial to the public service. (*Adm.*) *H.M.S. Bellorophon* page 449
10. *Necessaries—Wages—Transfer from County Court after decree—Reference to Registrar and Merchants.*—Where causes of necessaries and wages had been instituted against a ship in the High Court, and other causes of necessaries in a County Court against the same ship, and the latter had been transferred after decree made to the High Court for the purpose of enforcing the decrees, the ship being under the arrest of the High Court, the latter court ordered all the causes to be referred to the registrar and merchants to report the amount due thereon. (*Adm.*) *The Turlant* 603
11. *Notice of action—Local board—Public Health Act 1848.*—A local board authorized by a local Act to execute works out of their own district, the Act to be "executed subject to the powers and provisions" of the Public Health Act 1848, are entitled under sect. 139 of the latter Act to notice of action for anything done or intended to be done under the powers of the local Act. (*C.P.*) *Jolliffe and another v. The Walney Local Board* 146
12. *Notice of action—Non-feasance—Misfeasance.*—Notice of action must be given in a case of non-feasance, just as much as in a case of misfeasance under the Act. *Id.* 146
13. *Outport—Agency—Charges—Separate bills of costs.*—The practice, which has hitherto obtained in the High Court of Admiralty, of presenting separate bills of costs for the London proctor's own charges and for the outport or country agency charges, is now objectionable and must be discontinued for the future. (*Adm.*) *The City of Brussels* 102
14. *Outport agency—Agent not solicitor—Not entitled to charge for solicitor's work.*—Although a proctor may employ an agent, who is not an attorney or solicitor, to act as clerk *pro hac vice* for the purpose of collecting evidence in a cause, &c., in the outports, and may lawfully charge for the expenses incurred in respect of such agent as agency charges made by such an agent for doing work which is essentially the work of a proctor, attorney, or solicitor, such as "taking instructions for brief and drawing the same," &c., will not be allowed upon taxation. (*Adm.*) *Id.* 102
15. *Particulars—Negligence—Collision.*—Where the declaration in an action against the defendant for negligent navigation of his ship, causing injury to the plaintiff, contains only general allegations of negligence on the part of the defendant in respect of navigation, and of keeping the machinery and the ship in good repair, the court will not require the plaintiff to give particulars of matters which he may suppose to constitute the negligence of the defendant, because those matters are within the knowledge of the defendant and his servants, and not necessarily within the personal knowledge of the plaintiff. (*C.P.*) *George v. Wallis* 243
- See *Collision*, Nos. 37, 38, 39, 40—*Mortgages*, Nos. 1, 2—*Necessaries*, No. 5—*Sale of ship—Salvage*, Nos. 1, 2, 3, 4, 5, 6, 7, 8
- PRINCIPAL AND AGENT.
See *Broker's Lien—Marine Insurance*, Nos. 29, 30.
- PRIORITY.
See *Master's Wages and Disbursements*, Nos. 9, 10, 11—*Mortgages—Necessaries*, No. 3.
- PRIVILEGE.
See *Practice*, No. 9.
- QUANTITY AND QUALITY UNKNOWN.
See *Carriage of Goods*, Nos. 7, 24.
- REFERENCE.
See *Master's Wages and Disbursements*, No. 2—*Practice*, No. 10.
- REGISTRAR AND MERCHANTS.
See *Master's Wages and Disbursements*, No. 2—*Practice*, No. 10.
- REGULATIONS FOR PREVENTING COLLISIONS AT SEA.
See *Collision*, Nos. 1, 2, 3, 4, 10, 12, 19, 21, 22, 23, 24, 25, 27, 28, 29, 35, 31, 46.
- RE-INSURANCE.
See *Marine Insurance*, Nos. 35, 36.
- REPAIRS OF SHIP.
See *Marine Insurance*, No. 40.
- REPAYMENT OF FREIGHT.
See *Marine Insurance*, No. 22.
- RESTRAINT OF PRINCES.
See *Marine Insurance*, Nos. 37, 38, 39.
- RISKS.
See *Carriage of Goods*, Nos. 20, 21, 22—*Marine Insurance*, Nos. 37, 38, 39.
- RIVER.
See *Compulsory Pilotage—Navigable River*.
- RIVER NAVIGATION.
See *Collision*, Nos. 41, 42, 43, 44, 45, 46, 47, 48.
- SAILING SHIP.
See *Collision*, Nos. 2, 49.
- SALE OF CARGO.
See *Marine Insurance*, No. 5.
- SALE OF SHIP.
Contract abroad—Enforcement of in England.—Where an Englishman has entered into a contract abroad for the purchase of a ship then on her voyage to this country to be taken possession of by the purchaser immediately on delivery of the cargo at any place to which she might be ordered, the Court of Chancery has jurisdiction to enforce the contract, and for that purpose to issue an injunction to restrain the removal of the ship from the port of discharge, if within the jurisdiction. Where the vendor is abroad, substituted service of process upon the captain, the vendor's authorized agent in this country, in charge of the ship is sufficient. (*L.J.*) *Hart v. Herwig* page 63
See *Marine Insurance*, No. 46.

SUBJECTS OF CASES.

SALVAGE.

1. *Admiralty Court—Practice—Pleading—Salvor's expenses—Statement of amount.*—Where in a salvage cause the plaintiff's petition states expenses to have been incurred in rendering the services without stating their amount, and the defendant's answer admits all the allegations of the petition, the High Court of Admiralty will not allow evidence to be called by the plaintiff to show the amount of the expenses. If specific amounts are claimed they must be pleaded so as to give the defendant the opportunity of admitting or denying them. (Adm.) *The Eintracht* page 198
2. *Admiralty Court—Practice—Pleading—Statement of amount—Assessment.*—*Scmble.* that the court will, if necessary, amend the pleadings, allowing the plaintiffs to set forth the amounts, but giving the defendant time to admit or deny such amounts. (Adm.) *Id.* page 198
3. *Admiralty Court—Practice—Pleading—Evidence.*—Where, in a salvage suit, the defendants admit all the allegations of fact in the plaintiff's petition, but deny the inferences of fact made therefrom in the petition, the plaintiffs may call evidence to establish those inferences. (Adm.) *Id.* page 198
4. *Admiralty Court—Practice—Pleading—Rival salvors—Allegations of misconduct—Answer.*—Where in a cause of salvage against a derelict ship rival salvors institute separate causes and file separate petitions, alleging misconduct against one another, the Court of Admiralty will not allow the defendants, in their answer to the petition of one set of salvors, to plead that in the petition of the other set there are allegations of misconduct, and that they, for the purpose of the cause, and not otherwise, adopt those allegations; they must either make the allegations of misconduct as their own statements, or omit them. (Adm.) *The Kathleen* page 367
5. *Admiralty Court—Practice—Pleading—Rival salvors—Allegation of misconduct—Answers—Cross-examination.*—Where rival salvors file separate petitions, alleging misconduct against each other, and the defendants in their separate answers repeat the charges of misconduct made by each salvor against the other, so that the answers are contradictory, the defendants will not be allowed, on the hearing of both causes at the same time, to cross-examine one set of salvors to show that they, and not the other set, have been guilty of misconduct. (Adm.) *Id.* page 367
6. *Admiralty Court—Practice—Salvage bond—Merchant Shipping Act 1854, sect. 448—Leave to proceed in High Court—County Courts Admiralty Jurisdiction Act 1868, sect. 9.*—As it is a matter of grave doubt whether the County Courts having admiralty jurisdiction have power to enforce salvage bonds given to Receiver of Wrecks under the Merchant Shipping Act 1854 (17 & 18 Vict. c. 159) sect. 448, the High Court of Admiralty will, on the application of a salvor in request of whose services such a bond has been given, grant leave to proceed in the High Court under the County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71) sect. 9. *Scmble.* that even where leave is so given to proceed in the High Court, that court is not thereby precluded from condemning the plaintiff in costs, if at the hearing of the cause it should appear that the cause was improperly instituted in the court. (Adm.) *The John Evans* page 234
7. *Admiralty Court—Practice—Collision—Salvage suit—Right of wrongdoers to intervene—Bail.*—Where a ship has been found to blame in a cause of collision, and a cause of salvage has been instituted against the other (the injured) ship, the

- owners of the ship found to blame have a right to intervene in the salvage cause to protect their own interest; and if they choose to put in bail to answer the claim of the salvors in lieu of the bail given by the owners of the injured vessel, the High Court of Admiralty will give them the conduct of the defence of the salvage suit; under such circumstances the owners of the injured vessel are entitled to have their bail released, and to be paid their costs up to the time when the new bail is put in. (Adm.) *The Diana* page 366
8. *Admiralty Court—Practice—Sale of cargo—Objection of shipowner—Carrying on cargo—Freight.*—Where a ship and cargo are brought into port by salvors, and a suit is instituted in the High Court of Admiralty to recover salvage reward, that court will, on the application of the salvors, acting with the assent of the owners of the cargo, order a sale of the cargo to prevent deterioration from damage done, although the shipowner, desirous of carrying on the cargo so as to earn freight, opposes the sale, and offers to give substantial bail for both ship and cargo; but such sale will be ordered subject to all questions of right to freight. (Adm.) *The Kathleen* page 367
 9. *Damage to salvor ship—Gross negligence of salvor—Agreed reward—Right to recover.*—A salvor whose ship succeeds in bringing an injured ship into safety, but in doing so inflicts damage upon her by coming into collision through negligence and want of proper navigation, which are gross but not wilful, is not thereby deprived of his right to a reward which has been agreed upon between the masters of the respective vessels. (Adm.) *The C. S. Butler: The Baltic* page 237
 10. *Derelict—Ship ashore—Nature of service—Towage.*—Where an abandoned ship is found ashore on a shoal by two tugs which, while she is ashore are unable to render assistance, but, on her floating off with wind and tide, make fast and prevent her from going ashore again and take her to a place of safety, their service is salvage and not mere towage, nor is their service diminished in value by the proximity of a third tug, which could, but did not, render any assistance. (U. S. Distr. Ct.; East Distr. of N. Y.) *The Puritan* page 548
 11. *Derelict—Taking of master and crew—Returning to render assistance to ship—No actual service—Right to reward.*—Where the master and crew of a ship in distress are taken off by a steam tug (there being no immediate danger to life), and are taken ashore by the tug, which afterwards returns to the ship with her master and finds her placed in safety by other salvors, that tug has no claim for salvage reward. (U. S. Distr. Ct.; East Distr. of N. Y.) *Id.* page 548
 12. *Life salvage—Crew leaving ship without orders—Ship in danger—Crew imperilled—Right to recover against ship.*—Where some of a ship's crew leave their ship shortly after a collision at sea in consequence of her dangerous condition, not against her master's orders, but without orders and without his consent, and are picked up and rescued from a dangerous position by another vessel, the owners, masters, and crew of the latter, as salvors of life within the meaning of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), sect. 458, and the Admiralty Court Act, 1861 (24 Vict. c. 10), sect. 9, may recover reward against the ship. *Scmble.* that if a crew deserted their ship without reason and contrary to orders, and afterwards found themselves in a position of danger from which they were rescued, the ship would not be liable for salvage reward. (Adm.) *The Caire* page 257

13. *Misconduct of salvors—Dispossessing first salvors—Right to the amount awarded.*—If first salvors lawfully in possession of a derelict ship are wrongfully and violently dispossessed by second salvors, who succeed in bringing the ship into safety, the second salvors will receive no benefit from the service they may render, but the whole reward will go to the benefit of the original salvors. (*Adm.*) *The Kolklen* page 367
14. *Quantum—Appeal—Practice—Reduction of award.*—The Judicial Committee will not reduce an award of the High Court of Admiralty in a case of salvage, unless the amount awarded is so exorbitant and so manifestly excessive that it would be unjust to confirm it. (*P.C.*) *The Americus* ... 460
15. *Quantum—How estimated—Value of property salvaged—Services.*—The value of property salvaged is to some extent to be treated as an ingredient in the calculation of the quantum of salvage remuneration, but that value must not be allowed to raise the quantum to an amount altogether out of proportion to the services actually rendered. (*P.C.*) *Id.* 460
16. *Quantum—Value of salvaged property—Services.*—An award of £30,000 on a value of £190,000 in the case of a derelict ship reduced to £18,000 on the ground that the reward was out of proportion to the services rendered. (*P.C.*) *Id.* 46
17. *Signal—Ambiguous—Construction of—Condition of vessel—Right to reward.*—Where a vessel makes an ambiguous signal, it will be construed by the Court of Admiralty according to the condition of the vessel when boarded; if she is damaged and is in need of assistance, the signal will be treated as signal for assistance, and those answering it as salvors; if she is not damaged and wants only a pilot, the signal will be treated as a signal for a pilot only. (*Adm.*) *The Racer* 317
18. *Signal of distress—Vessel going out to answer—Unsuccessful services—Right to reward.*—Where a vessel makes a signal of distress, and another goes out with the bona fide intention of assisting that distress, and as far as she can does so, but some accident occurs which prevents her services being as effectual as she intended them to be, and no blame attaches to her, the Court of Admiralty will not allow her to go entirely unrewarded, but for the interests of commerce and navigation, and as an encouragement to perform salvage services, will give some reward (*semble*) if the property is salvaged by other means. (*Adm.*) *The Melponens* 122
19. *Termination of service—Ship in safety—Lying alongside.*—Where a steam tug is engaged to render assistance to a ship aground in the night time, and succeeds in getting her off, and takes her to a safe anchorage for the night, and lies alongside of her till morning, the salvage service does not end on the ship being anchored, but the steam-tug is entitled to reward for the time she lies alongside the ship ready to render further assistance if required. (*Adm.*) *The Philomela* ... 141
20. *Uncompleted service—Stopped by accident—Efforts not renewed through act of ship in distress—Right to reward.*—Where a steamship has been engaged to render assistance to another in distress by towing her to a place of safety, and after several hours' towing, the ships are parted by no fault of the salvor, and the captain of the ship in distress leads the salvor to the honest belief that his services are no longer required, and thereupon the latter proceeds to his own destination, he is not thereby deprived of his right to salvage reward, but upon the other vessel arriving safe in port by her own exertions, may proceed against her in respect of the services actually rendered. (*Adm.*) *The Nellie* 142
21. *Uncompleted service—Towing in track of vessels—Abandonment—Right to reward—Life salvage.*—Where a steamship having taken in tow a vessel in distress, and towed her for some hours in the track of vessels, on the weather getting worse and the lives of her crew becoming endangered, takes the crew out of her and finally abandons her in a place where she is afterwards picked up by another vessel and taken into port, the owners, master, and crew of the steamship are entitled to salvage reward in respect of the lives so saved, but not in respect of ship and cargo. (*Adm.*) *The Eintracht* page 198
See *Carriage of Goods*, No. 38.
- SALVORS.
See *Carriage of Goods*, No. 38—Salvage.
- SEAMEN'S WAGES.
See *Wages*.
- SEAWORTHINESS.
See *Carriage of Goods*, No. 16—*Marine Insurance*, Nos. 47, 49, 50, 51, 52, 53.
- SECURITY FOR COSTS.
See *Wages*, No. 5.
- SECURITY.
See *Collision*, No. 37.
- SET-OFF.
See *Master's Wages and Disbursements*, Nos. 1, and 2.
- SHIP.
See *Charter-party—Domages to cargo—Marine Insurance*, Nos. 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53—*Shipbuilding contract—Tonnage*.
- SHIPBUILDING CONTRACT.
Lien—Payment by bills—Discounted by bankers—Their right on bankruptcy of shipowner.—Where a shipbuilder contracts to build a ship for a merchant, the money to be paid in instalments as the building progressed, partly in cash and partly in bills, and from the time of the payment of the first instalment the ship to become the property of the merchant to the extent of the advances, subject to the builder's lien for unpaid instalments, and the merchant gives his bills of exchange for the instalments up to a certain period, and these bills containing the words "for value received in iron screw steamer new building," are discounted in the ordinary way by bankers; these bankers acquire no lien on the ship in respect of the amount advanced by them on the bills, and in the event of the bankruptcy of the shipbuilder and the merchant and the abandonment of the contract by the merchant, cannot enforce their claim against the ship. (*L.J.J.*) *Ex parte Lambton; Re Lindroy* 325
- SHIPOWNERS.
See *Carriage of Goods—Charter-party—Co-owners—Marine Insurance—Nos. 1, 19, 20, 21, 22, 23, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, —Necessaries—Pilot—Shipbuilding Contract*.
- SHIPPER.
See *Carriage of Goods*.
- SHORT DELIVERY.
See *Carriage of Goods*, Nos. 40, 42.

SUBJECTS OF CASES.

SIEGE.

See *Marine Insurance*, Nos. 38, 39.

SIGNAL OF DISTRESS.

See *Salvage*, Nos. 17, 18.

SLIP.

See *Marine Insurance*, Nos. 16, 17, 18, 54.

SOLICITOR.

See *Practice*, No. 14.

SPAR DECK.

See *Tonnage*.

SPECIFIC PERFORMANCE.

See *Sale of Ship*.

SPEED.

See *Collision*, Nos. 49, 50, 51, 52, 53, 54.

STAMP ACTS.

See *Marine Insurance*, No. 54—*Marine Insurance Association*, No. 4.

STATUTE OF FRAUDS.

See *Dock*.

STEAMSHIP.

See *Collision*, Nos. 3, 4, 5, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58—*Salvage*, Nos. 19, 20, 21—*Tonnage*.

STEVEDORE.

See *Carriage of Goods*, No. 26.

STOP ORDER.

See *Carriage of Goods*, Nos. 34, 35, 36.

STOWAGE.

See *Carriage of Goods*, Nos. 25, 26.

STRAINING.

See *Carriage of Goods*, No. 25.

STRANDING.

See *Marine Insurance*, No. 25.

TERRENE RISK.

See *Marine Insurance*, Nos. 37, 38, 39.

THAMES CONSERVANCY BYE-LAWS.

See *Collision*, No. 47.

THIEVES.

See *Carriage of Goods*, No. 12.

TIME POLICY.

See *Marine Insurance*, Nos. 47, 48.

TONNAGE.

Measurement—Upper deck—Spar deck—*Merchant Shipping Act 1854*, sect. 21, suba. 5.—A ship having above her main deck an upper deck which is not continuous from stem to stern, and the hatches and other fittings of which are not water tight, has not a third deck, or "spar deck," within the meaning of the *Merchant Shipping Act, 1854* (17 & 18 Vict. c. 104), sect. 21, sub-sect. 5; and the space between such deck and the main deck not being available for cargo or for the accommoda-

tion of passengers or crew within sub-sect. 4 of the same Act, should not be reckoned in estimating her tonnage. (*H. of L.*) *The Lord Advocate v. The Clyde Steam Navigation Company*.....page 502

TOTAL LOSS.

See *Marine Insurance*, Nos. 5, 9, 19, 20, 21, 23, 38.

TOWAGE.

1. *Damage to tow*—*Liability of tug*—*Contract of tug*.—Whenever a tug contracts to tow another vessel from one place to another under such circumstances that the tug has the sole control over the navigation and time of the voyage, and the tow is subject to the directions of the tug, the tug is a bailee of the tow for hire, and her duties are those of a private carrier for hire, and she is bound to exercise ordinary skill and prudence in the fulfilment of her contract, and the tug will be responsible to the tow for any injury arising to the latter by the want of any such skill and prudence on the part of the tug. (*U. S. Dist. Ct., Dist. of Oregon.*) *The Merrimac* 383
 2. *Damage to tow*—*Negligence of tug*—*Liability of tug*—*Want of skill of crew of tow*—*Sudden emergency*.—Where a tug negligently places a tow in a peril by which the latter is lost, it is no excuse that the tow might have been saved but for a mistake or a want of skill in the crew of the latter in bending a tow line on a dangerous and sudden emergency, or for the want of extraordinary ground tackle. (*U. S. Dist. Ct., Dist. Oregon.*) *Id.*..... 383
 3. *Damage to tow*—*Collision*—*Tow in distress*—*Taking off crew*—*Liability for damage*.—Where a tow has parted from the tug and gone adrift, and is in great peril, and the latter, at the request of the crew of the former, attempts to take them off, and in so doing collides with the tow and sinks her, the tug will not be responsible for such collision unless occasioned by gross carelessness on the part of the tug. (*U. S. Dist. Ct., Dist. of Oregon.*) *Id.*..... 383
- See *Carriage of Goods*, No. 8—*Collision*, Nos. 55, 56, 57, 58—*Salvage*, Nos. 9, 10, 11, 19, 20, 21.

TRANSFER OF CAUSES.

See *Practice*, Nos. 5, 7.

TRANSHIPMENT.

See *Carriage of Goods*, No. 9.

TRINITY HOUSE LIGHTER.

See *Collision*, No. 46.

TRINITY HOUSE PILOTAGE.

See *Compulsory Pilotage*, Nos. 1, 2, 3, 4.

TUG AND TOW.

See *Collision*, Nos. 55, 56, 57, 58—*Damage*, Nos. 4, 5—*Salvage*, Nos. 9, 10, 19, 20, 21—*Tonnage*, Nos. 1, 2, 3.

TYNE BYE-LAWS.

See *Collision*, Nos. 43, 44.

TYNE, THE RIVER.

See *Coal Dues*.

UNDERTAKES OF PIER.

See *Damage*, Nos. 1, 2.

UNDERWRITERS.

See *Marine Insurance*.

UNSEAWORTHINESS.

See *Carriage of Goods*, No. 16—*Marine Insurance*, Nos. 49, 50, 51, 52, 53.

USAGE.

See *General Average*.

VALUED POLICY.

See *Marine Insurance*, No. 12.

VALUE OF PROPERTY SALVED.

See *Salvage*, No. 15, 16.

VENDOR AND PURCHASER.

See *Bill of Lading*, No. 1.

VOYAGE.

See *Wages*, No. 6.

WAGES.

1. *Admiralty court—Foreign seamen—Jurisdiction—Voyage broken up—Seamen discharged by master.*—A court of admiralty will not decline jurisdiction of a suit by foreign seamen against a foreign vessel to recover wages, where it appears that the voyage has been completed or broken up, or the seamen have been discharged by the wrongful act of the master. (U. S. Dist. Ct., Dist. of Oregon.) *The Hermine* page 380
2. *Admiralty court—Foreign seamen—Jurisdiction—Discharge before expiration of voyage—Wages unpaid.*—*Seahle*, that the court will not decline jurisdiction where it appears the seamen have been discharged with their own consent before the expiration of the voyage, without the payment of wages already earned, or any agreement or understanding concerning them. (U. S. Dist. Ct., Dist. of Oregon.) *Id.* 380
3. *Desertion—Duty of seamen to stay by vessel—Knowledge of master—Ship put to expense—Set-off against wages.*—A seaman is bound to stay by the vessel according to his agreement, whether the master takes any means to compel him to do so or not, and, therefore, where seamen leave a vessel before the completion of the voyage, although with the knowledge of the master, and upon his promise that they should not be arrested therefore, but without his consent, they are guilty of desertion; and if, by their breach of contract, the ship is put to greater expense than their wages amount to, they can recover nothing. (U. S. Dist. Ct., Dist. of Oregon.) *The Hermine* 380

4. *Inequitable contract—Setting aside—Voyage incomplete.*—Contracts with seamen upon a discharge before completion of voyage concerning wages already earned, will be set aside or disregarded by Court of Admiralty if inequitable. (U. S. Dist. Ct., Dist. of Oregon.) *The Hermine* page 380
5. *Practice—Admiralty Court—Security for costs.*—Where a cause of wages was instituted against a foreign ship by her master and crew, who were also foreigners, and it appeared that, although they were at the time in this country, their only place of residence there was on board the ship, and that the master had stated that he had no means and intended to leave England, the High Court of Admiralty ordered the plaintiffs to give a security for costs in the sum of 150*l.* (Adm.) *The Zeffall* 597
6. *Shipping articles—Extent of voyage—How to be expressed—Merchant Shipping Act 1873, sect. 7.*—The provision of the Merchant Shipping Act 1873 (36 & 37 Vict. c. 85), s. 7, that agreements with seamen need only state the maximum period of the voyage or engagement and the places or parts of the world to which the voyage is not to extend, is sufficiently complied with if the shipping articles state the places to which the voyage may extend, as that is an implied agreement that the voyage shall not extend to any other places. (U. S. Dist. Ct., Dist. of Oregon.) *The Hermine* 380
See *Master's Wages and Disbursements—Practice*, No. 10.

WAR.

See *Marine Insurance*, Nos. 38, 39.

WAREHOUSING CARGO.

See *Carriage of Goods*, Nos. 33, 34, 35, 36.

WARRANTY.

See *Charter-party*, Nos. 5, 6—*Marine Insurance*, Nos. 18, 24, 28, 47, 48, 49, 50, 51, 52, 53.

WARRANTY OF SEAWORTHINESS.

See *Marine Insurance*, Nos. 47, 48, 49, 50, 51, 52, 53.

WAR RISK.

See *Marine Insurance*, Nos. 37, 38, 39.

WITNESS.

See *Master's Wages and Disbursements*, No. 11.

112

113





